NOTE: PURSUANT TO S 130 OF THE INTELLECTUAL DISABILITY (COMPULSORY CARE AND REHABILITATION) ACT 2003, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURT ACT 1980.

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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA412/2019
[2023] NZCA 660

BETWEEN	J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T Appellant
AND	ATTORNEY-GENERAL First Respondent
	DISTRICT COURT AT MANUKAU Second Respondent
	FAMILY COURT AT MANUKAU Third Respondent
	CARE CO-ORDINATOR Fourth Respondent
	CARE MANAGER Fifth Respondent

CA662/2021

BETWEEN	J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T Appellant
AND	CARE CO-ORDINATOR Respondent

Hearing:	16 and 17 November 2022 (further submissions received 31 July 2023
Court:	Courtney, Katz and Clifford JJ
Counsel:	A J Ellis and G K Edgeler for Appellant in CA412/2019 and CA662/2021 M J McKillop for First Respondent in CA412/2019 D R La Hood and A L Prestidge for Fourth Respondent in CA412/2019 and Respondent in CA662/2021
Judgment:	20 December 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Katz J)

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Introduction

[1] J, who is 39 years old, lives in a secure healthcare facility pursuant to a compulsory care order made under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act).[1] J was diagnosed with autism spectrum

[1] The compulsory care order which was the subject of the appeal in CA662/2021 was made in 2020: *Harvey v [J]* [2020] NZFC 5981 [2020 Family Court decision]. A further application to extend J's compulsory care order was heard in the Family Court in August 2023. In a judgment dated 12 September 2023, Judge AP Goodwin granted the extension with the result that J's compulsory care order has been extended for three years from 13 April 2023: *Care Co-ordinator v [J]*

disorder (ASD) at an early age. He also has a longstanding diagnosis of intellectual disability. J first became subject to a compulsory care order in 2006, when he was 22 years old. The order has since been extended multiple times, on the basis that compulsory care continues to be necessary to protect the community. J has been assessed as posing a high or very high risk of committing acts of violence if released into the community.

[2] In this appeal J, by his welfare guardian T, challenges the validity of his compulsory care order. He seeks an order quashing or staying his detention and an award of compensation. No other relief, such as a declaration of inconsistency, is sought. However, Mr Ellis, senior counsel for J, invited this Court to give a *Hansen* indication, if appropriate.[2]

[3] As we explain further below, the IDCCR Act was enacted together with its companion statute, the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act), to address a legislative gap that had "effectively disenfranchised persons with [intellectual disability] with challenging behaviours from regimes of supervisory care and treatment".[3] The new legislation aimed to meet the need for "more accurate means for determining the criminal responsibility of, and more suitable disposal options for, [intellectually disabled] offenders".[4] One of the stated purposes of the IDCCR Act was "to recognise and safeguard the special rights of individuals subject to this Act".[5]

[4] It is argued in this appeal that, in practice, the regimes established by the CPMIP Act and IDCCR Act fall significantly short of the goals that prompted their enactment. Rather than recognising and safeguarding the human rights of intellectually disabled persons, the legislation and/or the manner it has been applied

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[2023] NZFC 9651 [2023 Family Court decision].

2 The term "*Hansen* indication" takes its name from *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1. In *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 this Court described a *Hansen* indication as "a statement in which a court expresses, as part of its reasons, an opinion that legislation limits a protected right in a manner that cannot be justified in a free and democratic society, but does not grant the plaintiff a [declaration of inconsistency] or other remedy": at [7].

3 Warren Brookbanks "Protecting the Interests of Vulnerable Defendants in the Criminal Justice System: The New Zealand Experience" (2019) 83 JCL 55 at 55 and see 56–58.

4 At 56.

5 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCR Act], s 3(b).

in J's case is said to undermine J's human rights and the human rights of intellectually disabled persons. Specifically, J claims his ongoing detention is disproportionately severe, in breach of s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA), and is arbitrary, in breach of s 22 of NZBORA. He also argues that the statutory regime for dealing with intellectually disabled defendants, established by the IDCCR Act and the CPMIP Act, is inherently discriminatory and in breach of s 19 of NZBORA. Finally, J raises an issue of bias, which we address at [161]–[162] below.

[5] Two related appeals are before the Court. The first appeal (CA412/2019) is an appeal from aspects of a decision of Cull J in the High Court (the High Court decision). J, by his welfare guardian, brought four overlapping proceedings in the High Court challenging the validity of his compulsory care orders. Those proceedings were:[6]

(a) An application for an extension of time (by approximately 11 years) to appeal against decisions made by the District Court between 2004 and 2006 under the CPMIP Act, namely the decisions that J was involved in the alleged offending and that he was unfit to stand trial, and ordering that he be cared for as a care recipient.[7] Having fully engaged with the merits of the application and the proposed appeal,[8] Cull J declined to grant an extension of time.[9] It is common ground that there is no jurisdiction to appeal this decision.

(b) An appeal from a decision of Judge AP Goodwin in the Family Court extending J's compulsory care order by a period of 18 months and varying it from a supervised care order to a secure care order (the 2017 Family Court decision).[10] At the time of the High Court

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6 *J v Attorney-General* [2018] NZHC 1209 [High Court decision] at [3].

7 At [42]. "Unfit to stand trial" is defined in s 4(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) as meaning "a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so". It includes a defendant who, due to mental impairment, is unable to plead; to adequately understand the nature or purpose or possible consequences of the proceedings; or to communicate adequately with counsel for the purposes of conducting a defence.

8 At [47]–[48].

9 See [153]–[157].

10 *Harvey v [J]* [2017] NZFC 1079 [2017 Family Court decision].

proceedings, this was the most recent Family Court decision extending J's compulsory care order.

(c) An application to the High Court for an inquiry into the legality of J's detention as a care recipient, pursuant to s 102 of the IDCCR Act.

(d) An application for judicial review alleging, amongst other things, that the IDCCR Act generally, and J's detention as a care recipient in particular, breached various rights enshrined in NZBORA.

Cull J declined to grant the extension of time sought and dismissed both the appeal against the 2017 Family Court decision and the judicial review. After undertaking an inquiry under s 102 of the IDCCR Act, the Judge concluded that J was not detained illegally as a care recipient, and that he needed to be cared for under a compulsory care order for secure care.[11] We discuss the Judge's reasoning in further detail below.

[6] The second appeal (CA662/2021) is from a 2020 decision of Judge G Wagner in the Family Court extending J's compulsory care order by three years (the 2020 Family Court decision).[12] At the time J's appeal was heard in this Court, the 2020 Family Court decision was the most recent decision extending J's compulsory care order. Since the appeal hearing, the Family Court has extended J's compulsory care order for a further three years, effective from 13 April 2023.[13] The focus of argument at the appeal hearing was on the High Court decision, as the outcome of that appeal will also determine the Family Court appeal (to the extent it remains live, given it has now been superseded by a subsequent Family Court decision). We will not therefore address the Family Court appeal separately.

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11 High Court decision, above n 6, at [611]–[623].

12 2020 Family Court decision, above n 1. Ordinarily, the first appeal from the 2020 Family Court decision would lie to the High Court under s 133 of the IDCCR Act. In this case, however, the proceeding has been transferred to this Court by consent pursuant to s 59 of the Senior Courts Act 2016.

13 2023 Family Court decision, above n 1, at [32].

Background

J's compulsory care order

[7] J first became subject to a compulsory care order after he was found unfit to stand trial on charges of being in an enclosed yard without reasonable excuse[14] and wilful damage.[15] Based on the police statements of three witnesses — J's mother, J's neighbour and a police officer — the events that gave rise to those charges appear to be as follows.

[8] On the evening of 8 June 2004, J climbed over a fence onto his neighbour's property, carrying an axe. J's mother followed him and saw him smashing the windows of the neighbour's van with the axe. J cut his arm badly in the process. The neighbour heard the sound of breaking glass. When he looked out his window, he saw two people in his back yard. One of them was smashing the windows of his van. The neighbour called the police. Shortly afterwards, there was a knock at his door. The neighbour saw J, who was bleeding from his arm, and J's mother, who was tending to him. The neighbour opened the door and then helped bandage J's arm while J's mother apologised and explained that J had smashed the windows to the van because he was unwell. The neighbour reported that J was "acting really strangely, he was laughing out loud for no reason and just repeating over and over again that he was James Bond". The neighbour saw that the windscreen and right-side windows of his van had been smashed, as well as two windows in his garage.

[9] A police officer arrived to find J standing in the driveway with blood all over his clothes and holding his injured arm. J's mother was attempting to care for him and also restrain him, as he seemed in a very agitated state. The police officer reported that J told him "I am James Bond, I have a licence to kill". J's mother gave the police officer the axe. The police officer made "numerous attempts" to speak with J "but it was clear that he did not understand what was being said nor did he realise the ramifications of his actions". J was transported to hospital. The police officer

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14 Summary Offences Act 1981, s 29(1)(b). The maximum penalty for this offence is imprisonment for a term not exceeding three months or a fine not exceeding $2,000.

15 Section 11(1)(a). The maximum penalty for this offence is imprisonment for a term not exceeding three months or a fine not exceeding $2,000.

subsequently arrested J and tried to explain the charges and his rights to him "however it was clear [J] had no idea what was happening or what he had done".

[10] J was subsequently found to have caused the acts or omissions forming the basis of the offences and to be unfit to stand trial under the provisions of the CPMIP Act applying at the time.[16] The matter came before Judge RL Kerr for disposition in February 2006. Judge Kerr ordered that J be cared for as a care recipient under the IDCCR Act, and that he receive secure care. The initial term of the order was two years.[17]

J's behavioural presentation

Overview

[11] To consider the issues raised by this appeal in context, it is necessary to have a broad understanding of J's behavioural presentation and the concerns raised by the various specialist assessors[18] who have assessed him during his time in care. Ms Ingalise Jensen, a clinical psychologist who assessed J in both 2016 and 2020, summarised J's challenging behaviours as follows:

> [J's] Mild Intellectual Disability and Autism Spectrum Disorder are considered to be central to his challenging behaviours and aggression. He presents with a concerning combination of violent fantasies, aggressive behaviour and no discernible understanding that this violence would cause any harm to the victim. Unfortunately, these behaviours, obsessions and lack of insight have essentially not changed over a number of years despite environmental management, specific interventions and a very structured individualised programme of care.

[12] Other specialist assessors' reports contain similar statements. Given the large number of reports before the Court, we will not endeavour to summarise them all but will instead focus on identifying some of the common themes that emerge.

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16 CPMIP Act, ss 9 and 14 (since repealed); and see High Court decision, above n 6, at [104]–[121].

17 *Police v [J]* DC Manukau CRN 4092034925-26, 8 February 2006 at [15]; and CPMIP Act, s 25(1)(b).

18 Specialist assessors are health and disability professionals who are designated by the Director-General of Health. They perform certain functions under the CPMIP Act and IDCCR Act.

J's early history of challenging behaviours

[13] Dr Tanya Breen, a clinical psychologist who assessed J in February 2005, identified incidents of violent or aggressive behaviour by J dating back to 1999, when he would have been aged about 15. Her view was that there appeared to have been a "progressive deterioration" in J's behaviour from 2000. *[Redacted]* Dr Breen referred to a number of other incidents over the following years, including an incident in 2003 where J brought a knife to school.

[14] Dr Breen reported that J had, in drawings and conversation, "expressed strong interests in physical violence to people and property, fire setting, and using guns to kill people". J had a "strong" and "long-standing" interest in James Bond and in other violent movies and television programmes. Dr Breen referred to concerns that had been expressed about this, as well as comments that J had made about weapons, lighting fires and cutting throats.

[15] A number of reports refer to an incident in early 2004 when J climbed out of his bedroom window at night and broke into a nearby school building. Once there he smashed windows and stole photographs of teachers, stating that he was James Bond and was "on a mission to 'cut teacher's head off'".

[16] J has exhibited a range of other concerning behaviours and obsessions over the years. We set out below some of the key issues of concern, together with some illustrative examples.

Obsessions relating to feet

[17] J has had an interest in other people's feet since childhood. He is particularly focused on sniffing, smelling and licking feet, especially (but not exclusively) the feet of women or girls. Dr Jon Nuth, a clinical psychologist, reported in 2014 that J had drawn a very detailed picture of a woman in a restraining device and handcuffs being tortured. The woman is depicted as being in some distress. When asked about the picture, J is said to have "reaffirmed his obsession with women's feet, cutting them off and torturing women". Ms Beata Torok, a clinical psychologist, similarly recorded in a 2018 report that J had previously expressed a desire to chop off women's and

children's feet in order to sniff them, insert them into his mouth or anus or rub himself against them.

[18] Throughout his time as a care recipient, J has lived in a carefully controlled environment, with a high level of supervision. In 2011, for example, he was recorded as being "supervised by three staff during the day until 3.00pm and by two staff for the remainder of the day". More recently, following his transfer to hospital level secure care in 2020, he was being cared for "in a separate cluster with [a] 3:1 male staff" ratio during the day, and at night "with a locked door (with access to a toilet) [with a] 2:1 staff" ratio. Even with this high level of support and supervision, however, J has taken steps to try and act out his fantasies when the opportunity arises. In 2011, J reached out at a woman at a park and stated that he wished to sniff her feet. The same year, J attempted to jump out of a van he was being transported in, stating that he wished to sniff feet. Dr Nuth recorded that during a doctor's visit around 2013–2014, J absconded for approximately five minutes, during which he shouted at members of the public that he wanted to place "women's feet into his anus". He is reported to have grabbed a family member's feet at a family gathering in around 2014. In 2015, he grabbed the foot of a senior manager of his care facility, removed her shoe and began sniffing and licking her foot.

Obsessions related to violence and weapons

[19] J has longstanding fantasies about being a police officer, a special agent, or James Bond and, in this capacity, being involved in various scenarios involving physical violence to people and property. *[Redacted]* Dr Duncan Thomson, a clinical psychologist, noted in 2016 that J had previously referred to being on "missions" when behaving destructively. In her 2018 report, Ms Torok observed that J "continues to present with a fixation on violence and being James Bond and attempts to act out violent fantasies". Other specialist assessors have made similar observations.

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 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.

Incidents of violence, threats of violence and attempts to access weapons

[21] There are repeated references in the reports to incidents of J assaulting staff and others, including by slapping, scratching, pushing, kicking, biting, punching and smacking them. The reports also refer to numerous incidents of threats of violence, ranging from generalised threats against particular groups of people (such as New Zealand European people) to threats to harm or kill specific individuals. Some of the threats are detailed and involve extreme violence. In the review period prior to the 2020 Family Court decision, Ms Jensen recorded that there were 16 documented threats to harm others.

[22] J also has a history of attempting to access weapons. He is reported to have hidden sharp objects and pieces of rope in his bedroom, with the apparent intention of using these objects "to assist in acting out his violent fantasies", and to have attempted to put cutlery in his pockets. In May 2015, J is reported to have taken a butter knife and stated that he "wanted to cut a 'white [lady's] head off and run her over with a car'". In her 2016 report, Ms Jensen observed that:

> It is important to note that [J] lacks access to more potentially lethal weapons and that arguably he would threaten or harm others with, for example, knives if these were available to him.

[23] More recently, in 2019, J twice sought to gain access to a locked cabinet where a kitchen knife was stored. His attempt succeeded on one occasion, but staff were able to confiscate the knife. Incident reports prepared by staff recorded that, during these

incidents, J stated that he wanted to kill New Zealand European people and at one point made a threat against a specific named individual.

[24] J's behaviour is unpredictable. There are some recognised triggers for his violent outbursts. For example, J is hypersensitive to sound. Loud noises, such as slamming doors, can cause J to become agitated and aggressive. Other stressors include changes to J's routine. His care environment is carefully managed to minimise known triggers for violent outbursts. However, there is often no discernible external trigger for J's violent behaviour. Specialist assessors have noted that J's violent behaviour is difficult to manage for this reason.

Incidents of property damage

[25] J has a history of causing property damage, including breaking windows, breaking furniture, and punching walls and ceilings. In one recent incident while in hospital secure care, J is reported to have picked up a 20 kg chair and thrown it at a window six times and then, once the chair broke, continued hitting the window with a piece of the broken chair. J's property damage has necessitated modifications to his living space, including reinforcing the walls.

Behaviours resulting in self-harm

[26] At times, J's behaviour has resulted in self-harm. J has suffered a number of injuries when damaging property, including broken bones and injuries requiring stitches or surgery. Other reported behaviours and incidents include a preoccupation with burning himself and an attempt by J to pour boiling water on his hand; an interest in jumping from heights; and an incident where J reportedly attacked the driver of a van while travelling at speed because he wanted to find out what it would be like to be in a car accident.

J's ongoing care under the compulsory care order

[27] In 2011, J's compulsory care order was varied from secure care to supervised care.[19] Ms Jensen noted in a 2016 report, however, that J's behaviour had deteriorated

[19] *Harvey v [J]* FC Manukau FAM-2006-092-1669, 5 December 2011 (Minute of Judge Rogers).

after his care order was varied to supervised care. As a result, in 2017 Judge Goodwin varied the order from supervised care back to secure care, finding that secure care was necessary in light of J's risk level.[20] More recently, in 2020, J was transferred from a community secure care facility to a secure unit in a hospital, on the basis that he could no longer be cared for safely in a community secure care environment.[21] (This did not require a change to the care order, as both facilities were secure care facilities.)

The judgments under appeal

The High Court decision

[28] We address the specific findings and reasoning of Cull J that are challenged on appeal below. By way of broad overview, however, the key reason Cull J considered J's continued detention pursuant to a compulsory care order to be justified was the risk of harm he posed to the public.

[29] In the year prior to the High Court hearing, J was formally assessed by specialist assessors four times. Three assessments were undertaken by clinical psychologists (Ms Jensen, Dr Thomson and Ms Torok) and the fourth assessment was undertaken by a psychiatrist, Dr Judson, who has specialist expertise in working with intellectually disabled offenders.[22] The assessors based their views on interviews with J and clinical reviews (which included a review of documentation relating to J's care, including incident reports made by staff members). In addition, the three psychologists each used formal risk assessment tools. All of the assessors concluded that J posed a high or very high risk of future violent behaviour and that he needed to continue to be cared for as a secure care recipient. Any progress in reduction and management of the level of J's risk was predicted to be slow.

[30] Based on the specialist assessors' reports, Cull J concluded that "J's obsessional interests and impulsive behaviour continue to be ongoing features of [his]

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20 2017 Family Court decision, above n 10, at [111]–[117] and [125].
21 2020 Family Court decision, above n 1, at [29] and [49].
22 High Court decision, above n 6, at [364].

presentation and risk profile".[23] Referring to the most recent reporting period prior to the hearing in the High Court, Cull J noted that:[24]

> Between mid-April 2016 and 1 September 2016, there were 36 incident reports of J's behaviours, including 18 incidents of actual or attempted property damage (such as breaking windows), five occasions of absconding and seven serious incidents of actual, attempted or threatened violence. Between November 2016 to April 2017 there were an additional 25 incident reports, including physical assaults on staff and his mother, 10 threats to harm or kill members of the public, seven occasions of property damage and four attempts to escape with the intention of causing property damage. In April and May 2017, there were a further 10 incident reports, including violent fantasies, threatened and attempted violence as well as attempted property damage, although Dr Judson noted that the degree of severity of a number of the incidents in these two months is less and the recording and consistency of interventions has improved.

[31] Cull J observed that J's risk of violence had consistently been rated as high, but that his risk factors were currently being successfully contained through environmental restrictions.[25] These included ensuring that J had no access to weapons or to children or women's feet, and no access to the community unsupervised. In addition, his carers engaged in immediate intervention using a variety of strategies when J showed signs of agitation and managed external stimuli by environmental modification. Against this background, Cull J observed that:[26]

> There are thus ongoing concerns about how J's risk would be managed in the absence of environmental constraints and intensive staff supervision of his behaviour (particularly from male staff).

[32] Despite the high level of care and support from staff, Cull J noted that J had still been able to abscond on some occasions and had also been able to access and hide a knife. The assessments indicated it was probable that, without his level of care at the time, J would commit an offence.[27] Cull J concluded that the community protection interest outweighed J's liberty interest and J required secure care under a compulsory care order.[28]

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23 At [367(b)].
24 At [367(c)] (footnote omitted).
25 At [368(a)] and [368(d)].
26 At [368(d)].
27 At [368(e)].
28 At [423], [428]–[429] and [617].

The 2020 Family Court decision

[33] Following the High Court decision, a further application was made to the Family Court to extend J's compulsory care order. That application came before Judge G Wagner for determination. The Judge followed the approach set out by this Court in *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* (which we discuss in more detail below).[29]

[34] The Judge summarised the evidence before the Court regarding J's behaviour, noting that J's presentation and behaviour had regressed since the last hearing and that:[30]

> (c) Between 13 August 2019 and 6 January 2020 there were 40 incident forms completed for [J] whilst at [his previous placement]. These included such things as six actual assaults against staff, property damage (and threats of), threats to harm others eg threats to "kill [Europeans]" plus threats to harm or kill specific persons, and attempts to gain access to weapons.
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> (d) There were twelve summary of incidents reports from [J's hospital secure care provider] between 29 January and 29 March 2020. They refer primarily to attempts to and actual uninvited touching of staff members and physical violence towards staff, including violent reactions in response to noise.

[35] Three specialist assessors' reports were before the Family Court: one by Ms Jensen, one by Dr Craig Immelman, and one by Dr Willem Louw. The Judge also heard oral evidence from the assessors, J's care co-ordinator and Dr Duff, who was J's responsible clinician at that time. The Judge recorded that the view of the three specialist assessors and of Dr Duff was that J posed "an ongoing and significant risk", that the risk was "very high", and that the risk had not changed.[31] The Judge agreed with those assessments.[32]

[36] The Judge then turned to J's "liberty interest", which encompasses J's fundamental rights under NZBORA,[33] and balanced that against the community

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29 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641.

30 2020 Family Court decision, above n 1, at [31(a)]–[31(d)] (footnotes omitted).

31 At [32] and [37]–[39].

32 At [39].

33 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [35].

protection interest in accordance with the guidance given by this Court in *RIDCA*.[34] The Judge observed that since the High Court decision, J's behaviour had deteriorated.[35] The Judge was satisfied that J "continues to pose a very high risk and his … rehabilitation will be an ongoing, long term process".[36] The Judge concluded that secure care was necessary, as supervised care "would pose a serious and unacceptable danger" to J's safety and that of the community.[37] The Judge was satisfied that the maximum available period of extension — three years — was appropriate.[38]

The statutory framework

The legislative history of the CPMIP Act and IDCCR Act

[37] The genesis of the CPMIP Act and the IDCCR Act (which operate together) can be traced back to the early 1990s, when the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) was enacted. The MHCAT Act "represented a shift in emphasis from a paternalistic approach, aimed at care and protection, to one promoting patient autonomy".[39] The MHCAT Act included a new definition of "mental disorder" that, unlike its predecessor in s 2 of the Mental Health Act 1969, omitted any reference to intellectual disability.[40] Indeed, the MHCAT Act deliberately excluded people with an intellectual disability from its scope, unless they were also mentally disordered. This was on the basis that intellectual disability is not a mental illness, but rather "results in substantial limitations in functioning".[41]

[38] A consequence of this legislative reform was that clinicians took "the restrictive approach that if a person's disorder of mood, perception, volition or

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34 See [92].
35 2020 Family Court decision, above n 1, at [43].
36 At [48].
37 At [50].
38 At [56]–[57].
39 Brookbanks "Protecting the Interests of Vulnerable Defendants in the Criminal Justice System", above n 3, at 57.
40 At 57.
41 Intellectual Disability (Compulsory Care) Bill 1999 (329-2) (select committee report) at 1–2.

cognition was a feature of their intellectual [disability], then s. 4 [of the MHCAT Act] prevented compulsory intervention".[42] This, in turn, meant that:[43]

> … significant numbers of people with an [intellectual disability], who had previously been detained in protective long-stay psychiatric institutions, were discharged into the community, often without adequate support or supervision. … Included were a small number of intellectually disabled men with co-existing behavioural issues, some of whom, upon their unsupervised release into the community, committed serious criminal and sexual assaults.

[39] Relatedly, the exclusion of intellectual disability from the MHCAT Act regime meant that there were:[44]

> … limited options … available to the courts for dealing with people with an intellectual disability who are in need of compulsory care. For some this has resulted in inappropriate placement in prison, mental health services, or discharge into the community.

[40] The enactment of the MHCAT Act therefore "effectively disenfranchised persons with [intellectual disability] with challenging behaviours from regimes of supervisory care and treatment".[45] The resulting legislative gap was eventually filled by the CPMIP Act and the IDCCR Act. Together these Acts aimed to meet the need for "more accurate means for determining the criminal responsibility of, and more suitable disposal options for, [intellectually disabled] offenders".[46]

The CPMIP Act

[41] The CPMIP Act sets out the process for determining whether a defendant is unfit to stand trial and the steps to be followed if a defendant is found unfit.

[42] When the CPMIP Act was enacted, the court was required to first determine, on the balance of probabilities, whether the evidence was sufficient to establish that the defendant had "caused the act or omission that forms the basis of the offence with which the defendant is charged" (the involvement hearing).[47] Only if involvement

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42 Brookbanks "Protecting the Interests of Vulnerable Defendants in the Criminal Justice System", above n 3, at 57.

43 At 57.

44 Intellectual Disability (Compulsory Care) Bill 1999 (329-2) (select committee report) at 1–2.

45 Brookbanks "Protecting the Interests of Vulnerable Defendants in the Criminal Justice System", above n 3, at 55.

46 At 56.

47 CPMIP Act, s 9 (as it stood prior to 14 November 2018).

was established was a further hearing held to determine if the defendant was unfit to stand trial due to a mental impairment (the fitness hearing).[48] "Unfit to stand trial" is defined in the CPMIP Act as meaning that the defendant is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so.[49] The statutory definition includes (but is not limited to) defendants who, due to mental impairment, are unable to plead, to adequately understand the nature or purpose or possible consequences of the proceedings, or to communicate adequately with counsel for the purposes of conducting a defence.[50]

[43] The CPMIP Act was amended in 2018 to reverse the sequence of the involvement and fitness hearings.[51] The fitness hearing (now provided for in s 8A of the CPMIP Act) must take place first. Only if a defendant is found unfit will the matter proceed to an involvement hearing (now provided for in s 10 of the CPMIP Act). If a court is not satisfied of the defendant's involvement, it must dismiss the charge under s 147 of the Criminal Procedure Act 2011.[52] If a court is satisfied of the defendant's involvement, a further hearing is held to consider the most suitable course (the disposition hearing).[53]

[44] The available disposition options for an intellectually disabled defendant who has been found unfit to stand trial (ID unfit defendant) are immediate release or detention under the IDCCR Act, either as a special care recipient or a care recipient.[54] As the Supreme Court recently explained in *M (SC 82/2020) v Attorney-General*:[55]

> The IDCCR Act provides for two classes of "care recipient". The first class is a "special care recipient". A person who has been found unfit to stand trial and is subject to an order under s 24(2)(b) of the CPMIP Act is a special care recipient. … A special care recipient remains within the criminal justice system and must be held in a secure facility. The other class of care recipient is "a care recipient no longer subject to the criminal justice system". This class of care recipient is detained under a civil regime pursuant to a compulsory care order made by the Family Court under s 45 of the IDCCR Act or by operation of statutory deeming provisions.

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48 Section 14 (as it stood prior to 14 November 2018).
49 Section 4 definition of "unfit to stand trial", para (a).
50 Section 4 definition of "unfit to stand trial", para (b).
51 Courts Matters Act 2018, ss 125–127 and 131.
52 CPMIP Act, s 13.
53 Sections 23–26.
54 Sections 24–25.
55 *M (SC 82/2020) v Attorney-General* [2021] NZSC 118, [2021] 1 NZLR 770 at [12] per Winkelmann CJ, O'Regan and Williams JJ (footnotes omitted).

[45] We do not consider special care recipients further, as J falls within the category of care recipients "no longer subject to the criminal justice system," which includes persons who are subject to an order made under s 25(1)(b) of the CPMIP Act that the person be cared for as a care recipient under the IDCCR Act.[56] Such an order can only be made if the court is satisfied on the evidence of one or more health assessors that the defendant:[57]

(a) has an intellectual disability;[58]

(b) has received a needs assessment under pt 3 of the IDCCR Act; and

(c) is to receive care under a care programme completed under s 26 of the IDCCR Act.

[46] An order that a person be cared for as a care recipient under s 25(1)(b) of the CPMIP Act may be for secure care, which requires the care recipient to reside in a secure facility, or for supervised care.[59] The maximum duration of such an order is three years, but the order may be extended.[60] An order made under s 25(1)(b) is regarded as a compulsory care order for the purposes of the IDCCR Act, and a person who is the subject of such an order is deemed to be no longer subject to the criminal justice system.[61]

The IDCCR Act

[47] The IDCCR Act contains detailed provisions relating to the ongoing care and rehabilitation of care recipients. The purposes of the IDCCR Act are set out in s 3 as follows:

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56 IDCCR Act, s 6(3)(b).
57 CPMIP Act, s 25(3).
58 Section 25(3)(a). The definition of "intellectual disability" in s 7 of the IDCCR Act has the following elements: the impairment must be permanent; the impairment must result in significantly sub-average general intelligence (this threshold is met where a person has an intelligence quotient (IQ) of 70 or less, with a confidence interval of not less than 95 per cent); the impairment must result in significant deficits in adaptive functioning in at least two of the skills listed in s 7(4); and the impairment must have manifested during the person's developmental period (this period generally finishes when the person turns 18 years).
59 Section 26; and IDCCR Act, s 5 definition of "secure care" and ss 9, 63 and 64.
60 IDCCR Act, ss 46 and 85.
61 CPMIP Act, s 26(2); and IDCCR Act, s 6(3)(b).

(a) to provide courts with appropriate compulsory care and rehabilitation options for persons who have an intellectual disability and who are charged with, or convicted of, an offence; and

(b) to recognise and safeguard the special rights of individuals subject to this Act; and

(c) to provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act.

[48] In addition, s 11 sets out the principles that govern the exercise of all powers under the IDCCR Act:

> **11 Principles governing exercise of powers under this Act**
>
> Every court or person who exercises, or proposes to exercise, a power under this Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect—
>
> (a) the health and safety of the care recipient and of others; and
>
> (b) the rights of the care recipient.

[49] As noted above, a compulsory care order cannot be made unless a needs assessment under pt 3 of the IDCCR Act has been undertaken by a care co-ordinator.[62] The purposes of a needs assessment include assessing the kind of care the care recipient needs and preparing a care and rehabilitation plan for the care recipient.[63] Care plans must be individualised and are required to address a range of matters including the social, cultural, and spiritual needs of the care recipient and their medical and psychological needs.[64]

[50] The IDCCR Act also includes comprehensive oversight mechanisms and safeguards aimed at protecting the rights of individual care recipients. These include:

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62 Care co-ordinators are appointed by the Director-General of Health, and are responsible for particular geographical and operational areas specified by the Director-General. Care co-ordinators are responsible for provision of various functions and exercise of various powers within their designated area: IDCCR Act, s 5 definition of "co-ordinator" and s 140.

63 Section 16.

64 Section 25.

(a) *Initial Family Court review* — the IDCCR Act provides for a mandatory Family Court review six months after the care and rehabilitation plan of a care recipient has been approved under s 24(2).[65]

(b) *Regular clinical reviews* — while a compulsory care order is in force, a specialist assessor is required to undertake a clinical review at least every six months.[66] The specialist assessor must examine the care recipient and consult with other professionals involved in their care.[67] For persons (such as J) who are care recipients no longer subject to the criminal system, the assessor must issue a certificate stating whether or not, in the assessor's opinion, the care recipient still needs to be cared for as a care recipient.[68]

(c) *Family Court oversight* — a care co-ordinator may apply to the Family Court for cancellation of a compulsory care order at any time in respect of a care recipient who is no longer subject to the criminal justice system or a special care recipient who is liable to detention under a sentence.[69] If a specialist assessor issues a certificate stating that a care recipient no longer needs to be cared for as a care recipient, the care co-ordinator *must* apply to the Family Court for cancellation of the compulsory care order as soon as practicable. If the Family Court is satisfied that the care recipient no longer needs to be cared for as a care recipient, the Court may cancel the relevant order.[70]

(d) *District inspectors* — district inspectors (who are required to be qualified lawyers)[71] provide an independent monitoring function. Their responsibilities are outlined in pt 7 of the IDCCR Act.

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65 Sections 72–74.
66 Sections 77(2) and 78.
67 Section 78(3).
68 Sections 79(1), 79(3)(a) and 82.
69 Section 84.
70 Section 84.
71 Section 5 definition of "district inspector" and s 144; and MHCAT Act, s 2 definition of "district inspector" and s 94.

(e) *High Court oversight* — extensive oversight powers are conferred on the High Court, including powers to direct a district inspector or other person to examine a care recipient and to inquire into and report on any matter relating to them, and to order the care manager to bring the care recipient before a judge for examination. These processes can be initiated on the application of any person or on the Court's own initiative.[72] Where a care recipient is no longer subject to the criminal justice system (as in J's case), the judge may order their release if satisfied after examination that the care recipient is being detained illegally or no longer needs to be cared for as a care recipient.[73]

(f) *Rights to information* — as soon as a compulsory care order is made, the care recipient's care manager must explain to the care recipient, in a manner they are most likely to understand, their rights under the IDCCR Act including their right to have their condition reviewed by a specialist assessor; their right to seek a judicial inquiry; and the functions and duties of district inspectors. A written statement of the care recipient's rights must also be provided to the care recipient's guardian or principal caregiver. The care manager must keep the care recipient informed of these rights.[74]

(g) *Appeal rights* — there are rights of appeal from decisions of both the Family Court and High Court.[75]

(h) *Code of Health and Disability Services Consumers' Rights* — care recipients are "consumers" under the Code, which confers certain rights on consumers, and imposes certain obligations and duties on the providers of health and disability services.[76]

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72 IDCCR Act, ss 102–107.

73 Section 104.

74 Section 49.

75 Sections 133 and 134. There is a right of appeal to the High Court from a decision of the Family Court in which the Court "has made or has refused to make an order, or has otherwise determined or has dismissed the proceeding": s 133. A decision of the High Court on an appeal from the Family Court may then be appealed to this Court. Such an appeal requires leave of this Court, and is limited to a "question of law arising in an appeal" under s 133: s 134.

76 Section 48; and see Health and Disability Commissioner (Code of Health and Disability Services

Extension of compulsory care orders

[51] Section 85(1) of the IDCCR Act provides that the Family Court may, on the application of the care co-ordinator, extend the term of a compulsory care order. In deciding whether to apply for an extension and whether to extend an order respectively, the care co-ordinator and the Court must have regard to the most recent specialist assessor's certificate (as described at [50(b)] and [50(c)] above).[77] If the care recipient is no longer subject to the criminal justice system (as in J's case) and the Court decides to extend the order, it must determine whether the order should be for supervised care or secure care.[78] The Court can only order secure care if it considers that supervised care would pose a serious danger to the health or safety of the care recipient or of others.[79]

[52] The correct approach to applications to extend a compulsory care order was considered by a full bench of this Court in *RIDCA*.[80] The Court observed that, as no express criteria are set out in s 85, it is necessary to look at "the legislative scheme more broadly" in order to "determine the principles applying to decisions about the extension of compulsory care orders".[81] The Court rejected RIDCA's submission that the sole criterion for an extension decision was whether a care recipient posed "undue risk". Rather, the Court's view was that "a more nuanced approach" is called for.[82] The Court noted that, as set out in s 11 of the IDCCR Act, every court or person who exercises a power under the IDCCR Act in respect of a care recipient must be guided by the principle that the care recipient should be treated so as to protect the health and safety of the care recipient and of others, and the rights of the care recipient.[83] Although the IDCCR Act does not specify which rights are referenced in the phrase "the rights of a care recipient" in s 11(b),[84] the Court expressed the view that:[85]

Consumers' Rights) Regulations 1996.

77 Section 88.

78 Section 85(2).

79 Section 85(3).

80 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29.

81 At [28].

82 At [15] and [30].

83 At [31]–[32].

84 At [35].

85 At [35] (footnotes omitted).

> … there is no reason to read it down in any way. The IDCCR Act itself sets out a number of rights applying to care recipients or proposed care recipients, such as the right to legal advice and the right to information. There are many others. However, we think the focus of the principles set out in s 11(b) is on more fundamental rights, particularly rights ensuring basic freedoms of the kind described in the New Zealand Bill of Rights Act 1990 … such as the right to freedom of movement, the right not to be arbitrarily arrested or detained, and the right to be free from discrimination on the grounds of disability. In a similar context, the Supreme Court of Canada used the phrase "liberty interest" to describe these rights and we will adopt the same term.

[53] The Court considered that s 11 therefore requires that the "legitimate interest of the community in protecting the health and safety of the care recipient and others" (the "community protection interest") be balanced against the "liberty interest" of the care recipient. Undertaking such a balancing exercise, the Court explained, would enable a court considering an extension application under s 85 to achieve the purposes described in s 3 of the IDCCR Act (reproduced at [47] above), "because it will lead to the selection of the appropriate compulsory care and rehabilitation option for the care recipient and recognise his or her rights appropriately".[86] A compulsory care order should not be extended "unless the need to protect the public is sufficiently great to justify the interference with the liberty interest of the care recipient".[87] In conclusion, the Court summarised the approach that a judge should take to an extension application as follows:[88]

> (a) Sections 3 and 11 set out the guiding principles in relation to extension decisions. Unless the community protection interest outweighs the liberty interest of the care recipient, an extension of a compulsory care order should be refused. Given the objective of the IDCCR of protecting the rights of intellectually disabled people and the high value New Zealand society gives to individual liberty, the Judge determining an extension application must be satisfied that the community protection interest cannot be met other than by a compulsory care order. To put it another way, the compulsory care order must be the least coercive and restrictive option available.
>
> (b) It is not sufficient reason to extend a supervision order that the care recipient would benefit from supervised care and treatment and the opportunities for rehabilitation that would be provided under a compulsory care order. If the care recipient no longer constitutes a risk of sufficient seriousness to justify the continuation of the order, the extension should be refused. However, rehabilitation is an important objective of the

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86 At [36].
87 At [44].
88 At [92].

IDCCR Act. The Judge making an extension decision should be informed of the rehabilitation efforts that have been made and the outcome of them, and advised of the prospects of future rehabilitation. If the risk posed by the care recipient is unlikely to be reduced through rehabilitative efforts, the Judge may take that into account in determining whether the community protection interest continues to be outweighed by the liberty interest of the care recipient.

(c) The weight to be given to the liberty interest is not necessarily static. After the care recipient has been subject to a compulsory care order for a substantial period, the Judge may determine that greater weight needs to be given to the liberty interest.

(d) The nature of the original offending is relevant to an extension decision in that it may provide the Judge with an indicator of the level of risk posed by the care recipient. This can be taken into account with the clinical assessments of the health assessors in determining the weight to be given to the community protection interest. In a finely balanced case, the fact that an extension would make the period of compulsory care disproportionate to the offending of the care recipient may also be taken into account. However, in a case where a judge is satisfied that the community protection interest outweighs the liberty interest of the care recipient, the fact that the period during which the care recipient will remain subject to a care order would exceed the sentence to which he or she would have been subject if he or she was not intellectually disabled should not lead to the refusal of an extension.

Does J's detention constitute disproportionately severe treatment or punishment, in breach of s 9 of NZBORA?

[54] We now turn to consider the first issue on appeal, which is whether Cull J erred in finding that J's detention did not constitute disproportionately severe treatment or punishment, in breach of s 9 of NZBORA.

Relevant legal principles

[55] Section 9 of NZBORA guarantees everyone the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. The threshold for breach of s 9 is a high one. In *Taunoa*, Tipping J described s 9 as being "reserved for truly egregious cases".[89] Before us, Mr Ellis focussed primarily on the "disproportionately severe treatment" limb of s 9. The Supreme Court in *Fitzgerald v R* described this as referring to treatment or punishment that "would shock

[89] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [297] per Tipping J.

the national conscience of properly informed New Zealanders".[90] The threshold for a finding of disproportionately severe treatment or punishment is well beyond even manifestly excessive treatment.[91]

Submissions for J on appeal

[56] Mr Ellis submitted that J's detention as a care recipient for 17 years would "shock the national conscience".[92] He submitted that, interpreted in a rights-consistent way, s 85 of the IDCCR Act only permits a compulsory care order to be extended for a period equivalent to the maximum sentence that could have been imposed on a person convicted of the index charges. In J's case that would be three months. Mr Ellis submitted that the extensions of J's care order beyond that period have resulted in J being subjected to disproportionately severe treatment. Mr Ellis submitted that this Court's decision in *RIDCA* is either distinguishable or wrongly decided.

[57] Two further arguments were advanced in support of this ground of appeal. First, Mr Ellis argued that J has been subjected to disproportionately severe treatment because the approach to assessing the risk that J poses to the public has been fundamentally flawed. Second, Mr Ellis advanced an argument relating to prosecutorial discretion, based on the judgment of the High Court in *Fitzgerald v Attorney-General*.[93]

Must the duration of a care order be proportionate to the term of imprisonment that could have been imposed for the index charges?

[58] Cull J rejected the submission that the duration of a care order (including any extensions) must be proportionate to the term of imprisonment that could have been

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90 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [3], and see [79]–[81] per Winkelmann CJ, [239] per Glazebrook J and [167] per O'Regan and Arnold JJ.

91 *Taunoa v Attorney-General*, above n 89, at [289] per Tipping J.

92 See [289] per Tipping J.

93 *Fitzgerald v Attorney-General of New Zealand* [2022] NZHC 2465, [2023] 2 NZLR 214.

imposed for the index charges. Her key reasons for reaching that conclusion were that:

(a) The maximum prison sentence for the index charges is a factor to be assessed in a decision whether to extend a compulsory care order, but, as this Court observed in *RIDCA*, it is but one of many factors.[94]

(b) Rather than being an alternative to the imposition of a criminal sentence, the disposition of a proceeding under s 25(1)(b) of the CPMIP Act involves a person who has been deemed to be no longer subject to the criminal justice system, having been found unfit to stand trial.[95]

(c) The nature of J's index acts did not provide an accurate guide to the level of risk he poses to the community. There had been numerous other incidents both prior and subsequent to J becoming a care recipient that could have resulted in further criminal charges, and which supported the view that he posed a serious risk to public safety.[96]

(d) Because of the "very significant and ongoing risk" to the public which J posed, the community protection interest justified J's continued detention.[97]

[59] In *RIDCA*, this Court accepted that the nature of the index offending may in some cases provide "some indicator" of the nature and extent of a care recipient's risk level.[98] For example, where the care recipient has committed only a minor offence, the offence was that person's first offence, and there is no evidence that it was "an indicator of a risk of substantially worse events occurring in the future", that would support a conclusion that the care recipient's risk level "is at the lower end of the

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94 High Court decision, above n 6, at [412], [475] and [586]; and see *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [92]–[93].
95 High Court decision, above n 6, at [205], citing IDCCR Act, s 6(3).
96 At [408]–[412], [475] and [586].
97 At [427]–[428] and [586]–[589].
98 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [69].

spectrum".[99] The Court further stated that "proportionality between the terms and length of the compulsory care order and the original offence committed by the care recipient can be a relevant factor in finely balanced cases".[100] Specifically, where the community protection interest and the liberty interest of the care recipient are finely balanced and "the extension of the compulsory care order would lead to the duration of the order being disproportionate to the nature of the offending by the care recipient, that would be a factor to be taken into account in the decision whether or not to grant the extension".[101]

[60] The Court in *RIDCA* rejected the proposition, however, that proportionality with the sentence that could be imposed in respect of the index charges is a prerequisite to the extension of a compulsory care order, commenting that:[102]

> Taken to its logical conclusion, that would require a judge to refuse to extend a compulsory care order in circumstances where he or she is satisfied that there was a substantial need to protect the public, merely because the offence actually committed by the care recipient was, of itself, minor.

[61] The Court referred to the hypothetical situation of a care recipient who had committed only a minor offence "but constitutes a very significant and ongoing risk to the public", giving the example of a care recipient who was apprehended for a minor offence but who posed a high risk of sexually offending against children. The Court stated that in this situation:[103]

> the community protection interest will overwhelm the liberty interest, and the assumption must be that the minor nature of the offending did not provide an accurate guide to the level of risk posed by the care recipient. Thus we do not consider it is likely that a dangerous person could be released because the nature of the offending was taken into account in the risk assessment.

Finally, the Court noted that the assessment will be "very focused on the characteristics and rights of the individual care recipient".[104]

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99 At [71].
100 At [70].
101 At [72] (footnote omitted).
102 At [70].
103 At [94].
104 At [94].

[62] We do not accept that *RIDCA* is either distinguishable or wrongly decided. We see no basis on which a requirement that the maximum duration of a care order be limited to the sentence available for index charges could be read into s 85. There is nothing in the wording of s 85, the legislative history, or the overall scheme of the legislation that supports such an interpretation.

[63] We note that the Supreme Court of Canada, in *Winko v The Director, Forensic Psychiatric Institute* rejected a similar proportionality argument to that advanced in this appeal (in the context of claims under ss 7 and 15 of the Canadian Charter of Rights and Freedoms).[105] McLachlin J, writing for the majority, expressed the view that a "mechanistic comparison" of the duration of confinement, as between a convicted offender and someone who was not criminally responsible, is "inapposite" due to the fundamentally different purposes of the confinement.[106] Unlike sentences of imprisonment imposed upon conviction, health-related orders are made when a person is unable to be held morally responsible for their offending, and are therefore non-punitive. McLachlin J reasoned that:[107]

> Because the [not criminally responsible] accused's liberty is not restricted for the purpose of punishment, there is no corresponding reason for finitude. The purposes of any restriction on his or her liberty are to protect society and to allow the [not criminally responsible] accused to seek treatment. This requires a flexible approach that treats the length of the restriction as a function of these dual aims …
>
> In asserting that [not criminally responsible] accused must be treated "the same" as criminally responsible offenders who commit the same criminal act, the appellants assume that the infringement of their liberty is meant to serve the same function that it does for those found guilty of criminal offences. As I noted, this is mistaken. Any restrictions on the liberty of the [not criminally responsible] accused are imposed for essentially rehabilitative and not penal purposes. In the words of Taylor JA, unlike the sanctions faced by a convicted person, the scheme that addresses [not criminally responsible] accused "exacts no penalty, imposes no punishment and casts no blame" … Accordingly, a formalistic comparison of the "sentences" imposed on these two types of individuals belies a purposive understanding of the statutory provisions in issue.

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105 *Winko v The Director, Forensic Psychiatric Institute* [1999] 2 SCR 625; and Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

106 At [93] per Lamer CJ and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

107 At [93]–[94] per Lamer CJ and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ (citation omitted); adopted in *S v Attorney-General* [2017] NZHC 2629 at [681] and [683].

[64] We acknowledge that the court's power to extend a compulsory care order, potentially indefinitely, has serious implications for the very small cohort of care recipients[108] who, like J, have been detained for a lengthy period due to the high level of risk they pose to the public. The extension power in s 85 must therefore be exercised in a manner that is consistent with, and appropriately reflects, a care recipient's NZBORA rights. That is what the *RIDCA* approach was intended to (and in our view does) achieve. The *RIDCA* approach to extension applications requires the court to undertake a careful balancing of the community protection interest against the liberty interest of the care recipient, in circumstances where the liberty interest is not necessarily static and can appropriately be given greater weight with the passage of time. Further, an order must not be extended unless it is the least restrictive option available to the court to satisfy the community protection interest. Similarly, the terms of the order must be minimally intrusive, having regard to community protection.[109] In addition, the IDCCR Act contains numerous other checks and balances (as set out at [50] above) that provide a further layer of protection.

[65] In conclusion, in our view Cull J was correct to find that s 85 of the IDCCR Act, correctly interpreted, does not require that the total duration of a compulsory care be limited to a period equivalent to the maximum penalty available for the index charges. While the available sentence for the index charges is a relevant consideration, it is only one factor and is not determinative. Rather, when considering an extension application under s 85, a court must exercise its discretion in accordance with the guidance given in *RIDCA,* which requires a careful balancing of a care recipient's liberty interest and the need to protect the health and safety of both the care recipient and the community.

[66] We address J's alternative argument, namely that s 85 (if it permits indefinite extensions of a compulsory care order) is discriminatory, at [148]–[160] below.

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[108] Senior counsel for the care co-ordinator in this appeal understood the total number to be "probably about four", including J.

[109] *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [59].

Has a flawed approach to risk assessment resulted in J being subjected to disproportionately severe treatment?

[67] Mr Ellis further submitted that J has been subject to an unduly long (and disproportionately severe) period of detention because the approach to assessing the risk that J poses to the public has been fundamentally flawed in two respects:

(a) First, the assessments of risk undertaken by the specialist assessors relied, in part, on "incident reports" made by staff involved in J's care. Those incident reports may be inaccurate, and J was not able to challenge their contents (and is likely incapable of doing so, due to his ASD and intellectual disability).

(b) Second, J's risk must be ascertained solely with reference to the conduct giving rise to the index charges. Mr Ellis submitted that it is not appropriate or permissible to undertake risk assessments based on the risk of J engaging in other types of harmful behaviour, such as violence.

[68] Neither issue is expressly addressed in the High Court judgment, and it is not clear whether these arguments were advanced before Cull J. The Judge did note, however, that a report filed by the district inspector in February 2017 at the direction of Judge Goodwin had raised a number of matters in relation to J's care in the previous months. Cull J summarised that the concerns identified included that:[110]

> documentation of incidents and observations by the staff needed improvement in terms of accuracy, consistency and timeliness, with completions of incident forms, because unreported incidents were an underestimation of the ongoing risks that J presented to himself and others. There was a concern that the incident reports alone were not conveying an accurate picture of J's reported risks.

[69] In the 2020 Family Court decision, Judge Wagner noted that Mr Ellis had criticised the mode of incident reporting and had put a large number of the incident reports referred to in the specialist assessors' reports to the assessors and to Dr Duff at the hearing of the extension application. Mr Ellis had suggested to those witnesses that J's support team had caused the relevant reactions or behaviours through their

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110 High Court decision, above n 6, at [264].

own action or inaction, rather than J being responsible or "guilty". Judge Wagner explained that:[111]

> Dr Duff preferred to categorise the incident records more neutrally as "a description of what happened." She later agreed with the description put [to] her by Mr Gruar as the incident forms "seeking a way of explaining the behaviours, rather than apportioning guilt on his [J's] part".

[70] Judge Wagner rejected Mr Ellis's characterisation of others attributing blame to J for his various actions, and stated further:[112]

> Indeed I was struck by the compassion and respect which each of the experts/professionals showed and expressed towards [J]. There was no hint of judgement or blame of [J] for his various behaviours. Rather there seemed to be a unanimous drive, despite the long journey [J] and others have been on for many years now, to continue to try to understand the triggers for [J]'s behaviour and to provide the very best level of care and support for him as possible.

[71] In our view it was appropriate for the specialist assessors or other experts involved in the risk assessment process to rely on or refer to the incident reports as part of their risk assessment. Those reports contain information that is highly relevant to assessing risk, including information as to J's interests of concern, his behaviour, and the likely triggers for that behaviour. Obviously, there is always a risk of some inaccuracy when recording or reporting human behaviour. There is nothing to suggest, however, any deliberate falsification or exaggeration by the writers of the incident reports. On the contrary, to the extent that there may be an issue, it appears that it may be with under-reporting of incidents rather than over-reporting. It is also of note that there is a remarkable consistency in the reports, over a period of many years. Clear themes can be identified, as we have summarised at [11]–[26] above. It is difficult to see how J's risk could be accurately assessed without reference to this primary source material.

[72] Mr Ellis's second argument (that J's risk must be ascertained solely with reference to the conduct giving rise to the index charges, which related to property damage) overlooks that the index charges are simply the gateway through which J entered the IDCCR Act regime. The index acts are relevant to the risk assessment

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111 2020 Family Court decision, above n 1, at [44] (footnotes omitted).
112 At [47].

process in the ways explained in *RIDCA* (as summarised at [53] above). However, as this Court explained in *RIDCA*, the index charges are only one factor for the court to consider when assessing the nature of the risk currently posed by the care recipient.[113]

[73] Mr Ellis further submitted that the risk assessment exercise is inherently speculative. Prior to becoming a care recipient, J had only a very limited history of alleged violence, and he is now being detained for offences he has not committed and may never commit.

[74] This submission overlooks that (as we have noted at [18] above) J has lived in a carefully controlled environment, with a very high level of supervision, for most or all of the time he has been a care recipient. Because J is not able to manage his own high-risk behaviours, these are managed for him through strict environmental controls and constant supervision by male staff members (as at 2020, the staff ratio was either 3:1 or 2:1). Even with this high level of support and supervision, however, J has engaged in numerous violent or threatening acts (including multiple assaults on staff members) that could potentially have resulted in criminal charges if he was not a care recipient. As we have further noted, all three specialist assessors who assessed J prior to the 2020 Family Court decision concluded that he poses a *very high* risk of future violent behaviour, based on his behavioural presentation.

Prosecutorial discretion argument

[75] Mr Ellis submitted that the police ought to have withdrawn the charges before the conclusion of the CPMIP Act process due to the disparity between the maximum penalty for the charges and the detention that had already occurred (or, possibly, the further period of detention that could be anticipated). This claim relies, by analogy, on the reasoning of the High Court in *Fitzgerald v Attorney-General of New Zealand*.[114]

[76] This new claim was not pleaded and was not before the High Court. Evidence regarding the reasons or context for the prosecutor's decision-making in this case is

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113 See generally *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [70]–[72] and [92]–[93].

114 *Fitzgerald v Attorney-General of New Zealand*, above n 93.

not before the Court. We accept the respondents' submission that it is not appropriate for this new claim to be raised, for the first time, on appeal. In any event, we would have dismissed this claim on its merits. The situation that arose in *Fitzgerald* (in relation to the exercise of prosecutorial discretion) is not analogous to J's situation. Further, and significantly, this argument presupposes that the duration of a compulsory care order must be proportional to the sentence available for the index charges. We have rejected that argument, for the reasons outlined above.

Conclusion

[77] J's case is an exceptionally difficult one. All three specialist assessors who assessed him prior to the 2020 Family Court decision concluded that he poses a very high risk of future violent behaviour. Unfortunately, through no fault of his own, the level of risk that J poses can currently only be mitigated through controlling his environment — housing him in a secure facility, providing constant supervision, following a carefully developed care and rehabilitation programme, and so on. For the reasons we have outlined, it is our view that Cull J did not err in finding that J's ongoing detention pursuant to a compulsory care order under the IDCCR Act is not disproportionately severe treatment or punishment, in breach of s 9 of NZBORA.

Is J's detention arbitrary, in breach of s 22 of NZBORA?

[78] The second issue on appeal is whether Cull J erred in finding that J's detention as a compulsory care recipient under the IDCCR Act is not arbitrary, in breach of s 22 of NZBORA.

Relevant legal principles

[79] Section 22 of NZBORA codifies the right of an individual to be free from arbitrary detention. In *Neilsen v Attorney-General*, this Court provided the following guidance as to when detention will be arbitrary:[115]

> Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without

[115] *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [34].

> reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.

[80] A detention that is initially lawful may subsequently become arbitrary if the detention has become inappropriate, unpredictable or disproportionate.[116]

The High Court decision

[81] Cull J found that J's detention, although prolonged, was not arbitrary for the following key reasons:

(a) The CPMIP Act and IDCCR Act "were enacted to ensure that persons with intellectual disability were not sent to serve a term of imprisonment inappropriately".[117]

(b) J's initial disposition under the CPMIP Act, which brought him within the IDCCR Act regime, was "lawful and justified".[118]

(c) J's subsequent detention under the IDCCR Act was likewise justified, because it was based on his risk to himself and others, as well as his need for treatment and rehabilitation because of his intellectual disability. Such detention was authorised by law and was not arbitrary.[119]

(d) J's detention had followed a statutorily designed pattern of reviews and careful risk assessment. Judicial assessment was required each time an extension order was sought. This was a protective mechanism to ensure that the power to extend compulsory care orders did not have the same effect as preventive detention.[120]

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116 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [88], [90] and [100] per McGrath J, and [175] per Hammond J dissenting.
117 High Court decision, above n 6, at [433]–[437] and [463].
118 At [460].
119 At [461] and [504].
120 At [477]–[484] and [505].

(e) There had been nothing capricious or unreasoned, nor a decision made without reasonable cause, in the making of J's compulsory care orders.[121] Rather, the extensions were based on the evidence of specialist assessors which carefully explained why ongoing compulsory care for J was necessary.[122] J's risk had been assessed by a number of specialist assessors. They had all affirmed the need for J to remain in secure compulsory care, because of the risk he posed to himself and others.[123]

(f) The IDCCR Act incorporated safeguards which mitigated the risk of arbitrary detention.[124]

(g) J's detention was not arbitrary merely because he had received poor rehabilitation for a period.[125]

(h) Compulsory care orders made under the IDDCR Act regime should not be equated with the maximum sentence available on the index charges, as "[s]uch a comparison inappropriately equates the punishment of imprisonment with the therapeutic or protective care enacted for those with intellectual disability."[126]

Submissions for J on appeal

[82] The key arguments advanced in support of this ground of appeal were that:

(a) Cull J erred in her reliance on *RIDCA*, which should be distinguished and/or was wrongly decided;

(b) it has not been established that J's rehabilitative needs could not be met by less intrusive means than detention;

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121 At [484].
122 At [461].
123 At [504(b)].
124 At [461], [479], [484], [491], [503] and [505].
125 At [473].
126 At [475].

(c) there was a failure to provide effective rehabilitation during the first 10 years of J's detention; and

(d) Cull J should have met with J in person.

Did Cull J err in her reliance on RIDCA Central (Regional Intellectual Disability Care Agency) v VM?

[83] We have rejected Mr Ellis's submission that the interpretation of s 85 of the IDCCR Act set out in *RIDCA* is either distinguishable or wrong (at [62] above). Cull J was therefore correct to follow the approach to extension applications set out in *RIDCA* (and was bound to do so, in any event, unless she found *RIDCA* to be distinguishable).

Could J's rehabilitative needs be met by less intrusive means?

[84] Mr Ellis submitted that J's detention is arbitrary because Cull J failed to consider whether J's rehabilitative needs could be met by less intrusive means than detention.

[85] Mr Ellis referred to international case law, including decisions of the United Nations Human Rights Committee, in support of this submission. Cull J observed that international cases such as *Fardon v Australia*, *Rameka v New Zealand*, *A v New Zealand* and *Miller v New Zealand* were useful in understanding how New Zealand's obligations under the ICCPR have been interpreted.[127] The Judge summarised that:[128]

> The cases examined demonstrate that there are limits to the right to be free from arbitrary detention, both under art 9 of the ICCPR and s 22 of the NZBORA. The cases repeatedly indicate that preventive detention schemes, where the primary purpose is a punitive one, breach this right. Yet, the cases also acknowledge that there may be instances where continued detention is justified, particularly where rehabilitation is the focus of the detention and

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127 At [476], citing Human Rights Committee *Views: Communication No 1629/2007* UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) [*Fardon v Australia*]; Human Rights Committee *Views: Communication No 1090/2002* UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) [*Rameka v New Zealand*]; Human Rights Council: Working Group on Arbitrary Detention *No 21/2015* UN Doc A/HRC/WGAD/2015/21 (5 August 2015) [*A v New Zealand*]; and Human Rights Committee *Views: Communication No 2502/2014* UN Doc CCPR/C/119/D/2502/2014 (19 November 2018) [*Miller v New Zealand*].

128 At [476].

> where reviews and oversight mechanisms are in place to ensure detention takes place only for as long as it is justified. J's case is one of these.

[86] Cull J's view was that J's case was distinguishable from the international cases relied upon by Mr Ellis as it arose in the context of a protective rehabilitative scheme, not a punitive one. Further "as J's case demonstrates, the review mechanisms are frequent and effective".[129]

[87] In *RIDCA*, this Court noted that rehabilitation directed towards a "cure" is not available in cases of intellectual disability. Rather, for people with intellectual disabilities, rehabilitation is directed to teaching them "skills and tools to manage their difficulties and reduce the risk to the community".[130] The Court found it was clear from the legislative history that Parliament had considered "ongoing detention in cases of low level risk" to be unacceptable, and relatedly that "rehabilitation should be seen as a major objective of the legislation" and "rehabilitation options should be made available to those subject to compulsory care orders wherever possible". This intent found expression in the title and purpose of the IDCCR Act, and the fact that "the plans applying to those subject to compulsory care orders are called 'care and rehabilitation plans'".[131] The Court observed that:[132]

> the success or failure of rehabilitation efforts made during the compulsory care order, and the prospects for further rehabilitation are relevant factors in determining the issue before the Court, namely whether the community protection interest is sufficiently significant to outweigh the liberty interest of the care recipient.

[88] This Court further stated in *RIDCA* that if the risk posed by the care recipient is unlikely to be reduced through rehabilitative efforts, the Judge may take that into account when balancing the community protection interest against the liberty interest of the care recipient.[133] Ultimately, as this Court explained in *RIDCA*, "the Judge determining an extension application must be satisfied that the community protection interest cannot be met other than by a compulsory care order", or, expressed another

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129 At [477].
130 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [73]–[74].
131 At [84].
132 At [85].
133 At [92(b)].

way, "the compulsory care order must be the least coercive and restrictive option available".[134]

[89] In J's case, Cull J was clearly correct to find that the totality of the expert evidence overwhelmingly supported the view that J required secure care at that time.[135] The Judge carefully considered whether the risk posed by J could be reduced through rehabilitative efforts,[136] but ultimately accepted the expert evidence that "any progress in reduction and management of the level of risk will be slow".[137] Again, this conclusion was well supported by the evidence.

[90] J's rehabilitative needs and prospects are a relevant consideration, as outlined in *RIDCA*, but cannot be determinative of the outcome of an extension application. Here, J's rehabilitative needs were carefully considered and given appropriate weight in the overall assessment of whether an extension of the compulsory care order was necessary. In any event, there is nothing to suggest that J's rehabilitative needs would be better served in the community.

Inadequacies in rehabilitative support prior to 2016

[91] Mr Ellis further submitted that J's detention was arbitrary because there was a failure to provide J with effective rehabilitation prior to 2016.

[92] When considering an application to extend J's compulsory care order in 2017, Judge Goodwin noted that Dr Thomson, Ms Jensen and Dr Olive Webb had expressed concerns about the ability of J's care facility to implement recommended therapeutic strategies.[138] Judge Goodwin noted that there appeared to be "some common acceptance that [J's] rehabilitation has been less than optimum".[139] For that reason he was not prepared to extend the compulsory care order by three years and instead only extended it for 18 months, to ensure an ongoing review process.[140] The Judge also

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134 At [92(a)].
135 High Court decision, above n 6, at [423]–[428].
136 At [413]–[424].
137 At [424].
138 2017 Family Court decision, above n 10, at [87]–[92].
139 At [119].
140 At [120]–[121].

made some recommendations as to how the model of care delivery and rehabilitation could be improved.[141]

[93] Cull J commended the recent efforts that had been made to better address J's care and rehabilitation, following Judge Goodwin's comments in the 2017 Family Court decision.[142] On the issue of whether the inadequacies in the rehabilitative support provided to J prior to 2016 rendered his detention arbitrary, however, Cull J found:

> [473] Nor am I able to uphold the submission that because J received poor rehabilitation prior to 2016, this supports the proposition that he was arbitrarily detained. As the authorities make clear, the conditions on which an inmate or patient is being detained do not render the detention unlawful nor create a new detention. The review hearing before Judge Goodwin addressed the adequacy of J's care and rehabilitation plan and both the specialist assessors and the District Inspector, together with Dr Webb, drew attention to the fact that the plan was not addressing J's autism. Nor did the supervised care order reflect the level of staffing and management required to deal with J's behavioural risk. The Judge reflected all those concerns by making the secure care order for a term of 18 months only, which was both appropriate and lawful.

[94] On appeal, the respondents submitted that J's treatment has been appropriate and has not undermined the legality of his detention. Objection was also taken on the basis that this claim was not pleaded.

[95] The failure to plead this issue would preclude a finding of arbitrary detention on the basis of inadequate rehabilitation. We observe, however, that it is unfortunate and deeply unsatisfactory that inadequate attention was given to J's rehabilitation needs prior to 2016. Fortunately, the IDCCR Act contains mechanisms to raise and address these types of issues. Those mechanisms were effectively utilised in J's case, with the hearing before Judge Goodwin addressing issues as to the adequacy of J's rehabilitation plan,[143] and steps being subsequently taken to address the criticisms that had been made. Accordingly, since 2017, there has been a significantly increased focus on J's rehabilitative needs. In 2019, a positive behaviour support package for J was designed by clinical psychologist specialising in persons with intellectual

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141 At [124].
142 High Court decision, above n 6, at [425].
143 See generally 2017 Family Court decision, above n 10.

disabilities, Louisa Medlicott. The package was developed to provide J's support staff with clear and consistent interventions depending on the presenting behaviour of concern. Judge Wagner noted in the 2020 Family Court decision that "[a]lmost unanimously, those at the hearing spoke highly of that package".[144]

[96] Accordingly, even if this issue had been properly pleaded, we would have found that Cull J was correct to find that J is not currently being arbitrarily detained. Any inadequacies in the rehabilitation programme provided to J prior to 2016, while unfortunate and deeply regrettable, do not render his current detention arbitrary.

Cull J's decision not to meet with J

[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.[145])

[98] Cull J gave two reasons for not visiting J at his facility:[146]

> 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.[147] The fact that Cull J did not meet with J does not render his detention either unlawful or arbitrary.

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144 2020 Family Court decision, above n 1, at [28].

145 At [5]–[6].

146 High Court decision, above n 6, at [298].

147 Under s 102(1), it is also open to a High Court judge to make an order directing a district inspector or other persons to visit and examine a care recipient who is detained in a facility, and to inquire into and report on any matter relating to that care recipient that the judge specifies. That occurred in this case: see High Court decision, above n 6, at [286]–[299].

Further observations

[100] In *RIDCA*, this Court considered that, if the approach to extension applications outlined in that case were followed, no issue of unlawful discrimination or arbitrary detention would arise:[148]

> [96] Counsel assisting the Court and counsel for the Human Rights Commission argued that the approach advocated by RIDCA and the Attorney-General could lead to unlawful discrimination against intellectually disabled people and to arbitrary detention of care recipients. As we have not accepted the "undue risk" test for which RIDCA Central and the Attorney-General advocated, we do not need to engage with the discrimination and arbitrary detention issues. Neither counsel assisting the Court nor counsel for the Commission suggested that those concerns would arise on the approach taken by the High Court Judge. They do not arise on the approach we have taken either.

[101] Focussing at this stage on the issue of arbitrary detention (we address discrimination in the next section) we see no basis for departing from the view expressed in *RIDCA*. In our view the statutory scheme of the IDCCR Act is not inconsistent with the right to be free from arbitrary detention. Significantly, the IDCCR Act incorporates numerous safeguards that mitigate against the risk of arbitrary detention, including those we have summarised at [50] above. Detention as a compulsory care recipient is not indefinite, and care orders can only be extended based on a strict necessity test, in accordance with the guidance given by this Court in *RIDCA*. That approach requires a careful balancing of the risk a care recipient poses to themselves and to the community against the care recipient's liberty interest, and allows for increased weight to be given to the liberty interest over time.[149] There are also rights of appeal from decisions made under the IDCCR Act.[150] A similar risk-based detention regime, under the MHCAT Act, was found not to give rise to arbitrary detention in *S v Attorney-General*, given the various protective oversight and review provisions of the legislative scheme (which are similar to those found in the IDCCR Act).[151]

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148 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29.
149 At [36], [90] and [92].
150 IDCCR Act, ss 133–134.
151 *S v Attorney-General*, above n 107, at [707]–[710] and [723].

[102] In conclusion, it is our view that Cull J was correct to find that the statutory scheme of the IDCCR Act is not inconsistent with the right to be free from arbitrary detention. Nor, in our view, have there been any deficiencies or failures in relation to the specific decisions made regarding J that have rendered his detention arbitrary.

The discrimination ground of appeal

Relevant legal principles

[103] Section 19(1) of NZBORA provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the HRA). Section 21(1)(h)(iv) of the HRA provides that intellectual or psychological disability or impairment is a prohibited ground of discrimination.

[104] In *Ministry of Health v Atkinson*, this Court gave guidance as to how to approach a discrimination claim under s 19. The Court suggested the following framework:[152]

(a) Is there differential treatment or effects as between persons or groups in analogous or comparable situations ("the comparator group") on the basis of a prohibited ground of discrimination?

(b) If there is, has it resulted in a material disadvantage for the person or group differentiated against?

(c) If it has resulted in material disadvantage, can the discrimination be justified under s 5 of NZBORA?

[105] The Court explained in *Atkinson* that "[t]he focus on an appropriate comparator arises because it is necessary to determine whether the person or group is being treated differently to another person or group in comparable circumstances."[153] The Court noted, however, that there had been considerable debate about the usefulness of the

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[152] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55], [60], [109], [117], [136] and [143]. This approach was reaffirmed in *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43], [65] and [76].

[153] *Ministry of Health v Atkinson*, above n 152, at [60] (footnote omitted).

comparator exercise overseas, and that in the United Kingdom, the search for a comparator had been described as "an arid exercise".[154] The Court in *Atkinson* did not need to "resolve any of the broader questions about the use of a comparator" in the case before it, there being no challenge to the High Court's approach that the comparator was a "helpful tool" on the facts of that case.[155] In a similar vein, this Court observed in *Child Poverty Action Group Inc v Attorney-General* that using a comparator is "simply a tool in [the] analysis" and that in selecting the comparator the court must have regard to the "reality of the situation".[156] The selection of a comparator group will inevitably be highly context-specific.

The High Court decision

[106] Cull J noted that discrimination issues had been raised before her in three of the proceedings brought by J: the application for leave to appeal out of time against the original decisions of the District Court regarding J's disposition under the CPMIP Act, the appeal against the 2017 Family Court decision, and the judicial review claim.[157] Cull J recorded that Mr Ellis's "[o]verall" submission was that the statutory schemes under ss 9 and 14 of the CPMIP Act and the IDCCR Act were discriminatory.[158] He further submitted that the consequence of the combined statutory schemes was a new form of preventive detention which created potentially indefinite detention, and that this was discriminatory.[159] A declaration of inconsistency was sought.[160]

[107] When considering the appropriate comparator, Cull J appears to have had some sympathy with the respondents' submission that "ordinary offenders" and "those who are unfit to stand trial" are not in comparable or analogous circumstances.[161]

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154 At [60], citing *Regina (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 at [97] per Lord Carswell and *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [28] per Lady Hale.

155 At [60].

156 *Child Poverty Action Group Inc v Attorney-General*, above n 152, at [51]–[52].

157 High Court decision, above n 6, at [506].

158 At [507].

159 At [513].

160 At [507].

161 At [527].

Cull J appears to have accepted the Crown submission, however, that *if* a comparator group were to be identified:[162]

> … 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.

[108] Cull J therefore accepted there was differential treatment,[163] but concluded that ID unfit defendants were not materially disadvantaged by this differential treatment. Rather, she accepted the Crown's submission that the CPMIP Act and IDCCR Act regimes provided "a non-criminal alternative to a criminal process the defendant has no capacity to participate [in]".[164] Cull J found that the process under the CPMIP Act was "designed to identify the individual circumstances of a defendant" and recognised that the ordinary criminal justice process (trial, conviction and potentially imprisonment) was not appropriate for an intellectually disabled defendant.[165] The alternative regime had been designed to avoid the prejudice of a criminal proceeding for intellectually disabled persons, to respond to and treat their disability-related needs, and to protect the public and the care recipient from the risk such persons may pose to themselves and others.[166] The alternative process was "designed to achieve procedural fairness by accommodating the mental impairment or intellectual disability of the accused".[167] Cull J quoted, with approval, the following passage from the decision of Gendall J in *R v Mulholland*:[168]

> At the heart of the rules of law surrounding fitness to stand trial, lies the paramount premise that every person accused of a crime has a right to a fair trial. In relation to the issue of mental impairment, the fundamental concern is the ability to participate in the trial, which includes the presentation of a defence.

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162 At [528] and [530].
163 At [530].
164 At [531]–[532].
165 At [549].
166 At [531]–[532] and [534].
167 At [533].
168 *R v Mulholland* [2015] NZHC 881 at [91] (footnotes omitted), as quoted in the High Court decision, above n 6, at [533].

[109] In Cull J's view, ID unfit defendants are not materially disadvantaged by the fact that they are subject to a different statutory process to other defendants because:[169]

> I do not consider the "differential treatment" is discriminatory, when the alternative would mean a person's ability to participate in a trial is compromised and any consequent prison sentence does not consist of or provide suitable services for those persons with intellectual disabilities.

[110] Cull J concluded that any differences in treatment under the CPMIP Act and IDCCR Act reflected the fundamentally different purposes of the criminal justice system and the alternative regimes established by those Acts for defendants who are unfit to stand trial, which are protective rather than punitive in nature.[170]

[111] Cull J further observed that, if she were wrong in that conclusion and the differential treatment of ID unfit defendants *was* discriminatory, she would have found (in the alternative) that any discrimination would be justified under s 5 of NZBORA because:[171]

> (a) an order for care as a special care recipient ensures appropriate rehabilitation and care is received;
>
> (b) a finding of unfitness avoids the possibility of an unfair criminal prosecution and convictions; and
>
> (c) such treatment protects the public from dangerous behaviour in circumstances where a care recipient may have little insight into the impact of their actions on others.

Overview of submissions for J on appeal

[112] Mr Edgeler (who argued this ground of appeal on behalf of J) submitted that, although a number of arguments could be advanced, the following are sufficient to establish that the CPMIP Act and IDCCR Act regimes are discriminatory:

> (a) In contrast to an ordinary criminal trial, at an involvement hearing under the CPMIP Act:

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169 High Court decision, above n 6, at [535], and see also [533] and [572(c)].
170 At [531]–[534], [571] and [572(b)]–[572(c)].
171 At [536].

(i) there is no requirement for the mens rea of any alleged offence to be proved; and

(ii) the acts underlying the alleged offence only need to be proved on the balance of probabilities, not beyond reasonable doubt.

(b) There is differential treatment of "dangerousness" for intellectually disabled persons who are subject to the IDCCR Act regime, compared with offenders convicted of the index charges.

Our approach

[113] Cull J considered the discrimination arguments relating to the CPMIP Act and those relating to the IDCCR Act together, presumably reflecting the way the argument was run in the High Court. On appeal, however, discrete discrimination arguments were advanced in relation to the CPMIP Act regime and the IDCCR Act regime, as set out above. We will therefore address the discrimination arguments relating to each regime separately.

[114] As it is alleged that the statutory regime is discriminatory per se, the appropriate remedy would normally be a declaration of inconsistency. As noted above, no declarations of inconsistency are sought in this appeal. Mr Ellis did, however, invite the Court to give a *Hansen* indication, if appropriate. We understand this request was made on the basis that such an indication may assist to promote legislative reform. Given this context, we anticipate that it will be more helpful if our comments are addressed to the provisions of the CPMIP Act as they currently stand,[172] rather than as they were between 2004 and 2006, when the original decisions in relation to J's disposition under the CPMIP Act were made.[173] We proceed accordingly. For completeness, however, we note that the only material change to the provisions over this period has been the reversal of the order of the involvement and fitness hearings in 2018, with the result that the involvement hearing now occurs after a finding that a defendant is unfit to stand trial.[174]

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172 CPMIP Act, ss 8A and 10.
173 Sections 9 and 14 (as they stood prior to 14 November 2018).
174 Courts Matters Act, ss 125–127 and 131; and CPMIP Act, ss 8A and 10.

Is the CPMIP Act regime discriminatory?

Are ID unfit defendants treated differently to a comparator group?

[115] In his submissions, Mr Edgeler identified several possible comparator groups, but we understood his preferred option for the purposes of this issue to be defendants facing the same index charges as J who are not intellectually disabled. Future risk profile should not feature at this stage, Mr Edgeler argued, as it was not known at the time of the CPMIP Act disposition process what J's future risk profile would be. Mr Edgeler submitted that ID unfit defendants such as J are treated differently from this comparator group.

[116] Identifying an appropriate comparator group for the purposes of assessing the CPMIP Act discrimination argument is not straightforward. The factor that determines whether a person will proceed to an ordinary trial or to an involvement hearing under the CPMIP Act is not intellectual disability, but unfitness to stand trial.[175] These concepts are not synonymous: while many (possibly most) intellectually disabled persons may meet the criteria of being unfit to stand trial, others may not.[176] In addition, people who are not intellectually disabled can also be found unfit to stand trial. Nevertheless, we will treat defendants who are fit to stand trial as the relevant comparator group. There is no question that unfit defendants (including ID unfit defendants) are treated differently from this comparator group. As we discuss in more detail below, the relevant differences relate to the scope of the involvement hearing under the CPMIP Act and the standard of proof which applies at the involvement hearing.

Are ID unfit defendants materially disadvantaged by their differential treatment?

<u>The scope of an involvement hearing</u>

[117] It is first necessary to identify how the scope of an involvement hearing differs from an ordinary criminal trial. This is a matter on which there are differing judicial opinions.

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175 CPMIP Act, s 8A.

176 See CPMIP Act, s 4(1) definition of "unfit to stand trial" (set out in full at n 7 above).

[118] Section 10(2) of the CPMIP Act (previously s 9) requires the court to be satisfied at an involvement hearing "on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged". This Court noted in *R v Te Moni* that similar phrases are found in comparable legislation in the Australian Capital Territory and in the United Kingdom.[177]

[119] The United Kingdom legislation — the Criminal Procedure (Insanity) Act 1964 (UK) — was considered by the House of Lords in *Regina v Antoine*, where Lord Hutton described the object of s 4A of the Act as being to:[178]

> ... strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea.

The relevant phrase in s 4A, "did the act or made the omission charged against [the accused] as the offence", was accordingly interpreted as excluding the mental elements of an offence, with one qualification. In circumstances where there was "objective" evidence that the defendant would have had an arguable defence of accident, mistake or self-defence (defences which ordinarily involve an inquiry into the defendant's state of mind) the prosecution would be required to negative that defence.[179] Lord Hutton endorsed the view that, where a defendant has been found unfit to stand trial in the normal way because of their mental state, it would be "unrealistic and contradictory" for the involvement inquiry to include consideration of "what intention that person had in his mind at the time of the alleged offence".[180]

[120] Three years after *Antoine*, the Australian Capital Territory Court of Appeal was required to interpret a similar phrase ("committed the acts that constitute the offence

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177 *R v Te Moni* [2009] NZCA 560 at [71], citing Crimes Act 1900 (ACT), s 317(1) (requiring that the fact-finder be satisfied "that the accused engaged in the conduct required for the offence charged (or an alternative offence, if not satisfied in relation to the offence charged)") and Criminal Procedure (Insanity) Act 1964 (UK), s 4A (requiring that the fact-finder be satisfied that the accused "did the act or made the omission charged against [the accused] as the offence").

178 *Regina v Antoine* [2001] 1 AC 340 (HL) at 375.

179 At 375–377.

180 At 375.

charged") in s 317 of the Crimes Act 1900 (ACT) in *R v Ardler*.[181] The Court set out three possible interpretations of that phrase:[182]

(a) proof is required of the commission of the physical act or acts only;

(b) proof is required of both the physical and mental elements of an offence; or

(c) proof is required of "something that is unlawful (in a broad sense) so as to be an offence or an element of an offence", but it is not necessary to prove "the full mental element necessary in law to establish the commission of the offence".

[121] The Court adopted the third interpretation, holding the Crown must prove that "the acts allegedly done were done voluntarily and intentionally *and* that any specific intent or knowledge necessary to constitute the particular offence alleged was present".[183] If that were not required, the Court reasoned, it:

> [81] ... would lead to the ludicrous situation that possession of stolen goods would lead to liability for incarceration, at least on a mental health order, if the alleged offender was unfit to plead, but not if it appeared at trial that he lacked knowledge that the goods had been stolen. It would be no answer to say that, had the accused not been mentally impaired, he would have realised that the goods were stolen.

Similarly, the Court found that if there is objective evidence of, for example, self-defence or accident, the prosecution must negative that defence.[184] The Court concluded that:[185]

> When a Special Hearing is embarked upon ... the prosecution is required to prove beyond reasonable doubt the physical acts of the offence charged which would constitute an offence if done intentionally and voluntarily and with any particular intent or knowledge specified as an element of the offence but is not required to negative lack of mental capacity to act intentionally or voluntarily

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181 The provision was amended prior to delivery of the decision in *Ardler*, and now requires that the fact-finder be satisfied "that the accused engaged in the conduct required for the offence charged (or an alternative offence, if not satisfied in relation to the offence charged)": see Crimes Amendment Act 2004 (ACT), s 8.

182 *R v Ardler* [2004] ACTCA 4, (2004) 144 A Crim R 552 at [55].

183 At [81] (emphasis in original).

184 At [79], [80], [85] and [90].

185 At [90].

> or to have the specific knowledge or intention specified as an element of the offence unless there is objective evidence which raises such an issue including mistake, accident, lack of any specific intent or knowledge of the particularity necessary to constitute the offence that is an element of the offence or self-defence in which case the prosecution must negative that issue beyond reasonable doubt.

[122] Tasmania, New South Wales and Victoria, however, require full proof, at the involvement hearing, of all elements of the charged offence(s).[186] Similarly, the England and Wales Law Commission recommended in its 2016 report on unfitness to plead that the prosecution be required to establish all elements of the offence charged against a defendant who has been found to lack capacity for trial.[187] The United Kingdom Government recently rejected that recommendation, however, for the following reasons:[188]

> We reject this recommendation because this proposal would turn the procedure into a full criminal trial, in circumstances where it has been decided the defendant does not have capacity.
>
> This recommendation would likely take up more court time than the current s.4A hearing and involve far greater judicial case management of the proceedings in order to ensure the procedure could be properly conducted in a way which had regard for the interests of the defendant and was compatible with article 6 rights.
>
> Furthermore, requiring the jury to consider the fault element of the offence will likely impose a greater burden on prosecutors, particularly as defendants who lack capacity are often not able to give evidence in their own defence. This in turn will mean that juries will find it difficult to be sure of the defendant's guilt, in circumstances where they are told the defendant does not have capacity and not to hold it against him if he does not give evidence. These difficulties may mean the jury has no choice but [to] acquit, and the court will not be able to make an order which would protect the public.

[123] In the New Zealand context, in *R v Cumming* the prosecution argued that both *Ardler* and *Antoine* could be distinguished due to the different wording of the overseas statutes.[189] French J rejected this submission, noting that while the wording was not identical, it was very similar, and it was "difficult to see how the differences in wording

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186 See Criminal Justice (Mental Impairment) Act 1999 (Tas), ss 15 and 16; Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), ss 54 and 56; and Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 17(2).

187 England and Wales Law Commission *Unfitness to Plead – Volume 1: Report* (LC364, 2016) at [1.70]–[1.72], [5.67]–[5.70], [5.74], [5.77]–[5.83] and [5.85]–[5.86].

188 Ministry of Justice (UK) *Government response to the Law Commission report on 'Unfitness to Plead'* (25 October 2023) at [Recommendation 10.39].

189 *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009 [*R v Cumming* (HC)] at [86].

would lead to a different interpretation".[190] French J concluded that the correct position regarding the scope of an involvement hearing was as follows:[191]

> (a) so far as possible, the inquiry should focus on an accused's actions as opposed to his state of mind.
>
> (b) this distinction is dictated by the language of s9 and its social purpose.
>
> (c) the distinction cannot be rigidly adhered to in every case because of the diverse nature of criminal offences and criminal activity. In particular, it cannot be adhered to when mens rea is a composite element of the actus reus. In those circumstances, the finding an accused caused the act or omission may of necessity include some element of mens rea.
>
> (d) if there is objective evidence which raises the issues of mistake, self defence and accident, then the Court should not find the accused caused the act or omission unless satisfied on the balance of probabilities that the prosecution has negatived that defence.
>
> (e) it is not open to an accused to argue absence of mens rea by reason of mental impairment – in so far as there are passages in *Ardler* which suggest otherwise, I consider they are contrary to *Antoine* and the underlying policy of the legislation and should not be followed.

[124] This formulation of the correct approach was largely based on the principles emerging from *Antoine*, as summarised by the English High Court in *R (Young) v Central Criminal Court*.[192] It is also broadly consistent with the preferred approach in *Ardler*, save for the qualification set out at [123(e)] above.

[125] Other judges, however, have taken a different view as to the correct interpretation of s 9 of the CPMIP Act (and its successor provision). In *R v Lyttleton*, Wylie J suggested that the wording of s 9 and the scheme of the Act overall suggested that the first interpretation in *Ardler* should be preferred, namely that all that is required is proof of the physical act.[193]

[126] In *Te Moni*, this Court (in obiter comments) referred to *Ardler*, acknowledging that the approach taken in that case required "difficult distinctions" to be made.[194]

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190 At [86].
191 At [89].
192 *R (Young) v Central Criminal Court* [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12 at [12] and [35].
193 *R v Lyttleton (No 1)* HC Auckland CRI-2008-044-9466, 4 November 2009 at [37]–[40] and [44].
194 *R v Te Moni*, above n 177, at [78]–[79].

The Court noted that such distinctions would be unnecessary if all that was required to be proved at the s 9 hearing were the physical acts forming the basis of the offence. Focusing exclusively on the physical acts forming the basis of the offence, however, did not "appear to set a sufficiently high threshold to meet the objective of s 9" which, the Court held, was "to ensure that a court has made a finding of *criminal culpability* before the sanctions which can apply to a person who is unfit to stand trial can be imposed on that person".[195] The Court left the matter for decision in a later case, but observed that the "lack of clarity in the provision" was "concerning".[196]

[127] Uncertainty remained and, in 2014, Kós J observed in *R v RTPH* that "[t]he scope of s 9 remains controversial. The drafting is unhappy, and the precise purpose of the provision frustratingly obscure."[197] Kós J further noted that despite the concerns expressed by this Court in *Te Moni* about this lack of clarity, Parliament had not revisited the provision, and there were now "a number of conflicting authorities" on the scope of the involvement hearing under s 9.[198] (In *RTPH*, the defence had conceded that the s 9 test was made out.[199])

[128] Four years later, Parliament enacted the Courts Matters Act 2018, which amended the CPMIP Act to reverse the sequence of the fitness and involvement hearings. No amendments were made to clarify the intended scope of an involvement hearing. The Ministry of Justice's departmental report on the Courts Matters Bill 2017 noted that the New Zealand Law Society had expressed concern that s 9 of the CPMIP Act did not provide "sufficient detail to guide the courts as to the scope of the involvement inquiry, the nature and scope of evidence that may be admitted at such hearings, the fault elements to be proved, and the character of any final determination of non-responsibility". The report noted the Law Society's recommendation that the Australian and English models be further investigated, "with a view to crafting a comprehensive legislative regime that is better fit for purpose in the modern human rights environment".[200] The report also noted concerns expressed by the judiciary

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195 At [79] (emphasis added).
196 At [80].
197 *R v RTPH* [2014] NZHC 1423 at [4] (footnote omitted).
198 At [4].
199 At [8].
200 Ministry of Justice | Te Tāhū o te Ture *Departmental Report*: *Courts Matters Bill* (2018) at [466].

regarding the Bill's failure to address certain matters including "whether mens rea can be referred to at an involvement hearing".[201] These concerns, however, were said to be outside the scope of the Bill and therefore no further amendments were proposed to clarify the scope of an involvement hearing.[202] The report recorded that the Ministry was aware of recent reviews of procedures for determining fitness to stand trial in the United Kingdom and in Australia, and that the Ministry would "continue to monitor the impact of any legislative reforms that may be made by these jurisdictions, and the development of international human rights on approaches to cases involving persons considered unfit to stand trial, to support any future policy work in this area".[203]

[129] The 2018 amendment brought New Zealand into line with comparable overseas jurisdictions in relation to the sequencing of the fitness and involvement hearings.[204] In *Te Moni*, (which pre-dated the amendment to the CPMIP Act), this Court had observed that the pre-amendment sequencing of hearings, in which the involvement hearing occurred prior to the determination of the defendant's fitness to stand trial,[205] contemplated the possibility that the involvement hearing would be *in addition* to a trial, rather than an *alternative* to a trial. This was because, under the pre-amendment provisions of the CPMIP Act, at the time of the involvement hearing, there had been no determination of the defendant's fitness to stand trial; if the defendant were found fit to stand trial following the involvement hearing, a trial would then take place.[206]

[130] The implications of the reversal in the sequence of the hearings as a result of the 2018 amendment to the CPMIP Act were considered by Edwards J in *R v Tongia*.[207] The Judge considered the effect of the amendment was to "establish the [involvement hearing] as being an *alternative* to trial rather than a possible *addition* to trial", at least

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201 At [467].
202 At [468].
203 At [470].
204 Courts Matters Act, ss 125–127 and 131; CPMIP Act, ss 8A and 10. See for example Criminal Procedure (Insanity) Act (UK), ss 4 and 4A; Crimes Act (ACT), ss 314, 315C, 315D, 316 and 317; Mental Health and Cognitive Impairment Forensic Provisions Act (NSW), ss 42, 47, 48, 51, 54 and 55; Criminal Code Act 1983 (NT), ss 43R and 43V; and Criminal Justice (Mental Impairment) Act (Tas), ss 14 and 15.
205 CPMIP Act, ss 9 and 14 (as they stood prior to November 2018).
206 *R v Te Moni*, above n 177, at [70].
207 *R v Tongia* [2020] NZHC 2382, [2021] 2 NZLR 743.

in some cases.[208] In relation to defendants who have a condition that means they are likely to remain permanently unfit to stand trial, the Judge observed that:[209]

> The involvement hearing is the only opportunity the defendant will have to contest the charge and put the Crown to proof and in that sense is very much an alternative to trial. I consider that the full force of the protections enshrined in our criminal justice system, and most importantly those found in the New Zealand Bill of Rights Act 1990, should apply in those circumstances.

[131] The Judge therefore concluded that an involvement hearing was not limited to proof that the defendant caused the relevant acts or omissions but rather required that "[t]he unlawfulness of those acts or omissions … be weighed in the balance."[210] The Judge referred to a number of factors which, in her view, indicated that criminal culpability was relevant, including the scheme of the CPMIP Act and this Court's comments on the issue in *Te Moni* (set out at [126] above).[211]

[132] Accordingly, in *Tongia* the Crown was required to disprove self-defence on the balance of probabilities.[212] The Judge recorded that the involvement hearing had been conducted "[t]o the fullest extent possible … as if a Judge-alone trial".[213] In a note on Edwards J's decision, Professor Brookbanks observed that:[214]

> This change [in sequencing of the involvement and fitness hearings], as the judgment [in *R v Tongia*] makes clear, has significant implications for both the nature of the hearing itself and the application of evidential principles relevant to determining involvement. Despite its early characterisation as a "relaxed evidential inquiry", the re-sequencing of the order of the involvement hearing has created the possibility of its evolution into a hearing in the nature of a substantive trial, addressing questions of criminal culpability, in addition to questions of evidential sufficiency.

<u>The standard of proof at an involvement hearing</u>

[133] The standard of proof at an involvement hearing is the lower civil standard (the balance of probabilities) rather than the higher criminal standard (beyond reasonable doubt).[215] New Zealand is an outlier in adopting the civil standard of proof for

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208 At [42], and see also [43] and [47]–[48].
209 At [48].
210 At [51].
211 At [34]–[52].
212 At [33] and [51]–[52].
213 At [52].
214 Warren Brookbanks "*R v Tongia* [2020] NZHC 2382" [2021] NZLJ 236 at 236.
215 CPMIP Act, s 10(2).

involvement hearings. No other comparable jurisdiction appears to have taken a similar approach.[216]

[134] It is not clear why Parliament elected to adopt the lower civil standard of proof in this context. Various reasons have been suggested (although not necessarily endorsed), including that:

(a) A finding of unfitness does not involve a determination of criminal liability and only leads to civil detention.[217]

(b) An involvement hearing is a "a safeguard for a defendant," and is simply "a screening mechanism designed to protect a person from being subjected to the consequences of a finding of unfitness to face trial in the absence of proof to a defined standard of involvement in the alleged offending".[218]

(c) A finding that the defendant caused the relevant act or omission "is merely a determination that the prosecution has produced sufficient evidence to make out a prima facie case in relation to the physical elements of the offence", which is "not conducive to proof beyond reasonable doubt".[219]

(d) An involvement hearing is, "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".[220]

(e) The lower standard of proof is likely linked to the fact that, when the CPMIP Act was enacted, the order of the involvement and fitness

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216 See Robert Chambers "Trial Rights for the Mentally Impaired" (2011) 24 NZULR 478 at 483.

217 Criminal Justice Amendment Bill (No 7) 2001 (328-2) (select committee report) at 4–5; and *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768 at [62].

218 *Ruka v R*, above n 217, at [62]; and see also *R v Tongia* , above n 207, at [49].

219 Criminal Justice Amendment Bill (No 7) 2001 (328-2) (select committee report) at 4–5.

220 RD MacKay and WJ Brookbanks "Protecting the Unfit to Plead: A Comparative Analysis of the 'Trial of the Facts'" (2005) 2 Jur Rev 173 at 191. The authors reject this rationale on the basis that the involvement hearing is different as it "is not aimed at the determination of fitness".

hearings differed from other jurisdictions, with the consequence that the involvement hearing would be in addition to the trial, rather than an alternative to the trial.[221]

Discussion

[135] Mr Edgeler's first argument on this aspect of the appeal focussed on the different mens rea requirements at an involvement hearing and an ordinary criminal trial. On the approach taken overseas in cases such as *Antoine* and *Ardler*, as followed and expanded upon in New Zealand cases such as *Cumming* and *Tongia*,[222] the prosecutor is required to not only prove commission of the physical acts but also, in some circumstances, matters going to the defendant's state of mind. However, even on this wider (and in our view more rights-consistent) interpretation of s 10(2), an involvement hearing will not mirror an ordinary criminal trial, as a trial generally requires full proof, beyond reasonable doubt, of all elements of the charged offence.

[136] The issue of whether the alternative processes under the CPMIP Act and/or the IDCCR Act are discriminatory has previously been considered by this Court in *Ruka v R*[223] and *M v Attorney-General*.[224] In *Ruka* this Court rejected an argument that the legislative scheme of the CPMIP Act created a discriminatory criminal justice process, as it only applied to persons suffering a mental impairment.[225] The Court observed that Parliament was entitled to adopt a separate process "designed to deal with those suffering from mental or intellectual disabilities within the criminal justice system".[226] The Court observed that the procedures in ss 9–14 of the CPMIP Act (in force at the time of the decision) balanced the protection of two interests:[227]

> One is the public interest in detaining and treating those who present a risk through no fault of their own. The other is of the defendant himself or herself who needs care and assistance and thus should not be visited with the punitive response of conviction and sentence which society deems to be appropriate for the mentally or intellectually able.

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221 *R v Te Moni*, above n 177, at [70].
222 *R v Cumming* (HC), above n 189, at [89(d)]; and *R v Tongia* , above n 207, at [33], [42] and [51]–[52].
223 *Ruka v R*, above n 217.
224 *M v Attorney-General* [2020] NZCA 311, (2020) 32 FRNZ 685.
225 *Ruka v R*, above n 217, at [81] and [86]–[94].
226 At [89].
227 At [92].

[137] Section 9 of the CPMIP Act, in the Court's view, provided an "appropriate mechanism for balancing these interests". It did so by excluding the requirement to prove the mental element of the offence. This lowered the threshold for state intervention and provided "a justification for assisting those who need care and treatment", at the same time "preserving the public interest in detention of those who present a risk to society". The consequence was that the formal sanctions of guilt and punishment were removed for those found unfit to stand trial.[228]

[138] Subsequently, in *S v Attorney-General*, Ellis J also considered a submission that the CPMIP Act was discriminatory.[229] As the issue had not been fully argued before her, the Judge indicated that she would not deal with the discrimination argument "in any detail", but recorded that "there appear to be some quite serious difficulties with it".[230] First, the Judge commented that it was "highly questionable" that the differential treatment of defendants who were found unfit to stand trial was based on disability. Rather, in the Judge's view, "[t]he pleaded differences in treatment arise not from the applicants' disability but from the risk they pose to themselves and others."[231] The Judge then noted the difficulties in identifying an appropriate comparator group, but observed that even if prisoners were the appropriate comparator (as had been submitted), "it was difficult to see how those found unfit to stand trial and detained as special patients or special care recipients are disadvantaged as a result of their qualifying disability".[232] The Judge noted, among other things, that persons who are determined by the court to be unfit to stand trial were not convicted of any offence and there was no minimum period of detention before release could occur. In addition, the Judge noted that the statutes provided for reviews, inquiries and appeals to ensure the detention was justified.[233]

[139] In *M v Attorney-General* (an appeal by one of the claimants in *S v Attorney-General* in the High Court), this Court found that a defendant who was found unfit to stand trial and consequently made subject to orders under the

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228 At [93].
229 *S v Attorney-General*, above n 107, at [668]–[670].
230 At [678].
231 At [679].
232 At [683].
233 At [683].

MHCAT Act and IDCCR Act, was not at a material disadvantage compared to defendants who were not mentally impaired and stood trial in the normal way.[234] On the contrary, the Court found that the processes under the CPMIP Act provided significant advantages for a defendant, including that:[235]

(a) They were not exposed to the risk of a conviction and sentence.

(b) They would not be detained unless detention was necessary in the public interest.

(c) If they were detained, that detention would be frequently reviewed and would continue only for so long as it remained necessary in the public interest.

[140] We have not been persuaded that these previous decisions, or the decision under appeal, were in error on this issue. Overall, we accept the respondents' submission that the intent of the CPMIP Act regime is to promote, rather than undermine, equality by providing an alternative procedure which accommodates the unique needs of ID unfit defendants. This reflects that it has long been accepted that some modifications to the usual criminal process are necessary for defendants who are unfit to stand trial, because a finding of unfitness reflects that a defendant is not able to take part in a trial in the normal way.[236] Criminal justice systems that are adversarial (as in New Zealand) rely on defendants' considered participation for their legitimacy.[237] The right to a fair trial affirmed by s 25(a) of NZBORA is "absolute"[238] and "inviolate".[239] Any trial conducted while a defendant is unfit to stand trial would be unfair and thus any conviction obtained would be liable to be set aside.[240] Accordingly, as Cull J observed in the High Court decision, the CPMIP Act regime provides "a non-criminal alternative to a criminal process the defendant has no

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234 *M v Attorney-General*, above n 224, at [118]–[119] and [125]–[127].
235 At [125].
236 See for example *R v Te Moni*, above n 177, at [70].
237 *R v Cumming* [2006] 2 NZLR 597 (CA) [*R v Cumming* (CA)] at [37].
238 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77].
239 David Collins "The Dilemma Caused by Delusional Defendants" (2015) VUWLR 46(3) 811 at 825.
240 *R v L* [1998] 2 NZLR 141 (CA), at 146; *R v Cumming* (CA), above n 237, at [47]; and *Nonu v R* [2017] NZCA 170 at [24].

capacity to participate [in]".[241] Given the fundamental nature of the right to a fair trial, it is necessary to have some alternative procedure for people with mental impairments who lack the capacity to effectively understand and participate in a trial.

[141] We acknowledge that it is possible that the existing alternative procedures under the CPMIP Act (in particular, the scope of an involvement hearing) could be further improved to better promote the unique needs of ID unfit defendants. There can be little doubt that the enactment of specialised legislation for intellectually disabled defendants in 2003 (the CPMIP Act and the IDCCR Act) was a positive development, for the reasons we have set out at [37]–[40] above. Since then, however, views as to how to best meet the needs, and respect the human rights, of intellectually disabled defendants have continued to evolve. In recent years international human rights treaty bodies, law reform bodies, and academic commentators have all considered aspects of unfitness to plead laws.[242] The ongoing dialogue has been prompted, in part, by the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) by the United Nations General Assembly in 2006.[243] The Convention was signed by New Zealand in 2007 and ratified in 2008. The Convention reflects a "movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society".[244]

[142] Returning to the CPMIP Act, as currently drafted, s 10(2) gives very little guidance to the courts as to the appropriate scope of an involvement hearing. As outlined above, this has given rise to a great deal of uncertainty. The case law we have referred to indicates that, although some Judges have favoured a more literal

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241 High Court decision, above n 6, at [531].

242 In the New Zealand context, see for example Warren Brookbanks "Evidential Sufficiency Hearings: Is Section 10 of the CP (MIP) Act Fit for Purpose?" (2020) 29 NZULR 31; and Brookbanks "*R v Tongia* [2020] NZHC 2382", above n 214. In the international context, see for example England and Wales Law Commission *Unfitness to Plead*, above n 187; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC R124, 2014); and Committee on the Rights of Persons with Disabilities *Views: Communication No 7/2012* UN Doc CRPD/C/16/D/7/2012 (10 October 2016) [*Noble v Australia*].

243 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

244 "Convention On The Rights Of Persons With Disabilities (CRPD)" United Nations Department of Economic and Social Affairs: Social Inclusion <https://social.desa.un.org>.

interpretation of the phrase "caused the act or omission that forms the basis of the offence" in s 10(2) and its predecessor s 9, others have interpreted s 10(2) in a broader, more rights-consistent way. Ultimately, however, determining the proper scope of an involvement hearing raises significant questions of policy that cannot be adequately addressed through ad hoc, and at times somewhat strained, statutory interpretation. Resolution of these policy questions requires a careful balancing of competing rights and interests. Difficult policy decisions may need to be made.

[143] As we have noted above, unfitness to plead laws have been the subject of comprehensive review by law reform bodies in comparable overseas jurisdictions in recent years. In our view a similar process is now well overdue in New Zealand, particularly given the evolving understanding of the rights of persons with disabilities, and the repeated concerns that have been raised regarding aspects of the CPMIP Act, almost since its inception.[245]

[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:[246]

> 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

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245 See for example *R v Te Moni*, above n 177, at [80]; *R v Lyttleton*, above n 193, at [49]; *R v Cumming* (HC), above n 189, at [64]–[66] and [111]; *R v Tongia*, above n 207, at [20]–[50]; *R v RTPH*, above n 197, at [4]; Chambers, above n 216, at 482–484; Ministry of Justice | Te Tāhū o te Ture *Departmental Report*: *Courts Matters Bill*, above n 200, at [463]–[470] (referring to concerns raised by the judiciary and the New Zealand Law Society); Brookbanks "Evidential Sufficiency Hearings: Is Section 10 of the CP (MIP) Act Fit for Purpose?", above n 242; and Sarah Baird "A Critical Analysis of the Law Governing the 'Involvement Hearing' under New Zealand's Fitness to Stand Trial Process and Proposals for Reform" (2022) 30 NZULR 247.

246 Chambers, above n 216, at 483 (footnotes omitted).

> 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.

[146] As Sir Robert noted in his article, and Edwards J observed more recently in *Tongia*, a finding of involvement can have severe downstream consequences for a defendant who has been found unfit to stand trial, including the possibility of being detained for a lengthy period.[247] As Sir Robert put it, "[c]learly, much can ride on the outcome of s 9 hearing, just as much can [as] ride on the outcome of a trial."[248] If the lower standard of proof in New Zealand was linked to the different sequencing of the involvement and fitness hearings when the CPMIP Act was first enacted, that rationale cannot survive the 2018 amendments.[249] As Edwards J observed in *Tongia*, the lower standard of proof at an involvement hearing is an area of the law that is now in need of "urgent legislative attention".[250]

[147] For completeness, we note that in J's case, given the evidence we have summarised at [7]–[9] above, it is highly unlikely that applying the higher criminal standard of proof at the involvement hearing stage would have resulted in a different outcome. In some cases, however, applying a different standard of proof could potentially have a material impact on the outcome.[251]

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247 At 483–484; and *R v Tongia*, above n 207, at [48]–[50].
248 Chambers, above n 216, at 483–484.
249 *R v Tongia*, above n 207, at [49].
250 At [50].
251 See for example *R v Tongia*, above n 207, at [50].

Is s 85 of the IDCCR Act discriminatory?

[148] We now turn to the final issue on appeal, which is whether Cull J erred in finding that s 85 of the IDCCR Act is not discriminatory.

[149] Specifically, Mr Edgeler submitted that s 85 of the IDCCR Act is discriminatory because it involves differential treatment of "dangerousness" depending on whether a defendant is intellectually disabled or not. J's detention has been based on the level of risk he poses and the need to protect the community from that risk. A person who is not intellectually disabled, however, and who poses a similar level of risk could only be detained for a similar period to J if they had committed a very serious crime (resulting in a lengthy finite sentence) or were subject to preventive detention, an extended supervision order or a public protection order.[252] The conduct giving rise to J's index charges, however, was minor. A person who was not intellectually disabled could not be detained, potentially indefinitely, for such minor offending, no matter how dangerous they might be.

Discussion

[150] Similar discrimination arguments to those raised in this appeal were advanced in *M v Attorney-General* (a case in which Mr Ellis was also counsel).[253] This Court considered the appropriate comparator group for the purposes of assessing those discrimination arguments, observing that "[t]he critical element of risk to public safety is not squarely in the frame if 'ordinary offenders' are chosen as the comparator group."[254] The Court therefore considered two other possible comparator groups:

(a) The first possible comparator group was offenders who posed a significant risk to public safety, and whose detention was necessary in the public interest. The Court observed that the comparison "would then take into account the potential for the offender to be denied parole, to be subject to a sentence of preventive detention, to be subject to an

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252 See Sentencing Act 2002, s 87; Parole Act 2002, pt 1A; and Public Safety (Public Protection Orders) Act 2014.

253 *M v Attorney-General*, above n 224, at [98]–[99], [110] and [115]–[116].

254 At [129].

extended supervision order, and other mechanisms for addressing the risk posed by such offenders".[255]

(b) The second possible option was "to look to other groups outside the criminal justice system that pose risks to public health and safety … and the circumstances in which the law provides for their detention". The example given was individuals who were suffering from a serious contagious disease.[256]

Ultimately, however, the Court did not reach a conclusion on the relevant comparator group for the purposes of that discrimination argument.[257]

[151] The purpose of identifying an appropriate comparator is to assist the court to determine whether the subject person or group is being treated differently to another person or group *in comparable circumstances*.[258] Trying to identify an appropriate comparator group for the small cohort of high-risk care recipients who are in a similar position to J, however, is difficult. Neither intellectual disability nor unfitness to stand trial will, on their own, result in either the imposition or the extension of a compulsory care order. The key determining factor is risk.

[152] In our view it is not possible to identify any group that has a sufficiently similar risk profile to J to provide a helpful comparison. The key reason for this is that criminal culpability is predicated on offender agency.[259] Persons who have the capacity to choose between alternative courses of action will be held culpable if they make a deliberate choice to do a wrongful or prohibited act. Even offenders who have a high risk of recidivism are assumed to have the ability to choose not to offend. Their choice will likely be informed by multiple factors, including their motivations; their level of insight into the harm their wrongful acts will cause others; and their

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255 At [129].
256 At [129].
257 At [129] and [131].
258 *Ministry of Health v Atkinson*, above n 152, at [60].
259 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [91]. See also *Winko v The Director, Forensic Psychiatric Institute*, above n 106, at [31] and [93]–[94] per Lamer CJ and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

assessment of the overall risks of their actions (including the risk of being caught and the likely consequences that would follow).

[153] J, however, has little or no understanding of such matters and minimal capacity to exercise free agency in relation to any acts of violence he may commit. As Dr Duff explained in a report prepared in 2012, "[p]art of the presentation of autism for [J] involves restricted and fixated obsessional interests and a difficulty in differentiating between his 'fantasy' World and the 'real' World particularly as it exists for others around him." Dr Duff further noted that J "means no harm to others as he fails to have a core understanding of the permanency of harm". Ms Jensen similarly observed in 2020 that J "presents with a concerning combination of violent fantasies, aggressive behaviour and no discernible understanding that this violence would cause any harm to the victim".

[154] Some offenders who are able to exercise free agency will pose a high risk of recidivism. Even so, however, their risk profile will be materially different to a person such as J, who has little or no ability to make properly informed decisions about his actions and exercise free agency. The differing responses of the criminal justice system and the IDCCR Act regime cater to the very different circumstances of the two groups. Concepts such as punishment, deterrence and accountability are therefore relevant in the criminal justice system but are not apt when dealing with care recipients. J is largely unable to regulate his own behaviour and, for that reason, requires a high level of external support to help manage the risk he poses to himself and others. J's risk profile is therefore unique, and it is simply not possible to identify a comparator group with an even broadly similar risk profile. We agree with Cull J, however, that *if* a comparator group were to be identified, the closest group would be non-disabled offenders who pose the same degree of risk as J.[260]

[155] Mr Edgeler submitted that if s 85 of the IDCCR Act does not require that the duration of a compulsory care order be proportionate to the term of imprisonment available for the index charges, then the provision is discriminatory. We addressed the proportionality argument at [58]–[65] above, in the context of the ground of appeal

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[260] High Court decision, above n 6, at [530].

based on s 9 of NZBORA. The ability to repeatedly extend a compulsory care order under s 85 raises difficult issues, particularly in relation to the very small cohort of care recipients who, like J, pose a high level of risk to the public. However, the reasons we set out above for rejecting the argument that the duration of a care order must be proportionate to the maximum sentence available for the index charges apply equally here.

[156] As this Court observed in *M v Attorney-General*, detention following disposition under the CPMIP Act regime is not imposed for a punitive purpose. Rather, "it is for the purpose of public protection in circumstances where no other disposition is sufficient to achieve that objective".[261] A compulsory care order is not a "sentence" imposed for punitive purposes on a person found criminally culpable. Rather, it is a disposition option that is only available in respect of persons who have been found incapable of exercising the agency which would justify a punitive approach. McLachlin J made similar observations in *Winko*, in relation to mentally ill offenders who have been found not criminally responsible under the equivalent Canadian regime:[262]

> Every humane system of justice must provide for the disposition of cases where the perpetrator of the alleged crime is not criminally responsible … Where the regime involves a comprehensive administrative and adjudicatory structure, as here, it is appropriate to look at the regime as a whole. One must consider the special problem to which the scheme is directed. The problem of how to deal with mentally ill people who commit crimes for which they cannot in justice be held responsible, while protecting public safety, is a unique and difficult one. It is quite a different problem from how to deal with people who commit crimes for which they can and should be held responsible. In judging whether the system Parliament has imposed violates the fundamental principles of justice, these differences must be borne in mind.

[157] To treat persons who have been found unfit to stand trial, and who are therefore not criminally culpable for their acts, in an identical way to other defendants would not avoid disadvantage but would risk creating or perpetuating it (as happened prior to the enactment of the IDCCR Act). The CPMIP Act and IDCCR Act recognise and provide for the different circumstances of ID unfit defendants by creating alternative,

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261 *M v Attorney-General* above n 224, at [121].

262 *Winko v The Director, Forensic Psychiatric Institute*, above n 105, at [65] per Lamer CJ and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

more appropriate, pathways for initial disposition and subsequent care and rehabilitation. As McLachlin J observed in *Winko*:[263]

> The NCR [not criminally responsible] accused is to be treated in a special way in a system tailored to meet the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately. Under the new approach, the mentally ill offender occupies a special place in the criminal justice system; he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public.

[158] In some cases, ID unfit defendants will face shorter periods of detention under a compulsory care order than a person convicted of the index charges, or they may not be detained at all. In other cases (such as here) compulsory care recipients may be subject to civil detention for a longer period than a person convicted of the index charges would spend in prison. This reflects that the purposes for which a compulsory care order are imposed are not punishment, but care, rehabilitation, and community protection. A flexible approach to the duration of a compulsory care order reflects these fundamentally different purposes.

[159] A compulsory care order can only be imposed or extended for finite periods not exceeding three years. Further, the approach to extension applications outlined in *RIDCA* requires the court to undertake a careful balancing of the community protection interest against the liberty interest of the care recipient each time an extension application is made. A care order cannot be extended unless that is the least restrictive option available to the court to satisfy the community protection interest. And the terms of the order must be minimally intrusive, having regard to community protection.[264] In addition, the compulsory care regime under the IDCCR Act incorporates numerous safeguards, as summarised at [50] above. All of these factors weigh against any finding of material disadvantage.[265]

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263 At [30], and see also [82]–[86] and [92]–[97] per Lamer CJ and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ. We note that the Canadian discrimination test differs from that formulated by the New Zealand Court of Appeal in *Ministry of Health v Atkinson*, above n 152. Nonetheless, we consider these observations in *Winko v The Director, Forensic Psychiatric Institute* are equally apt in the New Zealand context. See also *M v Attorney-General*, above n 261, at [125]–[126].

264 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*, above n 29, at [59] and [92].

265 *M v Attorney-General*, above n 261, at [128] and [131].

[160] In conclusion, in our view Cull J was correct to find that any differences in treatment under the IDCCR Act regime did not materially disadvantage intellectually disabled persons, but rather reflected the fundamentally different purposes of the criminal justice system and the compulsory care order scheme, which is a protective scheme for intellectually disabled individuals who have been diverted from the criminal justice system.[266]

Bias

[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.[267]

Result

[163] The appeals are dismissed.

[164] We make no order as to costs.

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266 High Court decision, above n 6, at [534] and [621].

267 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3] per Blanchard J, [37] per Tipping J, [89] per McGrath J and [127] per Anderson J; and see also *Jones v New Zealand Bloodstock Finance and Leasing Ltd* [2023] NZSC 98 at [12].