IN THE SUPREME COURT OF NEW ZEALAND SC 136/2016

GLENN RODERICK HOLLAND

Appellant

v

CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS

Respondent

Hearing:	3 October 2017
Coram:	Elias CJ
	William Young J
	Glazebrook J
	O'Regan J
	Ellen France J
Appearances:	W C Pyke for the Appellant
	C A Brook and R K Thomson for the Respondent

CRIMINAL APPEAL

MR PYKE:

If it please the Court, Warren Pyke appearing for the appellant.

ELIAS CJ:

Thank you Mr Pyke.

MS BROOK:

Tena koutou, e nga kaiwhakawa ko Ms Brook maua ko Ms Thompson, e tu nei mo te karauna. May it please the Court, counsel's name is Ms Brook, together with my learned friend Ms Thomson for the Crown.

ELIAS CJ:

Thank you Ms Brook, Ms Thomson. Yes Mr Pyke.

MR PYKE:

Yes, if the Court pleases. In introducing my argument I'm going to take a direct approach related to further consideration of the central question, or preliminary first question, primary question is what the definition of "sexual offending" is having read my learned friend's submissions and looked at the issue again there may well be a more direct answer to the question in the Parole Act 2002 itself. And so I'm going to put this argument now, because it may well be a more direct and elegant answer to that issue than the approach that both sides have taken in terms of reaching around for what the meaning of sexual offending is in other legislation and generally. So if I can take the Court to section 107B of the Parole Act,

GLAZEBROOK J:

Have we got that?

MR PYKE:

Yes, it's in 99 of my bundle. Now the issue that wasn't argued in the Court of Appeal, just to preface this and to remind the Court of the argument on which leave was granted was what the meaning of sexual offending was for the purposes of 107I which is the offending that needs to be, the Court

needs to be satisfied has occurred when deciding if there's a pervasive pattern of serious sexual or violent offending. So the point I've taken is, there must be sexual offending. The two positions that broadly my argument was Part 7 of the Crimes Act 1961. The Crown argued no that it should include offences under the Films, Videos and Publications Classification Act 1993, which I'll just call the Classification Act for ease of reference.

Now if I can take the Court to 107B, that section, that is of the Parole Act, it is at 99 of my bundle, that has three definitions, one of relevant offence, one of relevant sexual offence and one of relevant violent offence, and I'm not quite sure why, when I was thinking this through it didn't occur to me to argue it in a more simple way, but the answer may well be in terms of interpreting this legislation, when one looks at what relevant sexual offending is under 107I, that can be discerned simply by reading in relevant sexual offence under 107B(2). So the sexual offending is classified as its defined with slightly different words in that section, and that may be the simplest and easiest answer to the interpretation issue rather than reaching about trying to find an extra-statutory definition in other legislation perhaps in common law, the Act itself is providing what a sexual offence is in that provision and it does say, in this Part an offence against any of the following sections of the Crimes Act 1961 is a relevant sexual offence."

O'REGAN J:
But does the definition "relevant sexual offence" then appear elsewhere, actually in those words?

MR PYKE:
Yes it does.

O'REGAN J:
So isn't there a counter argument that by not using it here they can't have intended to adopt it?

MR PYKE:

There is a counter argument but in my respectful submission it's a meaning of the, a different use of the tense of sexual offending in 107A(2) that really is the distinction. The relevant sexual offence is a singular use of the word relevant sexual offending is the plural. Now that, in my respectful submission, ought not to mean there is intended to be a different meaning in 107I when simply by virtue of that distinction, and it's an argument that is much more persuasive than reaching around for meaning of the words relevant sexual offending in other legislation or try to read in common law meanings.

GLAZEBROOK J:

Or just read the words.

MR PYKE:

By that…

GLAZEBROOK J:

Well read the words in context and in context the video offences, if they're particular types of offences, are relevant offences aren't they?

MR PYKE:

For eligibility purposes they are.

GLAZEBROOK J:

Well why would there be a distinction between eligibility and looking at the pattern? So why would you say these are eligible offences but when we're looking at a pattern we don't care.

MR PYKE:

The distinction itself is, seems to be built into the drafting of the legislation because it would have been simple enough to simply carry those meanings over into section 107I, and that hasn't occurred.

GLAZEBROOK J:

Well that might be but why would you make a distinction between eligibility and a pattern? What possible reason would you have for doing that?

MR PYKE:

The eligibility provision seems to be a broader canvas because it's aimed at looking at risk, and this is the point about what the health assessors can take into account that my learned friend has made, that when it comes to a risk assessment, that is saying is this person potentially a risk, when it comes to the fact of establishing whether in fact they are a risk of committing a relevant sexual offence, the risk aimed at is that sexual offending not broader offending against the Classifications Act, which does of course include other offences not just obscene publications, it includes all manner of material that's classified as being, containing extreme violence and the like, and if one uses that as an analogy, let's say the application was comparator, let's say the application for an ESO is made because of violent offending, the reasoning would then have to be well, probably fairly less likely that if the person is found in possession of extreme violence images, you can see there the reasoning to say well that means that's violent offending, it's not so easy to bring to bear the possession of images of violence –

GLAZEBROOK J:

I perhaps missed your point, can you make it again?

MR PYKE:

Well the argument, as I understand it, is that the old eligibility, to be included as possession of objectionable or obscene images in this case of children, and that is to be classified of sexual offending for the purposes of 107I, for the purposes of when you can't just decide is the order going to be made, not just should we look at making an order which is eligibility. So the point I took Your Honour to be making to me is that why not use the same criteria when coming to deciding whether to make the order. The same group of, broader group of –

GLAZEBROOK J:

Yes, because if it's relevant to risk, why would it not be relevant at both stages of the inquiry?

MR PYKE:

My argument is that the risk that it's directed towards of sexual offending as I have submitted it's to be restricted. It's not looking at risk of future possession or dealing with obscene publications.

WILLIAM YOUNG J:

That's true, but the sort of offending that is in issue here is offending that is likely to involve contact sexual offending, even if that's not the charge. It is material to his, the way he thinks and acts about young girls.

MR PYKE:

It's material to an assessment of the risk, yes.

WILLIAM YOUNG J:

But on your argument, the sexual offending in Australia would be excluded?

MR PYKE:

No, no, I have conceded that that wouldn't be, and also that offence in Russia would be included because I've agreed now that that is, those are the two offences, so if one takes – my friend's submissions, there's a helpful table at the back, I'll clarify that back now. It's a little bit difficult actually getting a handle on what the past offending was but I have noted there that the two offences that I concede qualify as sexual offending are the December 1988 one at the top of the table.

WILLIAM YOUNG J:

So how do they qualify as sexual offending, as relevant sexual offences?

MR PYKE:

That was sexual intercourse, so that was –

WILLIAM YOUNG J:

But it's not an offence against our Crimes Act?

MR PYKE:

No but it is a comparable offence…

ELIAS CJ:

Sorry, which table?

WILLIAM YOUNG J:

Isn't it picked up in (1)(d), 107B(1)(d)?

MR PYKE:

There's a table, sorry, appendix 1.

ELIAS CJ:

I see that but which page of the table?

MR PYKE:

The first page.

ELIAS CJ:

I see, thank you.

MR PYKE:

And Your Honour Justice Young took me to –

ELLEN FRANCE J:

Just to be clear, what of that first box, which offences are you now conceding are covered?

MR PYKE:

The first one in December 1988.

ELIAS CJ:

All of them?

ELLEN FRANCE J:

All of them?

MR PYKE:

Yes, sorry, the two counts there, all of that group, and the offending from 11 March 2007, which conviction was upheld by this Court in 2014.

WILLIAM YOUNG J:

Can you just explain to me, why is the Australian offending sexual offending? They're obviously relevant offences under section 107B(1)(d).

MR PYKE:

Yes, because they are sexual offending and would fall within, I haven't actually identified which of the relevant sexual offences in subsection (2) they would be, but they are the sort of sex – contact sexual offending.

WILLIAM YOUNG J:

But they're not within subsection (2) though?

MR PYKE:

No, they're not strictly speaking.

WILLIAM YOUNG J:

So on your interpretation serious sexual offending is only what's included in subsection (2), the Australian offences would drop out?

MR PYKE:

Well it's a different point to the point I'm –

WILLIAM YOUNG J:

I know but as a matter of – I'm just trying to work out the way your interpretation works.

MR PYKE:

Only because those offences are comparable or to the –

GLAZEBROOK J:

So they come within (1)(d) –

WILLIAM YOUNG J:

But they're just relevant offences, they're not relevant sexual offences.

MR PYKE:

Well they would be relevant sexual offences –

WILLIAM YOUNG J:

Under what provision of subsection (2)?

MR PYKE:

Well I haven't actually looked but that would be 1311, it would be G –

WILLIAM YOUNG J:

No, but it's not offending against – he didn't commit an offence against the Crimes Act in Australia.

MR PYKE:

No, and I agree with that.

WILLIAM YOUNG J:

So he's not within subsection (2), isn't he –

MR PYKE:

Not strictly.

WILLIAM YOUNG J:

Okay, well on your argument he either is or he isn't I would think. That either the offences are serious sexual offences and so material to whether the order

should be made or they're no and on your argument I can't see how they would be relevant at stage 2 of the enquiry.

MR PYKE:

Well they're relevant because they are equivalent to sexual offending here.

WILLIAM YOUNG J:

You're taking a sort of a textual approach to the statute. Sexual offending includes only the offences included in subsection 2, therefore his relevant offending in Australia which comes in under section 107B(1)(d) would be put to one side. I mean that must be so mustn't it, on your argument?

MR PYKE:

Well I was prepared to accept that the conduct itself amounted to a sexual offence if it had been charged in New Zealand.

WILLIAM YOUNG J:

But how does that get in?

MR PYKE:

Whereas the conduct of having obscene publications does not. It's not a sexual offence in the same way. I mean the point that Your Honour was saying is well there's no conviction in New Zealand, so strictly speaking there's no offending.

WILLIAM YOUNG J:

I'm not even particularly troubled whether there's a conviction in New Zealand, what I am interested in is where it fits in at section 107B. Now under your earlier approach, the Australian convictions – the Australian offending would be relevant because they're obviously, ordinary language, serious sexual offences.

MR PYKE:

I see where you're going, yes.

WILLIAM YOUNG J:

But under the alternative approach they drop out as I said.

MR PYKE:

Well if one took a strict interpretation to say only those offences listed in 107B(2) would qualify therefore Australian offending would be excluded as not being sexual offending, you'd have to read in an equivalence I guess to say that. That offending is convicted in New Zealand or its equivalent overseas, it's not dealt with expressly, I agree.

WILLIAM YOUNG J:

Except why would you read it in when it's actually specifically provided for in 107B(1)(d)?

MR PYKE:

Yes well that would seem to intend that any of the offences described in (2) committed overseas would be a sexual offence. Now 107I does not refer specifically to 107B(2) or (2)(a) when talking about relevant sexual or violent offending. That's missing and so it has to be filled in. What do those words mean? What's the best way to discern what is mean by the reference to "relevant sexual offending". I'll limit myself to that.

So one could say that the parliamentary intention was to capture sexual offending, that's the equivalent of sexual offences here under subsection (2) or 107B and so the offences in Australia would count but is plainly meant by this is there is to be a distinction between what's to be counted for eligibility purposes which brings in the statutory offences under the Classifications Act and what's to be counted when discerning a pattern of sexual or violent offending and the structure is to differentially define those things. So sexual offences under 107B is described separately from the Classifications Act offending in subsection 3 of section 107B. Now what I'm arguing is if the intention was to capture all of the offending in 107B in the analysis under 107I, it would've been simple enough to say so, instead it's been limited to sexual or violent offending which is defined separately under 107B. So one

can reach for it outside the statute for the meaning of those words or one can come back and look at what sexual offences under 107B include in that overseas offending because of 107B(1) and that gives your category of sexual offending.

Now this issue that I'm arguing now doesn't appear to have been explicitly considered when the legislation was drafted. I refer to the Legislation Advisory Committee warning about listing of offences but when it was redrafted it doesn't appear to have been, no one has turned their mind to it. Perhaps it's been assumed that the meaning would be straightforward.

Now I've asked the Registrar to hand up an extra page of, an extract of the legislation and the Public Safety (Public Protection Orders) Act 2014 which my friend has placed in the respondent's bundle under tab 3. Now this legislation was passed at the same time as the amending legislation under the Parole Act that we're considering now, so it was a suite, and my friend put in at page, in tab 3 at page 60 of the reprinted legislation, the definitions of serious sexual or violent offence for the purposes of the (Public Protection Orders) Act, and that seems to categorise those definitions (i) sexual crimes and (ii) violent crimes. The next page over that you don't have, which I've asked Mr Registrar to hand up, which is the following page in the definitions section, actually refers to extended supervision orders at the bottom, and I've put that in there because that cross-reference is of interest, and this is connected to the argument, as I've developed it this morning. That says, In this section extended supervision –

ELIAS CJ:
Which section, I missed that, I was looking for it?

MR PYKE:
It's at the bottom of the two page hand up on the second page at the bottom.

ELIAS CJ:
Yes, thank you.

MR PYKE:

There's a reference to extended supervision orders which wasn't put into the extract of the legislation my friend provided. That says, "Means an order imposed whether before, on or after the commencement of this section under 107I of the Parole Act 2002 on a person who was an eligible offender within the meaning of section 107C(1) of that Act because the person had been sentenced to imprisonment for a relevant offence within the meaning of that section, that is to say the 107C(1), that is also a serious or violent offence within the meaning of section 3 of the Public Protection legislation. And then you go back to that and you see that –

GLAZEBROOK J:

Whereabouts is the section 3 in your materials?

MR PYKE:

It's in the, in my friend's bundle, tab 3.

GLAZEBROOK J:

Thank you.

MR PYKE:

It's on the last page in that extract of that legislation. At the top of what's numbered page 60 you will see these two subparagraphs, a sexual crime under Part 7, an offence against any of sections 172 et cetera, and looking at those provisions it seems to be splitting up, the first subparagraph is sexual offending and the second could be broadly categorised as violent offending. So at the same time this legislation was being passed, and those definitions were being looked at, there was this cross-reference on the page that I've provided to sexual violent offence within the meaning of those two broad categories there.

GLAZEBROOK J:

Yes, that's quite a specialist definition isn't it? That's narrowing it even further.

MR PYKE:

What it does show, what, at the same time this legislation was being passed there were broadly those two separate types of groups of offending being considered.

GLAZEBROOK J:

That's right, except here very serious offending. You're not suggesting we carry that definition over, are you?

MR PYKE:

No, no, this is just as a comparison, but what is noteworthy is that if one goes back to what a relevant sexual offence is under 107B(2) of the Parole Act, included in that is an offence against section 208 of the Crimes Act, which is put across into what I could describe as the violent offending category in the Public Protection Act groupings. That offence is abduction for the purposes of marriage or sexual connection and the Parole Act has included that in what is a relevant sexual offence but otherwise all those other offences and what I've called the violent offending category in the Public Protection Act legislation are not included as a relevant sexual offence under the Parole Act.

So there does appear to be broad consistency between splitting those two categories up but in each case not including any offending against the Classifications Act and as I argued before, if one were to include dealing with whatever manner, obscene publications of sexual offending, one would then have to include dealing with publications showing extreme violence as the like as violent offending and that doesn't intuitively fit anywhere near as well as trying to argue that having obscene publications is a form of sexual offending but if one were to apply that reasoning and say well having obscene publications is a form of sexual offending, then you would have to be consistent and say well having possession of violent, extreme images of violence is a form of violent offending and that just is – it grinds, it doesn't fit intuitively as well perhaps as the former but there should be consistency in interpretation in my submission.

GLAZEBROOK J:

Well there doesn’t need to be, does there, if you say well you're looking at it in terms of categories of relevant offending.

MR PYKE:

Yes perhaps what Your Honour may have in mind is if one looks at the types of publications that are captured in the Parole Act, it does limit itself to broadly obscene publications involving youth or children and that’s apparent from 107B(3) of the Parole Act.

GLAZEBROOK J:

And they probably do that because of the idea of the connection that the children are in, by their very nature, being exploited through the taking of those photographs in any event and the link between that and – whereas the link between that and interest in children, which I would’ve thought was something that or a sexual interest in children which might well be a good pointer towards a risk of committing a relevant sexual offence, wouldn’t it be?

MR PYKE:

Yes.

GLAZEBROOK J:

Well isn't that the policy behind it then? I mean if it’s there at the first stage, why isn't it there at the second? That’s really the argument because if it’s relevant to risk why can't you take it into account when you're assessing whether there is actual risk in policy terms?

MR PYKE:

The risk being pointed to is of serious sexual offending, not the risk of having –

GLAZEBROOK J:

But why is it eligible anyway then? Why is it eligible? Why is it an eligible offence if it's not relevant to risk because the whole point about an ESO is risk?

MR PYKE:

It is relevant to risk when one looks at eligibility, points to a risk.

GLAZEBROOK J:

But why, if it's relevant to eligibility is it not relevant to an assessment of actual risk? What possible reason would you have it as relevant to eligibility but not in the least bit relevant to actual risk?

MR PYKE:

It's a question of actual risk of what, with respect.

GLAZEBROOK J:

Well actual risk of whether, as it says, because it's different wording between subsection 2 and subsection 3. So it's whether it's relevant to the high risk of a relevant sexual offence.

MR PYKE:

Yes which does not include –

GLAZEBROOK J:

Well it doesn't matter whether it includes it, it's whether it's relevant to that and the argument would be, one assumes, because otherwise why is it even an eligible offence, that interest in that type of publication is an indication that you might be at risk of relevant sexual offending, otherwise why have it in there in the first place?

MR PYKE:

Yes perhaps I just can come back a step. What has to be established under 107I before the order can be made is a pervasive pattern of serious sexual offending.

GLAZEBROOK J:

Which doesn't say "relevant sexual offending", which it does in B.

MR PYKE:

Yes but if I can just carry on. And then under, this is 107I(2), "And either or both of the following apply, there is a high risk that the offender will in future commit a relevant sexual offence." And if one goes back to that, that is restricted to those ones listed in 107B.

GLAZEBROOK J:

Well that's right but why in (a) would you not take account of something that might be relevant to an assessment of (b) because it must be relevant because why is it in there for eligibility in the first place if it's irrelevant?

MR PYKE:

Well you could do both and there has to be a pattern of serious sexual offending first and then the risk of future offending can be informed by this other material, obscene publications and that type of thing. With respect my argument is that the two do harmonise but you first have to have a pattern of serious sexual offending, not a pattern of statutory offences, long though they might be in this case, of having these obscene publications or images et cetera. The gateway offending is serious offending and my argument is once you go through the gateway the risk assessment can bring in to play these other matters. So the health assessment can take those into account and advise the Court well this person has –

ELIAS CJ:

But it's not just taken into account, you're saying, you're saying under the section it's the risk of committing a relevant offence. So you're not just taking

it into account, that is the object to which the extended supervision order is directed, commission of a relevant offence.

MR PYKE:

Yes. Relevant sexual or relevant violent, whichever the case may be or both perhaps.

ELIAS CJ:

Yes, so while – I mean I would've thought that serious sexual or violent offending may not be only an identified relevant sexual offence but a relevant sexual offence must necessarily, since that is what you are concerned to prevent in the future, must be a serious sexual or violent offence. So I mean I can understand the argument that there isn't entire overlay but I'm not sure that that takes you where you want to go.

MR PYKE:

Yes well I'm not sure I'm quite following what Your Honour is putting because if one restricts the meaning of the words "sexual offending" in 107I(2)(a), to the relevant sexual offences referred to in (b), which is in turn defined in the earlier provision, then that is the mischief that it's being aimed at, that type of offending, not offending against the Classification Act but offending of having obscene publications can inform the risk assessment of the likelihood of committing the serious sexual offences because they are pointers, they're evidential for that purpose but still the focus must be on the actual sexual offences and the risk of committing them, not the risk of in the future committing further offences against the Classifications Act because it would've been simple enough to say so because there's plainly drafters have in section 107B, split the three types of offences up into separate categories and have been very careful to limit the Classifications Act categories to only those ones involving sexual conduct et cetera with children.

Now it would've been much simpler to simply say relevant offence in 107I if that's what was intended and then the whole lot would've been captured but that's plainly not what's happened and what has happened is to split off the

sexual and violent offending from the Classifications Act offending and with respect that's my submission on how that should be properly read.

So I've perhaps simplified my argument and come away from reaching to the Crimes Act 1961 and other law for what sexual offending is and I've decided to limit my argument to the classifications in 107B. Now given that 107I does not expressly capture the Classifications Act offending, in my submission if my argued interpretation is an interpretation that at least stands equally well with reading in the Classifications Act offending, then that should be the one preferred because of the intrusion into liberty of these orders, and if one looks at what they restrict under 107JA of the Parole Act, and the conditions that can clipped on them under section 15, they are quite draconian, which is the phrase used to describe them by the Court of Appeal in *Shortcliffe v Department of Corrections* [2016] NZCA 597, which is at tab 8 of my friend's bundle. I won't take the Court to that judgment because it really just, to my purposes, stands for the proposition that these orders represent a very serious intrusion into the liberty of the subject, and of relevance to my argument of interpretation the Court there at 13 described them as, "A cascading sequence of mandatory prerequisites."

GLAZEBROOK J:
I still can't quite get the policy of it being relevant to risk but not taken into account when you're actually assessing risk.

MR PYKE:
Well it can be taken into account when assessing risk but there must still be the prerequisite –

GLAZEBROOK J:
But why? I'm not asking you to, I'm just asking you to tell me why the legislature would do that. What's the reason. Because you say if it's equally likely well it might be on the words, possibly, but you have to go back to the purpose and the policy don't you? So, because I would have thought you'd have to point to a policy that would say that's why you were doing it that way?

MR PYKE:

Yes, other than looking at the – pardon me if I can just locate my submissions which are buried under my pad. My learned friend's submissions have outlined the purposes and policies of the legislation at, which is a bit more thoroughly than I did, I just was very summary in mine, page 6 of –

GLAZEBROOK J:

Which one do you rely on? To have that split that you're talking about?

MR PYKE:

Yes, at paragraph 23 of my friend's submissions, the purpose of the Act is quoted as being, "To protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences." And those offences are, of course, defined in section 107B, so the purpose is not to prevent offending against the Classifications Act, or some broader category of like offending –

GLAZEBROOK J:

But I understand that, but if offences under the Classifications Act are relevant to whether someone will, and the legislators must have thought they were, relevant to whether somebody will commit a serious relevant sexual offence. Why would you take them out of some part and not other parts of the determination?

MR PYKE:

Yes, this is just a little abstract in my mind, what Your Honour is putting to me, because it seems, with respect, that you start with the category of serious sexual offending applicable here. You look at what the risk of future offending of that kind is, and Parliament has said it's a relevant consideration to look at these Classifications Act offences when assessing the risk of committing serious sexual offences. Now the logic of that seems inescapable to me, but that doesn't mean you suddenly bring those in to the category of offences that the risk points to. It's been restricted back to the more serious offending for good policy, for reasons of not having its reach go too far into less harmful

offending. The line has been drawn, has been drawn wider in other jurisdictions in terms of what my friend has pointed to, but that line appears, with respect, to have been drawn quite clearly here. So it can be brought to play on risk, and there's nothing in the underlying Parliamentary materials I've read that would contradict this submission, and in fact it's pretty light on this topic. Now that's what the legislation, in my submission, is clearly saying, is the Court is looking at the risk of sexual offending as such, not the risk of other less serious offending such as the Classifications Act, that could be broadly characterised as sexual in its connotation. So yes you can look at it for risk and I don't see anything intrinsically contradictory in that approach and that's presumably based upon research which I haven't looked at, but I may have read from time to time that says that people who consume this type of pornography are at greater risk of committing sexual offences actually.

GLAZEBROOK J:
But the logic of yours is you could've had a totally pervasive pattern of looking at this type of material, commit a really serious offence against a young child and it was very relevant, your pervasive pattern of looking at this material to whether you're going to commit another really serious offence against a child but you say you just don't get over the hurdle.

MR PYKE:
Yes.

GLAZEBROOK J:
Why would that be the case because of course you would say you only look at that really serious offence against a child, that's not a pattern because it's a one-off. The fact that it's a culmination after a whole pile or series of looking at this material, finally decide to act on it, really relevant to whether you're going to act on it again, in fact possibility even determinative of whether you're going to act on it again, and yet you can't even take it into account because you miss out on 2A and I'm asking you what the policy behind that might be?

MR PYKE:

Yes the legislation talks about a pervasive pattern and the question really was, what Your Honour was posing is is there a pattern, if one limits the interpretation to what I'm arguing, is there a pattern in one single offence, yet there's all these other Classification Act offences lurking in the background and leading up to it as a progression as it were. Well that could well be right, that if there's just one single one-off offence that you don't have a pattern and therefore you can't make the order.

GLAZEBROOK J:

And yet the fact that you have been looking at that pornography would be, you concede, totally relevant to whether there is high risk that you will commit a relevant sexual offence in the future, ie repeat the experience that you've –

MR PYKE:

Yes but if I can take that back another step to say look let's say there's no sexual offence other Classification Act offences, it couldn't be argued then that the legislation would bite.

GLAZEBROOK J:

Well no but you'd be hard pressed to say there was a high risk presumably that you would commit an offence in the future but you're still eligible.

MR PYKE:

Mmm.

GLAZEBROOK J:

And it might well depend on the type of objectionable material that you have, to be honest.

MR PYKE:

But if the Court were to go down the track and say well we have no sexual offending in the manner I've argued for it to be classified but we have this whole collection of having obscene publications, therefore that in itself could

point – could establish a pattern of sexual offending and then you could have an enquiry if the interpretation the respondent's argued for, you could actually have an enquiry based solely on that type of offending.

WILLIAM YOUNG J:

Well the best you could probably say is that the purpose of the pattern of sexual offending is to limit the power to make an ESO, to reduce the size of the net and a possible method of doing that is to say that such a – that an ESO cannot be made unless there have been more than two or more sexual offences of the kind which the ESO is intended to provide some mitigation of risk?

MR PYKE:

Yes or possibly another way of looking –

WILLIAM YOUNG J:

I don't find it very convincing but you could say well we're trying to limit the number of ESOs that are made and we'll do that by excluding some people who probably are at risk of sexual offending because that must have been the purpose of the amendment because it was to reduce the number of ESOs that were being made and one way of doing that is to say well you can't be receiving an ESO unless you've got two or more sexual offences that have been committed. Now it's a rather funny way of achieving that, but that could be a policy?

MR PYKE:

Yes, the problem is establishing a pattern. I mean one offence could, for example, be let's say, hypothesise, it could be a representative charge. So that could be captured in-

WILLIAM YOUNG J:

Well I don't know that's, it doesn't have to be, they don't have to be a pattern of offences for which you've been committed, it just has to be a pattern of offending, doesn't it?

MR PYKE:

Well how could there be offending if there's no convictions. In my submission that's got to follow –

WILLIAM YOUNG J:

Well I'm afraid there's quite a lot of offending for which there are no convictions.

MR PYKE:

Not as a matter of law though. You cannot say someone's committed an offence until they've been convicted in my submission.

WILLIAM YOUNG J:

Of course you can. People say it all the time. There are defamation cases about it. There are similar fact, propensity evidence, of course you can say it, and in this case some of the offending for which – your client's propensity to offend in terms of indecent images, tends to be associated with actual indecency.

MR PYKE:

So how does one, if one comes, steps back and says, right, to establish a pattern of offending we don't have to have convictions then what's the basis for it. Reports of third parties –

WILLIAM YOUNG J:

Well there might be admissions.

MR PYKE:

Well if those admissions have not been reliable, have not been tested.

WILLIAM YOUNG J:

Wouldn't it be a question of fact for the decision-maker?

MR PYKE:

Well then wouldn't the Court have to, if it's challenged, have to then say well we're going to challenge that admission, 10 years ago –

WILLIAM YOUNG J:

They can challenge it, it's just an issue of fact. I mean lots of things are challenged.

MR PYKE:

The more common context would possibly be disclosures to a health assessor, and those disclosures may, you know, in the sense a health assessor may be more open, but then people making those disclosures have not got the protections of, advice about the privilege against self-incrimination, so it may well depend on the context in which the admissions are made, how reliable they are, whether they are admissible. You would have to, you would potentially be going down a whole track of challenging that for admissibility which is not, with respect, contemplated by this, which would mean, in my submission, you'd have to come back to convictions. And then if you have parents and ex-partners and the like telling the health assessor information about their proclivities, the thing seems to be, at that stage, become quite open-ended and at odds with the protections that the suspects are normally accorded until there's been a proper due process to establish, in fact, if an offence has been convicted legally.

ELLEN FRANCE J:

Well in terms of a health assessor, the Act does say that the health assessor can take into account statements made that it, that, whether or not there has been a conviction.

MR PYKE:

Yes, but it doesn't say the Court can take those into account when establishing what relevant sexual offending is. So this is again coming back to the risk assessment. Wider factors are legitimate for a risk assessment because those are, there's a clinical type of opinion about risk, but there has

to be some sort of boundaries, clear boundaries to what qualifies a person for the making of an order of this nature, rather than the Court's proceeding on the basis of allegations, admissions in a closed environment to a doctor, and those types of things.

WILLIAM YOUNG J:
Well here, I mean it does arise in this case because some of his behaviour has been prosecuted in terms of pornographic images, but it did actually involve sexual offending.

MR PYKE:
Yes, some of it did, yes.

WILLIAM YOUNG J:
So is that to be ignored?

MR PYKE:
Not for the purposes of the risk assessment.

WILLIAM YOUNG J:
Wouldn't it be part of a pervasive pattern of serious sexual offending?

MR PYKE:
Well not on my argument. If there's been no charge, there's been no conviction, then no.

WILLIAM YOUNG J:
So that's another limitation we have to read into it. Sexual offending for which the offender has been convicted.

MR PYKE:
Yes. What would be the down consequences of opening that door wider, if I was acting for a person that was being sent off to a health assessor, I'd say, say nothing. Your family should say nothing. You've got a privilege against self-incrimination. Just talk about the offence you've been convicted with.

WILLIAM YOUNG J:

But you'd probably say that anyway, might you, because people do – I mean at the moment health assessors may refer to other offences that have been acknowledged by the offender.

MR PYKE:

I might say it but I doubt that it's commonly said or advised. I've never acted for anyone but certainly it's the sort of – if the signal was sent from the Court that those things will actually trigger a ground for making an order as being classified as offending, the person would have to stay quiet if they have any sense of self-preservation which would then defeat the purpose to get them to make disclosures so that the risk assessment can be fulsomely made but if those disclosures are then going to then form the basis of the actual making of the order and they're getting punished for being open, then smart ones and perhaps not so smart will just clam up, won't consent to their medical records being disclosed and the process would get potentially quite constrained.

Sorry can I just finish that, is that the other thing is that if one is advising on what a person who is the subject of this type of application should do and then going back in time, what they should do the charge that may trigger this process, then a very defensive position might be taken throughout that process, looking down the track to what it might end up with, a wide opening up of exposure to an ESO order being made.

WILLIAM YOUNG J:

Well just looking at the offending that he was committed in July, committed or sentenced in July 2008.

MR PYKE:

Yes.

WILLIAM YOUNG J:

So he has over 6000 objectionable images, a majority of the 30 representative images depicted the appellant's [suppressed]. They said he took the

photographs and he was visible in at least one of the photographs. Now he's charged under the – with possessing objectionable material but it is practically certain that that offending involved – could also be regarded as sexual offending.

MR PYKE:
Yes but he wasn't charged with that for whatever reason.

WILLIAM YOUNG J:
Yes, so you say that that has to be ignored in terms of a pervasive pattern of serious sexual offending?

MR PYKE:
Yes but not for the purposes of risk assessment.

WILLIAM YOUNG J:
Yes so you've got two thresholds, you've got to be convicted of an offence, there has to be a pervasive pattern of sexual offending and there has to be risk. So it's relevant for – it's a relevant offence, it's not a part of a pervasive pattern of sexual offending but it is relevant at the third stage. So it's relevant, irrelevant, relevant.

MR PYKE:
Well it's relevant for a different purpose. It's not relevant to the making of the order, it's relevant to the risk assessment. The Judge then looks at the risk assessment and says –

WILLIAM YOUNG J:
You never get to the risk assessment.

MR PYKE:
– "Does that point to a risk of relevant sexual offending in the future, this other conduct?"

WILLIAM YOUNG J:
But you never get to the risk assessment unless there's a pervasive pattern of sexual offending.

MR PYKE:
Well it's with respect not simply a matter of taking within one square box and saying relevant, same square box it's not relevant, same square box relevant again. The box has changed, the information going in them changes and the reason within the box changes at each stage. So I can't, with respect, see why it can't be relevant for one purpose but not another because the focus is different. The goal being to assess the risk of relevant sexual offending in the manner I have argued for it to be defined.

Now this may be convenient to address the question of well it may depend upon the random nature of how charges are prosecuted but with respect that's no answer because this confronts the system all the time. It's up to the prosecutor to choose the charges, it's up to the prosecutor to look at the availability of these types of orders and charge accordingly but that's just a normal function of how the system works. For example on preventive detention, you can charge an offence that might attract that penalty or not. That's the prosecutor's job. So that is, with respect, not an answer to the problem.

Now if one does take preventive detention and then looks at the sorts of things that are normally assessed in that context, they do for risk assessment to the public, do take a broader canvass but then the Court doesn't then suddenly say well you've committed murder and I've now got information that you've been a part of some conspiracy to murder or something, because of something you disclosed to the interviewing psychiatrist and therefore that gives me a jurisdictional basis to impose preventive detention, there has to be a, to be a conviction for an offence that enables that preventive detention sentence to be passed and I'm arguing that that's the same here. There has to be relevant sexual offending and there has to be convictions for it to give the Court the jurisdiction.

ELIAS CJ:

Would your argument be affected if section 107B(3) said that the offence was a relevant sexual offence. Is that, does it really…

MR PYKE:

107?

ELIAS CJ:

107B(3), it's a relevant offence. Is it your argument it's not a relevant sexual offence?

MR PYKE:

I see, so classified the Classifications Act offences as a relevant sexual offence.

ELIAS CJ:

Yes, would that undermine your argument?

MR PYKE:

If it fell within what's defined earlier in (2), yes, because it would be clear that that was what Parliament intended to capture.

ELIAS CJ:

It's hard to see that an offence described in (3) is other than a sexual offence except – well, unless you accept your argument that you have to import the classification in the Crimes Act.

WILLIAM YOUNG J:

Well, a risk of offences involving pornography isn't itself enough to justify an ESO. Someone may be a prodigious –

ELIAS CJ:

No, I understand that.

WILLIAM YOUNG J:

So if these offences were defined as relevant sexual offences, then a risk of offences involving pornography would be enough to warrant an ESO.

MR PYKE:

Yes, if they were, and the fact that –

ELIAS CJ:

If there was a pervasive pattern of sexual offending.

WILLIAM YOUNG J:

Yes, so but if the, offences involving pornography were treated as relevant sexual offences –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

The risk of further offences would justify an ESO.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But that's not the policy view that's taken, one can understand why. So it's not the likelihood that he's going to keep on offending in relation –

ELIAS CJ:

Under the classification –

WILLIAM YOUNG J:

– to pornography that's critical.

GLAZEBROOK J:

It's acting on it in an other than totally –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

And also it's relevant the production of pornography that's rather significant.

ELIAS CJ:

Yes, which is the exploitation.

GLAZEBROOK J:

Which is what he's actually engaged in, in fact.

MR PYKE:

It would appear that in other jurisdictions that has been brought into the jurisdictional part of the test, but not here, and it may be that, with respect, that if the Court hypothesising were to think it was desirable, the better fix is legislative to make it clear than drawing an interpretation which brings into the meaning of sexual offending something that on 107B, in my submission, appears to have been deliberately carved out as a separate category. It does strike one as, I'll go back to what the Act was before, it does seem that there's been changes made and this hasn't been thought through. So that may well be the explanation.

ELLEN FRANCE J:

Why do they, why is the descriptor "serious" used in 107I(2)(a), rather than "relevant" on your argument?

MR PYKE:

Well that would appear to have been so, well something more than mere sexual offending is intended to be captured before the order can be made. It could be low level –

ELLEN FRANCE J:

But isn't that the filter?

MR PYKE:

That is the filter and that's the filter that operated in the violent offending context in *Shortcliffe*. The Court wasn't able to actually see the offending is serious enough to engage an ESO partly because they didn't have enough information. That is one filter.

ELLEN FRANCE J:

I suppose in terms of your policy argument you would have us read in another filter. On top of the seriousness.

MR PYKE:

Well it's not a filter as such as a category. Once you –

GLAZEBROOK J:

And pattern, so there's two filters, pattern and serious.

MR PYKE:

Pattern and serious, well, and this is something that, pervasive pattern –

GLAZEBROOK J:

Well pervasive pattern so it's more, yes, it's actually an even stronger word.

MR PYKE:

Yes "pervasive" would suggest that more than a mere pattern has to be shown. "Pervasive" has a temporal sense to it.

GLAZEBROOK J:

But I think the point made by Justice France is that you're having us also leave out something that could be seen as serious sexual offending, not all offences probably of possession would be, but the sort of offences that would involve very serious pornography that quite clearly involved the sexual offending against children to produce that pornography.

ELIAS CJ:

And the participation of the offender.

GLAZEBROOK J:

And the participation of the offender are somehow left out when you're looking at – so that's another filter that you're having us read it. Having already got pervasive pattern and serious.

MR PYKE:

Well it's an argument which, in my submission, is what the Act has intended, whether it's desirable is another issue, but the fact that the, in this case an offender may have been part of the taking of the photos or the images, could have resulted in a charge which was captured as relevant sexual offending on my argument for some reason wasn't. So that's an answer to that. There is a solution already but it's just the mere possession or distribution of those images taken by third parties, it's the third parties that are committing the relevant sexual offending, not him but the fact that he's prepared to live off the fruits of that, through his own consumption or distribution with others of a like mind, is relevant to risk already and can be factored in but if the risk doesn't point to actually going out there and offending himself, then the legislation doesn't appear to bite. The intention doesn't appear to have been to make these orders merely by virtue of the fact that a person offends against the Classification Act.

ELIAS CJ:

Well I'd like to revisit that assumption because I hadn't focussed on the serious filter but what is wrong with the policy that seems, if you just look at the text, to apply, that those offences punishable by imprisonment under the Classification Act are serious sexual offending or sorry are sexual offending and if serious and if demonstrating a pervasive pattern and if there is a high risk of committing a relevant sexual offence, which clearly includes a classification offence, that's it. What's wrong with that?

MR PYKE:

Well the way the respondent has argued is that is in keeping with what's broadly described as the protective purpose of the legislation but if one comes back to how that's articulated, the purpose is to make these orders against

those who pose a real and ongoing risk of committing serious sexual or violent offences. So to interpret it in the way Your Honour has put to me would need to categorise those classification offences under that description.

GLAZEBROOK J:
Well there's no serious in (b), there's no serious (b), (2)(b).

MR PYKE:
No.

GLAZEBROOK J:
So is any old one of those offences, the only serious is in the pervasive pattern.

MR PYKE:
Well maybe but it could be, let's take the one-off, the various inherently, this is the point that's address in a different context in the judgment in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 which my friend has put in and the analysis in *Underwood* is quite helpful to deciding where seriousness fits within the scheme of offending. One can't just take one category such as the maximum penalty, one has to look into the offending, look at various things that *Underwood* broke down into starting point, the nature of the conduct itself, the number of victims, the effect on victims. So an evaluation of seriousness of an offence is something Courts are accustomed to do on an individual case basis and that would be the approach here. So for example take an indecent assault, if it was fleeting, over the clothing, the age was of someone's mid-teens, compared to invasive touching of a younger person, the latter would obviously be more serious than the former, so it's a case by case evaluation. Neither would be serious because of the pattern.

GLAZEBROOK J:
I understand that, but that's only for looking at the pattern you look at seriousness, when you're looking at whether there's a risk of committing an offence, you don't look at seriousness.

MR PYKE:

Yes. If, looking at *Shortcliffe*, for example, that's in tab 8 of my friend's submissions, one goes to page 103 of the judgment at 41, the Court there looked at the specific charges, this was violent offending, and held that they undoubtedly –

GLAZEBROOK J:

Sorry, I think I might be on the wrong, what paragraph, 41 that's right.

MR PYKE:

The respondent's bundle, tab 8, the Court then said they were at the lower end then looked at the sentences and, "It is dangerous to draw conclusions simply based on the length of the end sentence; there are likely to have been other factors in play, quite unrelated to the seriousness of the violence involved."

GLAZEBROOK J:

Sorry, I'm just not sure what your point, what's the point that you're making there?

MR PYKE:

Well then at 43 they held that there was no way they could hold that there was a pervasive pattern. But it does seem the analysis in 41 started by looking at the offending itself to say is it serious offending, so that tells you –

GLAZEBROOK J:

But how does that meet the Chief Justice's point, that if you have really serious offending under the Classifications Act, why can't you take that into account in the pattern? If it's not very serious offending, if it's sort of slightly on the cusp of pubescent girls, slightly naked, it may not be serious sexual offending.

MR PYKE:

Well that inquiry would be relevant, whatever type of sexual offending you bring into the pot.

GLAZEBROOK J:

But isn't that the point. So why does that, if it is however really serious, depicting the rape of a one year old, why can't it be taken into account?

MR PYKE:

Well in the sense of taking into account in the sense of saying, it is sexual offending.

GLAZEBROOK J:

Is there a pattern of serious sexual offending?

MR PYKE:

Well i would just repeat my argument to say it's not intended to be captured, that's all.

GLAZEBROOK J:

Right, okay.

MR PYKE:

But coming back to the evaluation of seriousness versus pattern, my submission would be the first enquiry would be, is the offending itself serious. If it's not, if it's minor, there's nothing else to indicate a pattern, then you don't even get there. If the offence is serious then you look at the pattern. Are there less serious ones, more serious ones in the past, that type of thing, when one is looking for a pervasive pattern. It's part of a cascading sequence of gates, as the Court of Appeal said, that one goes through, and it's structured in that way, in my submission, for a good purpose to –

GLAZEBROOK J:
Is this directed at the argument that you can only, when you're looking at the pattern, take account of the serious offences, is that…

MR PYKE:
I have re-thought that, and I'm not sure that my reasoning on that is correct.

GLAZEBROOK J:
All right.

MR PYKE:
That a collection of less serious offences could amount to a pattern of serious offences, of serious offending, but you still have to just look at each example of it. So if you only have one and it's not serious you don't go further. You have a number taken together it's serious. Yes, so I agree with it, that that analysis can be moulded to the manifestation of offending that each individual offender presents, so I don't pursue that line of argument any more.

So I've just gone through my submissions and I've got to the point to where, yes, I might just finish off on this particular topic, taking you to the parts of *Underwood* that are helpful on this evaluation of seriousness.

ELIAS CJ:
Sorry where's that?

MR PYKE:
That's in tab 13 of my learned friend's submissions. Now it is page 175 of the bundle, page 444 of the judgment. That's essentially where the seriousness of the offence topic is discussed in the context of admissibility.

ELIAS CJ:
This is in the context of the Evidence Act 2006.

MR PYKE:

Yes it is but at the following page, at para 42, “How should seriousness be measured?” And that’s talking about seriousness of offences. It’s quite helpful, scale of extended offending, the facts of the offending, the inherent seriousness of the offence. I’m summarising now. Age, number and harm to victims, invasion of bodily integrity, concerted or conspiratorial criminal activity, the starting point taken for each offence and the Court thought there that that was a more reliable indicator of the offending rather than looking at the end point which with respect is a sound approach. Now that broad way of looking at seriousness of offending could be transported into considering seriousness in this context and helpfully breaks it down into those categories in my submission. I just thought that when I was reading it, so I thought I’d say so.

In terms of, unless the Court has more for me, I want to move onto the question of whether the two groups of offending that I’ve agreed qualify as serious sexual offending would justify the order being made and I preface that submission by saying if the Court holds that the full range of offending comes into play, then I really don’t have much that I could argue against the Court of Appeal’s analysis if the full package was looked at but just focusing on the two, there is the two counts in 1988 and I’ve already argued that they're distant in time. They are serious offending in their own right but if that were taken in isolation in my submission there wouldn’t be a pattern established but then one brings into bear the 11 March 2007 offending, sexual conduct with a child out New Zealand and that’s described in the table under the appellant’s history, attached to my learned friend’s submission. The appellant arranged and directed a photograph of his [suppressed] masturbating another man and she reported that he’d photographed her several times.

What the Court would then need to say is, well does that repeated offending nearly 20 years later indicate a pervasive pattern and then is there a risk, looking at the whole package, that that there would be future sexual offending of those two types. Now in my submission, against that is the fact that there's been nothing of that type of offending since ’07 and the question would then

be whether those two taken on their own would establish a pervasive pattern over time that would suggest from this point forward or from the point when the ESO order was made against him, there was still the relevant risk of sexual offending in the future.

Now the arguments I've got is the distance in time since the last episode, the differences between the two. There was actually no full sexual activity by him with the [suppressed] but against that of course is the fact that he's encouraged or participated in another man having a less invasive sexual act in terms of bodily integrity but there's the age and relationship of the [suppressed] to him and I've identified, in relation to the '07 offending, that the starting point, and this is at page 53 of this Court's case on appeal, the starting point for the '07 offending was three years. I can't say what the starting point for the Australian offending was because I don't have that information and I don't think I can advance any additional argument on that issue beyond pointing those facts out to the Court.

So if I could summarise that, I would agree that there is a basis for consideration that those two groups of offending that I've just discussed, could establish a relevant and could point to future risk but for the reasons I've submitted, the distance in time and the differences that could equally point away from that. That's a question for the Court to assess, looking at the overall risk as reported by the health assessor. So unless I can assist the Court any further, I have no further submissions.

ELIAS CJ:

Thank you Mr Pyke. Thank you Ms Brook.

MS BROOK:

May it please the Court, the respondent's case in a nutshell is that whether or not an offender has had a pervasive pattern of serious sexual offending, it's a question of fact to be determined in the circumstances of each offender and in determining that question the Crown says the Court must be able to take into account all relevant conduct, whether or not it has resulted in convictions at

all, let alone convictions for a specified – or convictions of a particular category in circumstances where parliament has not prescribed any such limitations.

I'd like to start, if I could, with addressing a submission my learned friend made about the influence of the New Zealand Bill of Rights Act 1990 on the interpretation of these provisions but before I do that it might be useful just to place the 2014 amendments in some context. The 2014 amendments obviously significantly changed the ESO regime. For the purpose of the present appeal it did that in two ways, firstly the amendments expanded the eligibility criteria. Previously only child sexual offenders were eligible to have an ESO imposed but the amended legislation captures adult sexual offenders and serious violent offenders and it's perhaps important to note at this point that nothing changed in any material sense in terms of the eligibility for child sexual offenders. So that is while the eligibility was brought in to include additional types of offenders, the eligibility criteria did not materially change in respect of child sexual offenders. Or to put that another way, child sexual offenders who are eligible prior to the amendments remained eligible after the amendments and no additional child sexual offenders were captured.

The second significant change was that the threshold for imposing an ESO was increased, as Your Honour Justice Young has already observed. So essentially eligibility was expanded but it was made more difficult to have an ESO imposed because previously the Court was only required to be satisfied that the offender was likely to commit further offences but must now be satisfied that there is a high risk and there is also the pre-condition that the offender have the pervasive pattern of serious sexual offender that is at the heart of this appeal and in my submission the pervasive pattern requirement looks back at the offender's history and is essentially a question of fact to be determined by the Court, while the risk assessment looks forward. In that respect the Court is assisted by the health assessor's report which is required to address the four characteristics which are pre-conditions to a finding of high risk and are indicators therefore of risk.

The other changes included the ability to renew ESOs indefinitely and then the tandem requirement to review ESO cases regularly where high impact conditions were imposed, such as the sorts of conditions which are akin to home detention and those review provisions were introduced to address concerns about possible arbitrary detention which the Attorney-General had raised in an earlier section 7 report in 2009, advising parliament of an apparent inconsistency with the New Zealand Bill of Rights Act.

Now according to his section 7 report on this amendment bill, the 2014 amendments, those review provisions did sufficiently address the concerns about arbitrary detention, however he maintained the position that he had maintained or the previous Attorney-General had maintained since the ESO regime was first introduced in 2004 that the ESO regime is fundamentally inconsistent with the New Zealand Bill of Rights Act. So that must be the starting point, that we are dealing with legislation which is inconsistent with the New Zealand Bill of Rights Act because it imposes a second penalty on an offender who has already served their sentence and it also has retrospective effect because the offending may have been committed before the ESO regime came into force.

Now parliament obviously knew this because there had been no less than three section 7 reports at various stages since the ESO regime was introduced and further the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 confirmed, as the Attorney-General had envisaged that the ESO regime was inconsistent with the New Zealand Bill of Rights Act and at all stages it has been accepted that the limitations that the ESO regime imposes on the rights in the New Zealand Bill of Rights Act can't be justified in terms of section 5 of the New Zealand Bill of Rights Act. The Attorney-General's reasoning in that respect is because there would be other ways to achieve the same objective, namely a civil regime which did not amount to imposing a criminal penalty.

Yet parliament has continued to not only have the ESO regime on the statute books but indeed to expand it as it has done in 2014 and must therefore be

taken to have intentionally enacted legislation which is inconsistent with the New Zealand Bill of Rights Act. Which leaves us in the position, in my submission, of either having to find some interpretation of these provisions which is consistent with the Bill of Rights Act or to conclude that that's not possible and instead apply the provisions in accordance with their natural meaning and parliament's intention.

The Crown's submission is that it's simply not possible to construct any interpretation which is indeed consistent with the New Zealand Bill of Rights Act and that's because no interpretation of the provisions that are at the heart of this appeal will address the issues of retrospectivity and the fact that you are imposing a second penalty on an offender who has already completed their sentence.

GLAZEBROOK J:
Well isn't the argument on that, I'm not saying it's necessarily a good argument, but isn't the argument on that well you limit it as far as you possibly can to what is within the words of the legislation because even if you can't fix it up for everybody else, you can fix it up for the category of offender like Mr Holland?

MS BROOK:
Yes. That argument might have some appeal because it would limit the number of people in respect of whom an ESO could be imposed and therefore would be arguably less inconsistent with the New Zealand Bill of Rights Act and the Crown has two submissions in response to that suggestion. Firstly, in my submission, *Hansen v R* [2007] NZSC, [2007] 3 NZLR 1 does not require the Court to adopt a less inconsistent meaning. Section 6 applies where a consistent meaning is available, you must then prefer that over any other meaning. The Courts aren't permitted, in my submission, to read down legislation on the basis of inconsistency with the New Zealand Bill of Rights Act.

ELIAS CJ:

Unless it can be.

MS BROOK:

Unless it can be. So they may only and indeed must adopt a consistent meaning if there is one that is reasonably available which brings me to the second response.

ELIAS CJ:

Where do you get reasonably available? *Hansen*?

MS BROOK:

Yes Ma'am. In my submission it's a common thread through all the judgments of the Court in that decision.

GLAZEBROOK J:

Well of course the one thing probably that is on Mr Holland's side is the wording in this case. It's not a situation where Mr Holland is saying well let's read serious sexual offending as incredibly serious and only something or other, is it?

MS BROOK:

I accept that but in my submission the interpretation must still be reasonably available and the Crown's submission is that the appellant's interpretation of this phrase, a pervasive pattern of serious sexual offending is fundamentally inconsistent with parliament's intention because it would mean that or would have the result that two offenders who commit exactly the same types of offences in terms of their conduct but one is charged with offending against the Films, Videos and Publications Classifications Act and the other is charged with doing an indecent act under the Crimes Act, both would be eligible for an ESO, parliament has made that clear because a relevant offence can compass either type of conviction but despite the underlying conduct being the same and let's assume for a moment that both were found to be at high risk of committing further sexual offending, one offender would

escape an ESO because his convictions under the Films, Videos and Publications Classifications Act and the other under the Crimes Act and in my submission that's an overly technical approach which is not parliament's intention in the context of a public safety regime.

So that brings us to section 4 of the Bill of Rights Act. In my submission the Court must simply ascertain what the natural meaning of the phrase "pervasive pattern of serious sexual offending" is and give effect to that in accordance with parliament's intention. As to what the natural meaning of that phrase is, the Crown's submission is, as you will have seen, that there is no bright line which determines what serious sexual offending is and what it isn't. The respondent's submission is that determining whether or not an offender has a pattern of serious sexual offending or what is serious sexual offending, requires a factual enquiry in the circumstances of each particular case which takes into account all offending which is germane to that question regardless of whether or not it has resulted in convictions and of course the advantage of convictions is that they conclusively establish that the particular offending has been committed or that the conduct has occurred but the Court may be satisfied of that in other ways. For example offenders may have admitted offending which has not been subject of convictions to the health assessor or their probation officer or the Court may have heard evidence on the point and become satisfied that the offending had occurred.

GLAZEBROOK J:
Satisfied to what standard, civil or just satisfied or –

MS BROOK:
Just satisfied. It's not to the standard of beyond reasonable doubt.

ELIAS CJ:
Why not?

MS BROOK:
It's not a criminal prosecution.

ELIAS CJ:

No but it's a very serious matter and the law, as I understand it, has always been that if you are alleging effectively a crime, the standard of proof has to be commensurate with that.

MS BROOK:

Well there is yet no authority for the proposition that the offending which constitutes a pervasive pattern must be established beyond reasonable doubt because the Courts haven't yet considered that question. The scenario that I was just positing is the Court may have actually heard evidence on the point for example a propensity witness may have given evidence at the trial which gave rise to any convictions or the relevant convictions that the offender has or theoretically the Court could hear evidence on the question of whether or not a particular incident has occurred at the hearing of an ESO application.

My learned friend took issue with the suggestion that admissions should be able to be taken into account even where no conviction has resulted and the policy reason for that was stated to be that it would discourage offenders from speaking frankly with the health assessors because they might not want to make it any more likely than an ESO would be imposed by admitting to conduct which could then form part of a pervasive pattern.

ELIAS CJ:

Do they have to be warned?

MS BROOK:

No Ma'am.

ELIAS CJ:

I wonder. Anyway it's not before us.

O'REGAN J:

I mean do we really need to deal with this?

GLAZEBROOK J:
I mean we're not dealing with a situation and we're unlikely to be making definitive statements on it because we're really dealing with situations where there are convictions aren't we?

MS BROOK:
That's right Ma'am.

GLAZEBROOK J:
But I suppose we don't know whether he would've been convicted of being there had it been for instance in some of those.

MS BROOK:
In respect of the objectionable images convictions?

GLAZEBROOK J:
Well yes I was thinking in the 2007, we don't whether he would – it's obviously highly likely he would've been convicted of a Crimes Act offence but we don't know that.

MS BROOK:
Well you're right that we don't need to resolve that question because here he has been convicted of doing an indecent act with a child in respect to that 2007 offending.

The reason why, in my submission, well the reason why I was addressing that submission is because the Crown submission is that if convictions are required you are effectively adding another layer of eligibility criteria which not only isn't there in the Crown's submission but isn't necessary because the pervasive pattern of serious sexual offending requirement is but one of a number of steps the Court must go through before and ESO can be imposed and those steps all work together to ensure that only offenders who are at high risk of further sexual offending are made subject to an ESO.

ELIAS CJ:

Does it matter that this is in the Parole Act, this legislation? I'm just thinking about the convictions.

MS BROOK:

Do you mean included in the Parole Act as opposed to a standalone piece of legislation?

ELIAS CJ:

Yes I'm just wondering what the overall context of the legislation is.

MS BROOK:

Well the Parole Board imposes the special conditions of an ESO and essentially administers and the Department of Corrections administers offenders who are subject to extended supervision orders. So in that sense is part of the administration of sentences essentially.

ELIAS CJ:

Yes I just wondered whether it speaks to whether the assumptions are of convictions.

GLAZEBROOK J:

Maybe not because the Parole Act would certainly take wider conduct into account. They'd take conduct in prison into account in a general sense when thinking about parole.

ELIAS CJ:

Yes I'm just thinking about eligibility.

MS BROOK:

Well as to eligibility, parliament was obviously express that convictions are required which the Crown submits suggests that convictions are not necessarily required at the pervasive pattern stage because it would've been a simple matter for parliament to have –

ELIAS CJ:

Well I don't think we would enter into that here because it's not necessary for us to determine that.

MS BROOK:

Yes. So turning then to the question of what this phrase does actually mean and where it is restricted to any particular types of convictions. Obviously the starting point is that the phrase is not defined in the legislation which suggests in my submission –

ELIAS CJ:

Sorry which phrase?

MS BROOK:

The phrase, "Pervasive pattern of serious sexual offending", specifically the phrase serious sexual offending is not defined in the Parole Act which suggests in my submission that parliament didn't intend to restrict it to a particular class of offences as it has done in other contexts and my learned friend drew the Court's attention to the Public Safety Act where serious sexual offending is defined by reference to a very specific list of offences.

ELIAS CJ:

So it's simply ordinary language and it requires an assessment?

MS BROOK:

That's my submission and it's particularly relevant that, as my learned friend accepted, the Public Safety Act and these 2014 amendments were part of a package of reforms that proceeded through parliament at the same time, yet parliament obviously decided to take a different approach to what serious sexual offending meant in each of the two pieces of legislation.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.52 AM

MS BROOK:

Thank you Ma'am. Prior to the adjournment Your Honour the Chief Justice asked me about the burden of proof where the Court is considering whether or not a pervasive pattern of offending has been established and my learned friend Ms Thomson, during the adjournment, has helpfully found a reference that may be of assistance to the Court in the context of preventive detention where the test is similarly that the Court must be satisfied that. The particular decision is *R v Leitch* [1998] 1 NZLR 420 (CA) at page 428 and I'll just read the particular paragraph which is at lines 35 to 40 on that page.

GLAZEBROOK J:

Wasn't that satisfied rather of a – because this doesn't say "satisfied" anyway but wasn't that the risk side of it, if I remember rightly?

MS BROOK:

That is correct but the passage that I'm going to take the Court to is simply directed at what the word "satisfied" might mean in any context. It says, "The need to be "satisfied" calls for the exercise of judgment by the sentencing Court. It is inapt to import notions of the burden of proof and of setting a particular standard, e.g. beyond reasonable doubt. As this court said in *R v White* [1988] 1 NZLR 264 (CA) at 268, "The phrase 'is satisfied' means simply 'makes up its mind' and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification." And obviously that is in a different context.

ELIAS CJ:

Well it's a very different context.

MS BROOK:

But in terms of what "satisfied" might mean, the Crown submission –

WILLIAM YOUNG J:

If you're looking backwards at something of historical fact, there probably is a standard of proof issue that has to be grappled with. If this is treated as part of the sentencing process, which in a sense it is, you might bring in the provisions of the Sentencing Act 2002 which would suggest the aggravating features provision. Anyway it doesn't arise here.

ELIAS CJ:

It doesn't arise here but I don't think *Leitch* is in point here.

MS BROOK:

So we got to the point where the Crown submission was that – the Crown's interpretation rather of serious sexual offending starts from the position that the phrase is not defined in the legislation and that suggests that parliament didn't intend to restrict it to a particular class of offences because it could have done so, as it did in the Public Safety Act which was introduced at the same time. Secondly, that it can't be synonymous with relevant offending or relevant sexual offending because, as I've set out in my written submissions, different words used within the same statute must be interpreted as having different meanings particularly when, as here, they are also used within the same specific statutory provisions and I've set those provisions out at paragraph 43.1 and 43.2 of the Crown's submissions which is at page 12. There are only two occasions in the Parole Act where the phrase "serious sexual offending" is used and on both occasions it is used in the same provision as the term "relevant sexual offence" which supports, in my submission, the Crown's submission that they are not synonymous.

The final observation which may assist in interpretation, is that this phrase is new, it wasn't included in any previous forms of the Parole Act. So there's no assistance to be gained from pre-2014 authorities and since the amendments came into force, we only have a handful of decisions from the Court of Appeal which consider the 2014 amendments and only two of which address the pervasive pattern requirement at all. The first is *Shortcliffe* which my learned

friend referred to and the second is *Wardle v Department of Corrections* [2017] NZCA 298.

In *Shortcliffe,* the Court considered that firstly there was no pattern of sexual offending because there was only two offences committed on the same day which was insufficient to constitute a pattern and secondly, in respect of the possibility of a pattern of serious violent offending, the Court considered that it was not able to reach the finding that the offending in question was serious because there was no information about the underlying facts of that offending and it's not appropriate to simply rely on the nature of the offence for which the conviction had been entered, the maximum penalty or the sentence which had been imposed and my learned friend took the Court through that earlier. In my submission that supports the Crown submission that a factual enquiry is what is required, that's at least been the approach of the Court of Appeal.

The other decision which addressed pervasive pattern was *R v Wardle* which was really concerned with what is serious but my friend now accepts today that a pattern may be established for sexual offending that is serious, even if the individual offences are in isolation perhaps at the lower end of the scale, they my collectively or cumulatively establish a pattern of serious sexual offending.

The appellant's argument as to what the proper interpretation is of serious sexual offending has obviously shifted somewhat this morning from the interpretation that was proposed in the written submissions. It appears now that the submission is that serious sexual offending should be equated with relevant sexual offending and I've already explained why the Crown's submission is that cannot be so.

It is perhaps even more problematic than the original interpretation for the reasons that Your Honour Justice Young pointed out in the course of argument this morning because it would have the effect of excluding the Australian convictions which parliament plainly intended to be considered.

Now my learned friend also referred to the Public Safety Act provisions and of course the term “serious sexual offending” is defined in the Public Safety Act as we’ve already canvassed but he relied on, and this is the document that was handed up to the Court this morning, section 7, subsection (3) of the Public Safety Act which refers to extended supervision orders. I’m not quite sure I fully understood the point that was being made but if it is suggested that that reference to extended supervision orders being imposed for relevant offences that are also serious sexual or violent offences somehow supports the argument that serious sexual offences are as defined in the Public Safety Act, that submission would, in my submission, be misconceived because this provision is about eligibility for or the threshold for imposing public protection orders and one of the possibilities is that section 7, subsection (1b), the person is subject to an extended supervision order with particular conditions attached to it and then subsection (3) provides that it’s not all extended supervision orders which will then be captured by that eligibility threshold, it is only those extended supervision orders which have been imposed for an offence which would also be a triggering offence under the Public Safety Act. So if anything, in my submission, that suggests that serious sexual offending in the ESO context must be broader than in the Public Safety Act.

ELIAS CJ:
They were enacted at the same time.

MS BROOK:
That’s correct Ma’am, they were introduced together, passed through the house together and came into force on the same date.

I now propose at this point to move on to consider what the Crown says can be taken into account in establishing the pervasive pattern and in my submission it’s useful to start with the approach taken by the Court of Appeal at paragraph 55 of their decision which is at page 46 of the Supreme Court case on appeal. The appellant’s approach seems to have assumed that the Court of Appeal took all of the appellant’s offending against the Films, Videos and Publications Classification Act into account in establishing a pervasive

pattern but if you read the decision closely that's not in fact the case. At paragraph 55 the Court of Appeal says that the only offending that they consider is necessary to establish the pattern is the 1990, that should be 1988, that's a typo in paragraph 55, the 1988 Australian offending, together with the 2007 indecent act, that's the Russian offence, and the 2008 importation and possession of objectionable material. "In our view that history is sufficient to constitute a pattern of serious sexual offending." So they did not in fact consider any of the appellant's other offending as to whether or not it might be able to be taken into account because they considered that the pattern was established on those three offences or sexual offences alone and in my submission the difference between the appellant's position and that of the Crown is that the only offending that could not be taken into account that the Court of Appeal did take into account was the 2008 importation and possession of objectionable images and that rather begs the question in my submission whether that really adds anything to the pervasive pattern, given you've got the Australian convictions in 1988 and the indecent act in Russia in 2007, the importation charge was at about the same time as the 2007 conviction and of a similar character because obviously the background was photography to the indecent. So in terms of establishing a pattern, in my submission it would not detract significantly from that pattern if the 2008 importation was not to be considered. Of course the Crown position is that you can take it into account.

ELIAS CJ:

So it's a fallback position?

MS BROOK:

That's correct Ma'am. And the final point I would make is that my learned friend pointed to the passage of time since the most recent conviction and I'll just remind the Court that of course the requirement is that the offender has or have had a pervasive pattern of serious sexual offending. So it is sufficient for the pattern to have existed in the past because there is then of course an entirely separate risk assessment which looks to future risk.

I set out in some details in the written submissions the various statutory interpretation arguments the Crown relies on. I don't propose to take the Court through those in any great detail but I wonder if the Court has any questions for me about that aspect?

ELIAS CJ:
No thank you.

MS BROOK:
In that case, if the Court pleases, those are my submissions.

ELIAS CJ:
Thank you Ms Brook. Mr Pyke do you want to be heard in reply?

MR PYKE:
Yes please, briefly. Just on the question of the Australian offending being part of the definition of relevant sexual offence in section 107B. If the Court turns to page 100 of my bundle, that's got 107B(2), it would actually be captured in the definition of relevant sexual offence under (p) which is a reference to section 144A(1) of the Crimes Act, sexual conduct with children and young people outside New Zealand. So it would all be captured within that definition.

WILLIAM YOUNG J:
But he wasn't prosecuted in New Zealand.

MR PYKE:
But in terms of the definition though, it's a relevant sexual offence in this part. So we don't have to read that conduct in. I knew I'd sort of looked at this issue before and I just couldn't reconstruct my thoughts on it.

WILLIAM YOUNG J:
I wonder if that offence was in place in 1988?

MR PYKE:
You mean 144A(1)? Let's have a look.

GLAZEBROOK J:

I think they were brought in, some of those, after the trafficking protocol and the optional protocols to the children's convention.

MR PYKE:

Yes that replaced an earlier provision in 2006. I'd have to go to the history of that provision to see when it was first enacted. Just looking at it and its terms, yes it is speaking contemporaneously, so it's created that offence whenever that first came into force but the intent plainly is to capture that sort of offending, sexual conduct with children and young people outside New Zealand, so that's not a strained interpretation to count that.

Now I'm not sure how far, in light of the indication that the Court has given about the issue of the assessment of uncharged – of conduct for which there has been no conviction but my learned friend made a submission about propensity evidence, so there would be occasions, probably relatively frequently, where a person goes to trial on this type of offending and propensity evidence is being called. There is authority that where propensity evidence has been called but there's been no conviction for offending disclosed by the propensity, that's not relevant to sentencing and has to be put to one side. The case is called *Iti v R* [2015] NZCA 572. In that case the propensity evidence had been the subject of a successful application for discharge under section 147 of the Criminal Procedure Act 2011 and the Judge took it into account as an aggravating feature on the sentence for the convicted charge and the Court of Appeal reduced the sentence saying that was an error of principle.

The Court didn't deal with the question of propensity evidence where there simply was an absence of a conviction, this was going one stage further, there'd actually been a discharge without conviction but the Court held that the offender in that case was entitled to the benefit of that. The point really being that taking into account offending in inverted commas, that is not proven by conviction would prove to be somewhat of a minefield and would have to be dealt with very carefully and the simpler way is to just deal with convictions

in my submission. I have nothing further in reply, unless I can assist the Court further.

ELIAS CJ:

No, thank you Mr Pyke. Thank you counsel, we will take time to consider our decision in this matter. Thank you for your help.

COURT ADJOURNS: 12.12 PM