BOOK REVIEWS

The Nature of Legislative Intent

Richard Ekins

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I INTRODUCTION

It is often taken for granted that the judiciary will aim to give effect to the intention of the legislature when interpreting statutes. Yet it is precisely this legislative intent that has been a source of jurisprudential debate over the past century. Richard Ekins's *The Nature of Legislative Intent* comes into the heart of this discussion.[1] Based on his Oxford doctoral thesis, the book presents a comprehensive and original account of legislative intent and analyses its significance in our legal and political system.

II A THEORY OF LEGISLATIVE INTENT

The modern legislature is typically a large and diverse assembly of individual legislators. This has led scholars to challenge the idea that coherent intention can arise from such a group.[2] Ekins scrutinises those concerns by developing, over the course of nine chapters, a holistic theory of legislative action and intention. His position is broadly summarised as follows:[3]

> [T]he well-formed legislature exercises rational agency in legislating, forming and acting on complex intentions to convey certain meanings and to change the law in the chosen way, for the common good.

The book is not designed to be light reading. However, Ekins assists the general reader with clear language and logical structure, pausing throughout the development of his analysis to restate and clarify his argument. At times, readability is compromised by an abrupt turn in the text. Notwithstanding minor shortfalls, Ekins's work stands alongside those of some of the most prominent theorists in jurisprudence. It does not pale in comparison.

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1 Richard Ekins *The Nature of Legislative Intent* (Oxford University Press, Oxford) (forthcoming). All pinpoint references have been given as a guide, but may differ slightly from the final publication.

2 Michael Kirby, a former Justice of the High Court of Australia, noted that the "intention of Parliament" is a potentially misleading expression and to speak of a single intention of Parliament is a "self-deception": Michael Kirby "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24 Stat LR at 95 at 98–99. Max Radin too refers to it as an "absurd fiction": Max Radin "Statutory Interpretation" (1930) 43 Harv L Rev 863 at 870.

3 Ekins, above n 1, at 14.

Ekins begins by addressing the central question of whether legislatures are able to form and act on intentions. He identifies at the outset that the primary difficulty facing any account of legislative intention is the need to explain how the actions of legislators, a group of persons, are able to constitute the action of a legislature, the institution. In chapter two, the book considers and addresses a selection of notable criticisms that reject the concept of legislative intent. These criticisms treat legislative intent as the aggregate of the intentions of individual legislators. Ekins rejects Dworkin's conclusion that legislative intent is a fiction (Dworkin argues that only individual persons have mental states; the legislature does not).[4] Rather, Ekins makes the well-founded criticism that the sceptical arguments are focused too narrowly, as they never address (and, importantly, never refute) the possibility that the legislature, the institution itself, can form and act on intentions that do not collapse into the sum of each individual legislator.

From chapter three, the book proceeds to set out and defend an original account of the nature and purpose of legislative intent. The breadth of his work is generous and Ekins deals with a cross-section of theories and debate in a systematic and logical manner. Addressing the concerns outlined in the preceding discussion, chapter three begins by looking at how members of a group may act together for a common end. Ekins argues that it is possible for groups to form and act on joint intentions. A joint intention, being a plan of action that coordinates and structures joint action, does not reduce to the sum of individual intentions and, crucially, makes group agency possible. The book notes that legislative agency is needed to explain what enables the legislature to maintain collective rationality and participate in reasoned joint action. The sceptical theorists discussed in chapter two overlook the possibility of the legislature acting as a collective whole.

In chapter four, Ekins makes the convincing and well-illustrated argument that the legislature responds to reasons with detailed and complex intention (and not minimal intention). He is heavily critical of Dworkin's view of the legislature as merely a body elected to aggregate the preferences of society.[5] Instead, Ekins stresses the point that the reasonable legislator will act for reasons — a view which also leads him to reject Waldron's "voting machine" model.[6] That the legislature acts in response to reasons is a cornerstone of Ekins's account and he concludes "that legislating is centrally the making and promulgation of reasoned choice and that the well-formed legislative assembly is capable of such choice".[7]

4 Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge (MA), 1986) at 335–356.

5 See Ronald Dworkin "Social Sciences and Constitutional Rights — the Consequences of Uncertainty" (1977) 6 Journal of Law and Education 3 at 10.

6 Waldron's understanding of the legislative process, which Ekins refers to as the "voting machine" model, is outlined in Jeremy Waldron *Law and Disagreement* (Clarendon Press, Oxford, 1999) at 124–129.

7 At 117.

In exploring what it is to legislate in chapter five (and extending the case of a sole legislator[8] to a legislative assembly in chapter six), Ekins argues that a legislature's object is to exercise its capacity to change the law deliberately when there is good reason for change. The legislative act is the reasoned choice, responding to the common good, to change the set of legal rules that direct the community. Where the legislature is an assembly — and the reader is given good reasons to prefer an assembly over a sole legislator — internal hierarchy and procedures exist to facilitate the making of coherent and reasoned choices, so that the size and diversity of the legislative assembly does not prevent it from acting well.

Ekins supports his account by considering the centrality of intention to the nature of language use in chapter seven. He argues that the nature of language use is to confer the meaning that the author intended it to convey. This is contrasted against the pure semantic content (also know as the literal meaning) of the text. It follows that the well-formed legislature will use language to convey its intended meaning to the community, as to be inferred from the text of legislation.

Chapter eight echoes the book's earlier discussion in chapter three, applying the analysis of joint intention and group agency to the legislature. Ekins explains that legislative intent is the intention of the assembly: all members jointly intend, and stand ready to act on, the proposal that receives majority vote. It is this legislative act that is the joint act of *all* legislators. Of note here is the distinction he draws between the standing intention of the legislature, which is to adopt the procedures that form its custom and practice (and therefore to exercise rational agency), and the particular intention behind the legislative act — the end for which the legislature acts.

The implications of Ekins's account are finally examined in chapter nine. He concludes that "to interpret a statute is to understand the legislative intent, which means to infer the intended meaning the legislature acts to convey and the reasoned choice it makes".[9] In other words, legislative intent is to be inferred from the text of the enactment, examined in light of the context that is known to the community.

The discussion in chapters eight and nine is particularly interesting. Ekins argues not only that the intention of individual legislators is irrelevant to the content of the joint act, but also that the legislative history of an enactment has very limited relevance. Legislative intent is not the same as legislative history. This analysis is of practical and constitutional importance, and it challenges the practice of consulting *Hansard* when issues of statutory interpretation arise.

8 The book illustrates this with an example of a prince.

9 At 284.

III CONCLUSION

As an original account of the nature of legislative intent, the book fulfils its purpose. Ekins pieces together and develops his theory in a clear and structured manner and defends it well against potential criticism. One example appears in chapter three, where he argues that secret defection of a member would not preclude group action. The applied examples and analysis are also of value. Notable instances include: the discussion on Washington and Westminster in chapter six (reinforcing the idea that legislatures are capable of reasoned choice); the illustration of collective irrationality in section four of chapter three; and the recurring hypothetical statute the "Vehicles in the Park Act 1993", adopted from Waldron.[10]

It is not until the second half of the book that he brings the journey full circle to elaborate on the nature and purpose of legislative intent. Despite this, the significance of Ekins's argument is not to be downplayed. He is able to weave the legal, political and jurisprudential aspects of this topic into an account that explains the role and function of the modern legislature. This is nothing short of impressive. As is highlighted throughout the book, the subject matter goes to the heart of legal interpretation and constitutional theory.

Ekins's book gives a compelling account that enriches the current discussion on legislative intent and challenges our understanding of its role in the exercise of statutory interpretation. For students and scholars of constitutional law and legal philosophy, this book leaves us with plenty to think about.

10 Waldron, above n 6, at 124.

Competencies of Trial: Fitness to Plead in New Zealand

Warren Brookbanks

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I INTRODUCTION

Warren Brookbanks's *Competencies of Trial: Fitness to Plead in New Zealand* has filled a long-standing gap in New Zealand legal commentary on the topic of fitness or competence to stand trial.[1] This is a complex and important area of the law that arises at the intersection of criminal procedure and mental health rights. It is often overlooked in debates on criminal procedure, where the more popular focus tends to be on issues surrounding criminal responsibility of the mentally impaired and the defence of insanity.

However, the last decade has seen an emerging awareness of the importance of the doctrine of fitness in the criminal process. International developments, both legislative and jurisprudential, have also fuelled increasingly sophisticated New Zealand judicial debate on issues under the fitness doctrine. Nevertheless, it remains a vexed area of the law, which New Zealand's courts and legislature have struggled to understand over the last decade.[2] In this timely text,[3] Brookbanks provides much needed clarity, critical discussion and, perhaps most importantly, recommendations for legal reform of both the procedural and substantive elements of the doctrine.

The book is divided into 12 chapters that culminate in a thorough and well-researched account of all key aspects of trial competency. The text more than achieves the author's stated principal aim of "provid[ing] an account of the development of the doctrine of unfitness to stand trial with particular reference to New Zealand law".[4]

II REVIEW OF CHAPTERS

Fitness to stand trial, as described by Brookbanks, is "a fundamental aspect of the criminal trial process, namely, the necessity for criminal defendants to be able to *meaningfully* participate in criminal proceedings".[5] He makes the

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1 Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (LexisNexis, Wellington, 2011).

2 See, for example, *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009 at [111]; and *James v R* [2011] NZCA 219, [2012] 1 NZLR 353.

3 The Ministry of Justice, in collaboration with the Ministry of Health, is currently undertaking a major review of the law and policy in this area.

4 At vii.

5 At 1 (emphasis in the original).

crucial distinction at the outset that the doctrine is not primarily concerned with criminal responsibility but *accountability*, or the capacity of a person to be held to account by criminal adjudication.[6]

As well as introducing the topic, the first chapter provides the reader with a surprisingly detailed overview of the organisation and content of the text.[7] This serves as a useful roadmap to orientate the reader as to what will follow in the substantive chapters and will be particularly helpful for those unfamiliar with this area of the law.

The second chapter traverses the somewhat strange history of the doctrine of fitness to plead, which dates back to mid-seventeenth century England. After considering the origins and development of the common law test and procedure for determining fitness, the author highlights two principal concerns.[8] The first is that the doctrine is founded in the "practicalities of the trial process" rather than a carefully formulated theory of trial capacities.[9] Secondly, while the underpinning rationale for the doctrine persists (namely to protect "incapacitated defendants against the risk of being subjected unfairly to criminal proceedings"),[10] the form and parameters are constantly shifting. The challenge for courts over many generations has thus been to draw the many strands of trial fitness into a workable test. At first glance, this chapter may seem to be of most relevance to those with a particular interest in historical legal study. However, Brookbanks's detailed analysis of the rationales for, and inherent tensions pervading, the doctrine provides an important backdrop for the subsequent critique of the doctrine's current form.

Chapter three considers what is required to raise the issue of a defendant's fitness in criminal proceedings, so as to trigger the statutory unfitness process. This is a matter of significant importance because the Courts have no obligation to determine the question of unfitness unless the matter has been raised. Conversely, once the statutory process has been triggered, it must be followed to completion and result in a finding of either fitness or unfitness to stand trial.[11] This part includes good analysis of leading authorities such as *R v Te Moni* and *R v McKay*,[12] which have settled a number of difficulties arising from the drafting of the legislation.

Brookbanks then moves on to discuss the special hearing procedure, or s 9 hearing, which is arguably the most controversial feature of the current fitness provisions in New Zealand.[13] The meaning of "caused the act or omission" in s 9 is perhaps more conceptually interesting than other issues surrounding the hearing,[14] but is covered in more detail in the author's other

6 At 1.
7 At 7–11.
8 At 41.
9 At 41.
10 At 41.
11 At 43–70.
12 *R v Te Moni* [2009] NZCA 560; and *R v McKay* [2009] NZCA 378, [2010] 1 NZLR 441.
13 Criminal Procedure (Mentally Impaired Persons) Act 2003.
14 Section 9.

writing on the topic. Brookbanks has previously written on the vexed issue of whether, and to what extent if any, courts are free to investigate mens rea elements in such hearings, or whether the inquiry is confined to consideration of actus reus elements.[15] A more extensive comparative analysis would have been warranted if the author wished to make a stronger case for reform, as the law currently allows only limited consideration of mens rea elements in s 9 hearings.[16]

Chapter four begins with a discussion of the emerging debate around whether a defendant's ability to make decisions in his or her "best interests" should be included as a necessary component of fitness to stand trial.[17] Brookbanks then moves on to examine the statutory test for fitness in New Zealand, contained in s 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Brookbanks's focus is on whether the criteria in this section set a "low" threshold for trial competence or whether they import (or are capable of importing) notions of rational understanding or "decisional competence".[18] He suggests that the current test should be replaced by a test for unfitness that is better able to address a defendant's decision-making ability, rather than focusing exclusively on cognitive abilities.[19]

The reviewer suggests this chapter could have been more logically structured to first consider the current statutory test for fitness in New Zealand (as illuminated and interpreted by case law). This could have been followed by a critical analysis of this test in light of recent debate and developments, such as the "best interests" test and the notion of decisional or rational capacity.

Chapter five is written by another expert in the field, Professor Ronnie Mackay.[20] This chapter provides a conscientious and useful overview of the comparative procedures and legislative framework for the doctrine of unfitness to plead in the United Kingdom. The discussion of current issues with the doctrine and proposals for reform in the United Kingdom ties in well with Brookbanks's consideration of the threshold for trial fitness in New Zealand and the s 9 hearing procedure.

Chapter six is a thoroughly researched and referenced discussion of all aspects of expert evidence. These range from general evidentiary principles, to the complex role of expert evidence in the assessment of trial competence, and the pros and cons of standardised testing for unfitness. It is expected that this chapter will be particularly useful for legal and medical practitioners. The high level of detail is likely to exceed that required by students undertaking a general health law course.

A special feature for the reviewer was Brookbanks's confrontation

15 Warren Brookbanks "Special hearings under CPMIPA" [2009] NZLJ 30; Warren Brookbanks "At a section 9 hearing" [2010] NZLJ 30; and Warren Brookbanks "Section 9 hearings" [2009] NZLJ 430.

16 *R v Te Moni*, above n 12, at [71]–[80].

17 At 73–80.

18 At 88–96.

19 At 357–358.

20 Ronnie Mackay "Unfitness to plead in the United Kingdom" in Warren Brookbanks (ed) *Competencies of Trial: Fitness to Plead in New Zealand* (Lexis Nexis, Wellington, 2011) 105.

in chapter seven of the many ethical issues relevant to a determination of fitness, including those faced by medical practitioners in this field. Here, Brookbanks showcases his depth of knowledge of the inherent tensions that arise at the intersection of legal and medical professional standards and obligations. These include, for example: the so-called "double-agent" conflict between a psychiatrist's role as examiner for the government and his or her role for the defendant patient;[21] the right to refuse treatment;[22] and the issue of whether a practitioner should raise the issue of trial competency over a client's objections.[23]

Chapters eight and nine address the particular difficulties in determining trial competency when dealing with two particularly vulnerable groups: young offenders and the intellectually disabled. Intellectual disability has long been associated with unfitness to stand trial due to the inability of many intellectually disabled defendants to perform functional tasks central to the trial process.[24] A key issue identified in relation to intellectual disability is that it is not necessarily static, so a single assessment of fitness during the proceedings may be insufficient.[25] An insightful discussion of juvenile competency follows, with Brookbanks concluding, "the trial competence of juvenile defendants is an issue of major concern that can no longer be ignored".[26]

The relevance of fitness in the post-conviction phase of criminal trials is discussed in chapter ten of the text. Brookbanks is dissatisfied that it is not currently possible to raise the issue of unfitness during sentencing in New Zealand. He makes a strong argument for its availability, based on one of the underlying precepts of sentencing: the ability of a defendant to understand the nature of the sentence to be imposed and the reasons for its imposition.[27]

Chapter 11 moves on to consider the disposition options for persons unfit to stand trial. For the reviewer, this was the most complex and difficult part of the text to follow. The use of aids such as diagrammatic representations may have better conveyed the myriad of disposition options available. These options depend on the basis of the finding of unfitness and the court's assessment of the appropriate outcome for the particular defendant.

Brookbanks's analysis of the doctrine of fitness reveals a number of uncertainties and difficulties with the law as it currently stands. These are seen to originate from the complex development of the doctrine, inconsistent application of the test for fitness by medical practitioners and numerous shortcomings in the current New Zealand legislative framework. The author addresses these issues in chapter 12, making the case for a raft of legislative reforms. He views these reforms as a necessary, but admittedly non-

21 At 201.
22 At 188.
23 At 204.
24 At 211.
25 At 226.
26 At 286.
27 At 303.

exhaustive, means of moving the doctrine to a form that is both adequately certain and logically based.

The strongest of these is his case for relocating the s 9 hearing procedure to follow (rather than precede) a finding that the defendant is unfit to stand trial.[28] He also raises the possibility of a specialised mental health court and argues that the question of fitness should be open to determination by consent in certain cases, an option already available for the defence of insanity.[29] Other logical amendments include better processes for screening putatively unfit defendants, and more specialised training of medical practitioners involved in fitness hearings.[30]

III CONCLUSION

Some minor quibbles might be made. It would have been helpful in places for the author to replicate more of the key legislative provisions in the text. This would have aided the reader in comprehending what are evidently complex standards and procedures, discussed with admirable academic insight by Brookbanks. While the author has been successful in dividing the doctrine of fitness into workable categories, a greater use of cross-referencing between various parts of the text would have aided the comprehension and clarity of how the various aspects of the doctrine work in practice, particular for readers of discrete chapters. A future edition might include a glossary of key terms as a quick tool of reference for those less familiar with the doctrine and the variety of terminology used across different jurisdictions.

Overall, the depth of knowledge and research informing the text makes it a worthy read for those interested in mental health law and an invaluable tool for law students, legal practitioners and medical professionals engaged in the field. It is hoped that the book will be used to inform the pressing need for legislative change. But more fundamentally, it is hoped that the book serves to further Brookbanks's underlying aim — that a sophisticated approach be taken to the issue of fitness in order to achieve a clearly articulated and rational doctrine of fitness that is suitable for the complexity of modern criminal justice systems. This would ensure that adequate protection is given to the rights of those unfit to face criminal adjudication.

28 At 353–355.

29 At 356.

30 At 356.