**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 21/2023**
**[2023] NZSC 148**

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| BETWEEN | JOSHUA PERA VAN SILFHOUT<br>Appellant |
| AND | UDAYA LAKSHMAN AGAS PATHIRANNEHELAGE<br>Respondent |

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| Hearing: | 18 July 2023 |
| Court: | Winkelmann CJ, O'Regan, Ellen France, Williams and Kós JJ |
| Counsel: | D A Ewen and A L Hill for Appellant<br>No appearance for Respondent<br>D J Perkins, Z R Hamill and I M C A McGlone as counsel assisting the Court |
| Judgment: | 6 November 2023 |

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## JUDGMENT OF THE COURT

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**A The appeal is allowed.**

**B The award of $5,000 to the respondent made by the Victims' Special Claims Tribunal is set aside.**

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## REASONS

**WINKELMANN CJ, O'REGAN AND ELLEN FRANCE JJ**
(Given by Ellen France J)

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## The appeal

[1] This appeal deals with the interpretation of s 64 of the Prisoners' and Victims' Claims Act 2005 (the Act). That section suspends the limitation period, the time limit otherwise applicable to a claim made by the victim of offending against the offender, while the offender is serving a sentence of imprisonment. The issue on the appeal is whether time spent in remand prior to sentence counts to suspend the limitation period.

[2] The issue arises in this way. In early July 2010 the appellant, Mr van Silfhout, went into a service station where the respondent, Mr Pathirannehelage, was working on his own. The appellant had a weapon. He threatened Mr Pathirannehelage and took money and cigarettes. The appellant was subsequently charged and convicted of aggravated robbery. He was sentenced to four years and three months' imprisonment.[1]

[3] On 21 January 2020, the Department of Corrections agreed to pay the appellant $12,000 (GST included) compensation for an alleged breach of privacy. The Prisoners' and Victims' Claims Act requires this money (less minor deductions) to be paid into a trust account to be available for victims' claims. In general terms, the Act relevantly provides that when an imprisoned offender recovers compensation from the

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1 *R v Van Silfhout* DC Tauranga CRI-2012-070-6107, 13 May 2014.

State for breaches of human rights or interferences with privacy, victims of the crime committed by that offender can, themselves, make a claim to the Victims' Special Claims Tribunal for compensation against the prisoner. The Tribunal decides whether the victim is entitled to compensation. If so, the compensation payment is to be met, to the extent that it can be, from the amount earlier awarded to the offender.

[4] In this case, upon receiving a claim from the respondent in April 2020, the Tribunal made an award of $5,000 to the respondent.[2] The Secretary for Justice was directed to pay that sum from the amount held in trust to the respondent.

[5] The appellant appealed the decision to the High Court. His case was that the respondent's claim had been filed too late so that it was time-barred under the Limitation Act 1950.

[6] Section 64 of the Prisoners' and Victims' Claims Act, as we have indicated, suspends the six-year limitation period that would otherwise apply "while the offender is serving a sentence of imprisonment" for the offending giving rise to the claim "in a penal institution, prison, or service prison". We will discuss other relevant provisions in the Act and elsewhere shortly. If the words "serving a sentence of imprisonment" include time spent in prison on remand, the respondent's claim was brought in time. That is because the six-year limitation period which applied would have been suspended for about a year and three and a half months when the appellant was remanded in custody.[3] If those words do not include pre-sentence detention, the respondent's claim was out of time.

[7] The High Court dismissed the appellant's appeal.[4] His appeal to the Court of Appeal was also unsuccessful.[5] Both Courts found that the words "serving a sentence of imprisonment" included pre-sentence detention. In doing so, they relied on wording in the Parole Act 2002 about how "time served" under that Act is calculated. Both Courts accordingly found that the claim by the respondent was brought in time.

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2 *Pathirannehelage v Van Silfhout* [2021] NZVSC 3 (Judge Blackie).
3 Limitation Act 1950, s 4(1). The 1950 Act applies by virtue of s 59 of the Limitation Act 2010.
4 *Van Silfhout v Pathirannehelage* [2021] NZHC 2268 (Cooke J) [HC judgment].
5 *Van Silfhout v Pathirannehelage* [2023] NZCA 5 (Miller, Brown and Katz JJ) [CA judgment].

[8] The appellant says that the Court of Appeal was wrong. He argues, instead, that the Prisoners' and Victims' Claims Act is clear that the words in issue only include time spent in prison after sentence and that when the Act is read as a whole, the Parole Act approach (which would incorporate pre-sentence detention on remand in prison) does not apply.

[9] The respondent has played no part in the appeal. Accordingly, so that we could hear argument to the contrary to that advanced by the appellant, counsel for the Secretary for Justice was appointed to assist the Court by providing those opposing arguments. The Secretary for Justice supported the decision of the Court of Appeal, arguing that s 64 of the Prisoners' and Victims' Claims Act cannot be read in isolation from the Parole Act.

**Background facts**

[10] The six-year limitation period for the respondent to make his claim under the Act started running on 9 July 2010, the date of the aggravated robbery.[6] The appellant was not arrested and charged until some time later. He was remanded in custody on 30 January 2013. He remained on remand until 12 May 2014 and was sentenced the following day.

[11] The appellant was released on parole on 21 November 2016 and was subject to an interim recall order on 1 March 2017. He was detained again in prison under the recall order from 2 March 2017 and then released on his sentence expiry date on 2 May 2017. As we have noted, the Department of Corrections agreed to pay him compensation on 21 January 2020. The respondent's claim for compensation for emotional harm was subsequently received on 2 April 2020.

[12] The issue in the case is, as we have indicated, whether the period of one year and three and a half months on remand in custody had the effect of suspending the limitation period. If the limitation period was not suspended whilst the appellant was

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6 There is a lack of clarity about whether the robbery took place on 8 or 9 July 2010. We follow the Tribunal, High Court and Court of Appeal in referring to 9 July. The appellant's chronology refers to 8 July. Nothing turns on this difference.

remanded in custody prior to sentence, the respondent's claim would have been at least 10.5 months out of time.[7]

**The statutory framework**

[13] As the Court of Appeal noted, the Prisoners' and Victims' Claims Act was a legislative response to the judgment in *Taunoa v Attorney-General*, which awarded damages for breaches of the New Zealand Bill of Rights Act 1990 to prisoners who had been subjected to the Behaviour Management Regime, a programme then in operation at Auckland Prison.[8] The Court of Appeal adopted the submission from Mr Ewen for the appellant that "there was a perception that something had gone very far awry when prisoners were being awarded large amounts of compensation on their claims without the ability for victims to make claims against that sum".[9]

[14] The Act has two Parts. Part 1 sets out the general provisions. Part 2 sets up the regimes for prisoners' and victims' claims. As Mr Perkins, counsel for the Secretary of Justice, submitted, Part 2 of the Act is doing a number of different things. That is apparent from s 3 of the Act which sets out a series of purposes. Section 3(1) provides that the purpose of subpart 1 of Part 2, the subpart dealing with prisoners' claims, is "to restrict and guide the awarding of compensation sought by specified claims" and, this, "in order to help to ensure that the remedy of compensation is reserved for exceptional cases and used only if, and only to the extent that, it is necessary to provide effective redress".

[15] Section 11 of the Act gives an overview of this subpart, which is all we need note for present purposes. Section 11 provides as follows:

> To help to achieve its purpose, when compensation is sought from a court or tribunal by a specified claim, this subpart—

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7 For completeness we note that there was another period during which the limitation period was suspended in this case under s 64B of the Prisoners' and Victims' Claims Act 2005. That suspension addresses the period until the standard statutory deadline for filing a victim's claim. The only point we need to make about this aspect is that, in agreement with the Court of Appeal, we consider the better reading of s 64B is that the limitation clock stops running when notice is given to the victim of payment into the Secretary's account. This is what s 28(1)(a) and (3) appear to envisage. See CA judgment, above n 5, at [5], n 5. Compare Williams and Kós JJ below at [65].

8 *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC).

9 CA judgment, above n 5, at [7]. See also (14 December 2004) 622 NZPD 17987; and Prisoners' and Victims' Claims Bill 2004 (241-2) (select committee report) at 1.

(a) ensures compensation is not awarded unless the plaintiff has first made reasonable use of the specified internal and external complaints mechanisms reasonably available to him or her; and

(b) requires other remedies to be used if, in the particular circumstances, they are capable, alone or in combination, of providing effective redress; and

(c) encourages timely mitigation of loss or damage by the plaintiff and the defendant if that is reasonably practicable; and

(d) ensures the court or Tribunal takes into account specified matters (including the extent (if any) to which effective redress has been, or could be, provided otherwise than by compensation) before awarding compensation.

[16] The stated purpose of subpart 2 of Part 2, which deals with claims by victims, is to:[10]

(a) establish, require payments into, and regulate the operation of, a victims' claims trust bank account; and

(b) provide a procedure for the making and determination of victims' claims.

[17] The regime set up by subpart 2 makes provision for a trust account into which compensation payments are to be placed. It also allows victims to pursue claims under a speedier and less expensive process. Under s 18 of the Act, certain sums are to be deducted from the amount paid into the trust account, for example, to meet charges under the Legal Services Act 2011, and any reparation outstanding.

[18] The key section for present purposes, that is s 64, is found in subpart 3 of Part 2. The stated purpose of that subpart does not advance matters in terms of the question for us. That purpose is "to suspend the running of limitation periods for certain claims by victims".[11]

[19] Section 63 makes it clear that s 64 applies to applicable limitation periods for actions based on a claim made by or on behalf of a victim, against an offender, and based on acts done or omitted to be done by the offender in committing the offence.

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10 Section 3(2).
11 Section 3(3).

[20] Section 64 provides as follows:

> **64 Limitation periods suspended while offender serving sentence of imprisonment**
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> (1) The limitation periods to which this section applies cease to run while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison.
>
> (2) In this section, **serving a sentence of imprisonment in a penal institution, prison, or service prison**—
>
> (a) means serving in a penal institution, prison, or service prison—
>
> (i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii)); and
>
> (ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and
>
> (iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and
>
> (b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act 2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

[21] Section 5(1)(a) provides that an offender in relation to a victim "for the purposes only of subpart 3 of Part 2" (the part dealing with the suspension of the limitation period) means:

> … a person—
>
> (i) convicted (alone or with others) by a court or the Court Martial of the offence that affected the victim; and
>
> (ii) on whom a court or the Court Martial has, because of the person's conviction for that offence, imposed a sentence of imprisonment (the **sentence of imprisonment for the offence**);

[22] For all other purposes, an offender is relevantly defined in s 5(1)(b) as a person found guilty by a court of the offence that affected the victim, or found guilty of that offence by a disciplinary officer under the Armed Forces Discipline Act 1971, or who pleads guilty to that offence.

[23] Section 5(2) makes it clear that for the purposes of s 5(1)(a) it is immaterial whether, at the time the court imposed the sentence of imprisonment, the person was already subject to, or was at that time or later also made subject to, a sentence of imprisonment for another offence or offences.

[24] The "sentence of imprisonment" referred to in both ss 5 and 64 is also a defined term. Relevantly, the term means a sentence of imprisonment imposed under any one or more enactments, such as the Sentencing Act 2002.[12] It includes both determinate and indeterminate sentences of imprisonment but excludes, for example, imprisonment for non-payment of a sum of money.

[25] We come back shortly to the detail of the relevant provisions of the Parole Act but note at this point that the critical provision, s 90, includes the period spent in pre-sentence detention for the purposes of calculating the "key dates" (start date, sentence expiry date and release date)[13] and non-parole period of a sentence of imprisonment.

**The earlier decisions**

*The decision of the Victims' Special Claims Tribunal*

[26] Judge Blackie considered the claim for $10,000 compensation for emotional harm suffered by the respondent. In light of similar cases, he awarded the respondent $5,000.

[27] In terms of the limitation period, it appears that the Judge considered that further periods of imprisonment imposed for unrelated offending subsequently also had the effect of stopping the limitation clock. That is, it was not necessary for the sentence to have any nexus to the offence committed against the victim seeking compensation. The Judge said this:

> [8] … Although the offending occurred in July 2010 and, therefore, the normal limitation period, by which time a claim would need to have been filed, would have expired in July 2016 on account of the respondent having been sentenced to a period of imprisonment for four years and three months in 2014

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12 Section 4.
13 Parole Act 2002, s 4.

> and, indeed, further sentences of imprisonment thereafter, the claimant was within the limitation period when his claim was received on 2 April 2020.

[28] It was common ground in the High Court that this approach was not correct.[14] First, it is only the time served in prison that is excluded rather than simply deducting the total sentence imposed. Secondly, the sentence of imprisonment which may trigger suspension under s 64 is the sentence imposed for the offence to which the Tribunal claim relates.

*The High Court decision*

[29] Cooke J dealt first with the statutory purpose. The Judge determined there were two purposes, as follows:

> [39] … the limitation period is extended, and the running of limitation period suspended, whilst the prisoner is serving the sentence of imprisonment for the offending involving that victim. That is because it is usually futile to seek to sue prisoners whilst in prison, and there is also a nexus between the relevant imprisonment and offending against that victim.

[30] The High Court then turned to the ordinary meaning of s 64. The Judge considered that the ordinary meaning of the words "while the offender is … serving in … prison … the sentence of imprisonment for the offence" were those that people more familiar with the context would adopt. Cooke J said that "[t]hose familiar with the context [of the way that sentencing works] understand that 'time served' includes pre-sentence detention".[15]

[31] The Judge considered that this approach was consistent with the statutory purposes. That was because, first, pre-sentence detention along with that post-sentence, involve a period where it might be futile for the victim to try to sue the prisoner. Second, the pre-sentence detention would normally be for the particular offending against the victim, thereby creating a nexus to the offending making it fair or just for the suspension period to be engaged. The Judge went on to consider other factors. Essentially, the Judge considered that the way in which the sentencing regime provided for in the Sentencing and Parole Acts operates "as a matter of fact and law"

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14 HC judgment, above n 4, at [25].
15 HC judgment, above n 4, at [44].

could be said to be the "starting point for understanding the regime established" by the Prisoners' and Victims' Claims Act.[16]

*The Court of Appeal decision*

[32] The Court of Appeal began by identifying the statutory purpose. Like the High Court, the Court did not find a great deal of assistance in the statement of the purpose for the relevant subpart in the Act. The Court of Appeal accepted the High Court's statement of the purposes set out at [29] above.[17]

[33] The Court of Appeal accepted the submission for the appellant that the "trigger" for the suspension of the limitation period "comprises the dual events of conviction and sentence in respect of the offence which affected the victim making a claim".[18] But the Court did not accept what had been the second step of the argument for the appellant, namely, that the period of suspension must post-date the occurrence of both those events.

[34] The Court made four points about s 64 which it saw as providing a formula for calculating how long the limitation period would be suspended. First, the Court noted that this formula was not limited to the "sentence of imprisonment for the offence" as defined in the Act. Rather, it extended to associated cumulative sentences "and to particular instances of prison detention consequent upon recall from parole".[19] The next point made was that the period of suspension was not limited to "future directed" service of the sentence but, because of s 64(2)(a)(ii), included serving "earlier sentences of imprisonment on which the victim-affected sentence of imprisonment" was to be served cumulatively.[20]

[35] Third, the Court considered it was inherent in the "extended definition" that calculating the period of any suspension would inevitably involve a retrospective analysis.[21] That was seen as apparent from both the possibility of a subsequent

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16 At [53].
17 CA judgment, above n 5, at [35].
18 At [39].
19 At [41].
20 At [42].
21 At [43].

cumulative sentence as envisaged in s 64(2)(a)(iii) and from the fact the calculation of time spent in detention included recall from parole but only where a final recall order was made. Finally, the Court said:

> [44] … the reference in that bespoke definition to such concepts which are the subject of the sentencing and parole legislative regimes necessarily imports those concepts into subpt 3. It follows in our view that the sentencing and parole regimes are thereby a part of the subpart's context, in the light of which the meaning of s 64(1) is to be ascertained.

[36] In addition, the Court considered that its approach resulted in parity with the effect of s 177A of the Armed Forces Discipline Act.

[37] Whether the Courts below were correct turns on the interpretation of the statutory scheme.

**The approach to interpretation and statutory purpose**

[38] In determining whether the Court of Appeal was correct to treat the Parole Act regime as part and parcel of the relevant provisions of the Prisoners' and Victims' Claims Act, there is no dispute that it is necessary to consider both the text and purpose of the latter Act and that context is relevant.[22]

[39] Nor is there any real challenge to the assessment of the Courts below that the purpose of the Act in suspending the limitation period was to facilitate the making of claims by victims. In particular, there was a recognition of both the futility of seeking to sue offenders whilst the offender is in prison and of the link between the relevant imprisonment and the offending against the victim seeking compensation from the offender. In terms of the latter point, the Act envisages prisoners might come into funds (as the appellant did), recognises that this makes successful claims by victims possible, and seeks to make it easier to bring those claims.

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[22] Legislation Act 2019, s 10; and see also *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

**Summary of submissions**

[40] The case for the appellant is that the relevant context here is provided by the limitations under the Limitation Act, not the Sentencing or Parole Acts. The Prisoners' and Victims' Claims Act makes specific provision for the application of the Parole Act provisions and otherwise those provisions are only relevant where it is necessary for them to apply in order for the Act to work. The appellant says that, based on its clear wording, s 64 applies to an offender serving a sentence of imprisonment, which means that the defendant has to have been found guilty and sentenced for the relevant offence.

[41] Counsel assisting the Court say that the Prisoners' and Victims' Claims Act cannot be read in isolation from the Parole Act because the Parole Act regime is central to calculation of the period of time the offender will serve in prison. In particular, when an offender is sentenced to imprisonment, the Parole Act deems any time spent in pre-sentence detention to form part of the time served under the sentence. The argument is that to the extent the Parole Act applies pre-sentence detention to sentence calculation, it must apply equally to s 64. Further, the point is made that the sentence imposed is that imposed under the Sentencing Act.

[42] It is also submitted that s 64 is to be construed as an exception to the general position in terms of limitation periods. It has been seen as appropriate to strike the balance differently from the general position in order to achieve the statutory purpose of the suspension provisions.

[43] We address additional detail in the submissions as necessary in the discussion that follows.

**Does time spent on remand suspend the limitation period?**

[44] Section 90 of the Parole Act is central to the approach adopted by the Court of Appeal and to the arguments before us. It is helpful at this point to set out the relevant provisions of the Parole Act. The starting point is s 89 which makes it clear that in determining time served, the provisions in the relevant subpart, which

include s 90, apply. Section 90 specifies that time served includes pre-sentence detention. We set out s 90 in full:

> **90 Period spent in pre-sentence detention deemed to be time served**
>
> (1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender's statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.
>
> (2) When an offender is subject to 2 or more concurrent sentences,—
>
> (a) the amount of pre-sentence detention applicable to each sentence must be determined; and
>
> (b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence.
>
> (3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.

[45] It is clear from s 91, which defines "pre-sentence detention", that time on remand is included. Section 91(1) states as follows:

> (1) **Pre-sentence detention** is detention of a type described in subsection (2) that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
>
> (a) any charge on which the person was eventually convicted; or
>
> (b) any other charge on which the person was originally arrested; or
>
> (c) any charge that the person faced at any time between his or her arrest and before conviction.

[46] We consider that the approach adopted by the Court of Appeal and supported by counsel assisting is not the correct interpretation of s 64. We say that for a number of reasons.

[47] First, it is plain on its face that s 90 of the Parole Act is a deeming provision for a particular purpose. That stated purpose is to assist in defining key dates for the purposes of undertaking calculations necessary for the administration of the sentence.

Whilst the key dates include the start date that is, again, just a deemed date to enable calculations to be easily undertaken. It is not directed to the status of the incarceration, but it is the status of incarceration which is in issue here. It is not apparent why s 90 should be used to determine that different issue. Indeed s 89 and the opening words to s 90(1) are explicit that it applies only for the purposes of undertaking those calculations. As to that, Mr Ewen directs us to other parts of the Parole Act, for example, to s 76(1) which provides that the start date of a sentence is the date on which the sentence is imposed, subject to ss 77–81.[23]

[48] Second, contrary to the view adopted by the Court of Appeal, we consider that the specific references to the impact of cumulative sentences in s 64(2)(a)(ii) and (iii) and to the effect of recall in s 64(2)(b) would be redundant if the Parole Act applied. In other words, it would not be necessary to make provision for those situations if the sentencing and parole regime governed the situation. The other side of the coin is that, as Mr Ewen submits, there is no necessity to incorporate the latter regime here. Where the broader sentencing regime applies, the Act makes that clear, for example in the definition of a sentence of imprisonment in s 4. We therefore disagree with the Court of Appeal that s 90 applies as a matter of necessity.

[49] Third, the phraseology used in s 64 suggests a prospective element. The limitation periods which "cease to run" do so while the offender "is serving" the sentence of imprisonment. The Court of Appeal's approach imposes a level of retrospectivity and, contrary to the view of the Court, we do not see s 64 as inevitably involving some retrospectivity.[24]

[50] We accept Mr Perkins' point that the phrase "cease to run" reflects the broader limitation context.[25] But clearer language would be needed to enable the inference to be drawn that the limitation period is also suspended by the period during which the

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23 "Start date" is defined, in relation to a sentence of imprisonment, as "the date on and from which an offender who is subject to the sentence begins to be subject to it": Parole Act 2002, s 4.

24 The Secretary for Justice need not give the notice otherwise required to a victim or take steps to ascertain the contact details of a victim where the Secretary believes on reasonable grounds a limitation defence may be successful: Prisoners' and Victims' Claims Act, ss 21(5) and 24(5). But that says nothing about the extent to which the words "is serving" are prospective.

25 See *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [156] per McGrath, Glazebrook and Arnold JJ.

offender is, subsequently, "deemed to be serving" the sentence by virtue of s 90. Contrary to the submissions from counsel assisting, we consider those additional words would effectively have to be read into s 64.

[51] The fact that s 64 applies to an "offender" also highlights problems with the interpretation adopted by the Court of Appeal. Mr Perkins argues that it is difficult to draw much from the different subparts of the Act as they have different purposes. That is true. However, an "offender" is defined, as we have seen in s 5, for the purposes of the limitation periods specifically. An offender is a person who has been convicted of the relevant offence and had a sentence of imprisonment imposed. The effect of s 64 is that, from the point after that, the limitation period is suspended. Again, that suggests a forward-looking rather than a retrospective approach. Further, the special purpose definition makes no reference to the Parole Act.

[52] For these reasons, we consider that the textual considerations do not support treating the Parole Act as effectively governing the meaning of s 64.

[53] Nor do we see the approach we have adopted as contrary to the statutory purpose. Obviously the respondent's claim, on our approach, would be time-barred and we accept that an expansive approach was intended towards the facilitation of claims by victims. But that general point does not add particularly to the question that has arisen here where quite how broad the approach was intended to be is not apparent from the legislative history. Indeed, the legislative history does not indicate that specific attention was given to the impact of time spent on remand on the limitation periods.[26]

[54] Both the appellant and counsel assisting pointed to examples of arbitrary consequences under either of the interpretations advanced. The most that can be drawn from these examples is that they serve only to highlight tensions apparent in the legislative scheme. Nor do we consider the references to the wording "serving a sentence of imprisonment" in other legislative contexts of assistance.

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[26] The passages relied on by counsel assisting serves only to emphasise the point. See, for example, (1 June 2005) 626 NZPD 21016–21017.

[55] Our conclusion is that clearer words were necessary to strike the balance in the way in which the Court of Appeal has done. We consider s 90 applies for a specific purpose and does not change the prior character of remand time for the purposes of s 64. This Court is of the view that, under the Prisoners' and Victims' Claims Act, the time spent in remand by the appellant prior to sentence does not count to suspend the limitation period.

**Costs**

[56] Mr Ewen has not yet submitted an account for his costs. He is concerned that if he makes a claim for those costs on the legal aid fund, that sum will then be clawed back from the funds held by the Secretary for Justice in the trust account under the Prisoners' and Victims' Claims Act. The result would be that the appellant would receive no funds himself although successful.

[57] In these circumstances, Mr Ewen asks the Court to indicate that this is a case where it would be just and equitable for the Legal Services Commissioner to exercise the statutory power to write off the costs.[27] Mr Ewen submits the appellant should not have to bear the cost of clarifying an important point of interpretation of the Act. Counsel for the Secretary of Justice had no objection to our making an indication to that effect.

[58] We agree it is appropriate to indicate it would be unfair for the appellant to foot the bill in these circumstances.

**Result**

[59] The appeal is allowed. The award of $5,000 to the respondent made by the Victims' Special Claims Tribunal is set aside.

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[27] Legal Services Act 2011, s 43(1)(c).

**WILLIAMS AND KÓS JJ**

[60] We accept the text of the Prisoners' and Victims' Claims Act 2005 (the Act) compels the conclusion reached by the majority. Any prisoner,[28] whether an accused person or a convicted offender, can bring a claim against the Crown under the Act. However, due to s 28(1)(b), the Victims' Special Claims Tribunal must be able to point to a convicted offender before a victim is entitled to file a claim. So, Parliament well appreciated the distinction between remand detainees and sentenced prisoners when it established the alternative Tribunal claim system for victims and altered the ordinary limitation rules that would otherwise have applied to their claims. It is clear s 64 suspends any limitation period only *after* the prisoner is convicted of the relevant offence and *while* serving a prison sentence for that offending or any other earlier sentence on which the prison sentence is directed to be served cumulatively or later sentence that is directed to be served cumulatively on it.[29] To import (and repurpose) s 90 of the Parole Act 2002 into the Prisoners' and Victims' Claim Act would amend that architecture and so is impermissible by mere implication.

[61] We therefore concur in the result, but wish to add some observations on the effect of the legislation. It has some peculiar consequences that might justify Parliamentary reconsideration.

[62] We start by noting that the exact policy objective of Parliament in using the Act to modify limitation periods is very difficult to infer. It seems best found in the explanatory note to the Prisoners' and Victims' Claims Bill 2004:[30]

> It is often futile to contemplate proceedings while the offender is in prison; by the time he or she is released, the normal limitation period of 6 years may have expired. For victims of offenders sentenced to prison, the Bill overcomes this difficulty by providing that the period ceases to run while the offender is in prison.

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28 Under s 6(1) of the Prisoners' and Victims' Claims Act 2005, a "specified claim" may be made by a "person under control or supervision" which, by virtue of s 4, includes a "prisoner". A prisoner, in turn, includes any person (who is not a service detainee or a service prisoner) for the time being in legal custody under the Corrections Act 2004.

29 Prisoners' and Victims' Claims Act 2005, ss 5(1)(a) and 64(2)(a). The other sentences made cumulative with that for the offending against the victim need not themselves have involved the same victim.

30 Prisoners' and Victims' Claims Bill 2004 (241-1) (explanatory note) at 4.

However, to state the obvious, the practical futility of bringing proceedings is identical whether the defendant is in prison on remand, or in prison as a sentenced prisoner. That reality underlay the conclusions reached in the Courts below.

[63] Although the Minister of Justice suggested in Parliament that the limitation period would be suspended whenever the offender was in prison,[31] the words adopted cannot bear that meaning. It is only time served under the sentence *relating to the offending against the victim* that stops the clock (along with other earlier or later sentences made cumulative with it).[32]

[64] So, s 64 has the effect of modifying limitations for the *underlying* claim against the offender. In the present case, that was a claim for emotional harm arising from an armed assault, to which a six-year limitation period applies. The Act presents the victim with a procedural choice. The victim may bring the claim in the courts, or in the Tribunal created by the Act. But there is an election; only one route may be adopted. If, knowing there are funds held on trust that may be accessed, the victim chooses the simple, cheap Tribunal procedure,[33] any claim already made in the courts must be discontinued.[34] And, as noted earlier, the Tribunal claim may only be brought after the defendant has the status of "offender" (i.e. has been convicted) *and* the victim has received notice that a payment has been received by the offender which is being held in trust.[35] Here, by the time the respondent received the notice his underlying claim was already out of time.[36]

[65] Sections 64A and 64B[37] then create a further suspension of time for claims made via the Tribunal: where a claim is made against prisoners' money held by the Secretary for Justice, limitation periods "cease to run" until the statutory deadline expires.[38] That is when the clock restarts if no claim has been filed. But when would

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31 See (14 December 2004) 622 NZPD 17988; and (12 May 2005) 625 NZPD 20556.
32 Sections 5(1)(a) and 64.
33 For instance, s 29 provides that no filing fees are payable.
34 Section 28(1)(c).
35 Section 28(1)(a) and (b).
36 Time expired on 21 March 2019, being six years after the assault plus the 985 days he spent in prison as a sentenced prisoner for that offence.
37 Inserted by s 13 of the Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013.
38 Section 28(3) sets the standard statutory deadline which is generally six months after the sending date of the notice.

it have *stopped*? One view is that it stops on the receipt of money by the Secretary under s 17. That at least seems to be what the relevant select committee thought was intended when the 2013 amendments were made.[39] A second view is that it stops on notice being given.[40] A third view is that it only stops when the subject of the claim has become an "offender", as s 64A(b) perhaps hints at.

[66] A potential problem with s 28 and one that affects all three interpretations above is that, although notice can be given where the perpetrator is still only an accused person, the victim cannot then file a claim until the accused becomes an "offender" upon conviction. Changing from an accused to an offender may well happen more than six months after notice is given, so time then would restart before a qualifying claim could be made and potentially count it out—a course inviting the accused/offender to game the criminal justice system in order to keep the money.[41]

[67] Apart from these difficulties, the limitation period continues to run against the victim where the defendant is incarcerated on remand until a sentence of imprisonment is imposed.[42] This has some odd effects.

[68] First, as the Courts below noted, the post-sentence period of imprisonment might be very short indeed. Potentially no time at all, if the whole sentence is already time served as is rather too often the position given post-COVID backlogs.[43] In such a case the limitation clock never stops,[44] despite what may be a substantial period spent by the offender in prison (on remand) where, in substance, they are serving pre-emptively, the sentence eventually imposed.

[69] Secondly, it also has the curious outcome that where there are two indistinguishable co-offenders, one of whom pleads guilty early, the other remanded

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39 The Justice and Electoral Committee noted the amendment "would also clarify that the Act … would suspend the civil limitation period for victims' claims when compensation was paid to the Secretary for Justice, recommencing following the deadline for victims to file a claim against the compensation": Prisoners' and Victims' Claims (Continuation and Reform) Amendment Bill 2013 (92-1) (select committee report) at 2.

40 The Court of Appeal considered this second approach the correct one: *Van Silfhout v Pathirannehelage* [2023] NZCA 5 (Miller, Brown and Katz JJ) at [5], n 5.

41 Though we note s 28(4) allows the Tribunal to extend the deadline for a claim to be filed.

42 Subject to s 64B, which we have just discussed.

43 Because of s 90 of the Parole Act 2002, discussed above at [44].

44 With the potential exception of the application of ss 64A and 64B.

in custody, limitations would run differently as between them. This would be despite the fact that, guilty-plea credit apart, their sentences would be identical and they would have both been incarcerated since the date of arrest.

[70] Thirdly, where neither co-offender pleads guilty, but one is remanded on bail, and the other is remanded in custody, again limitations run differently. The offender remanded in custody will serve a shorter-duration sentence post-sentencing (because of the s 90 credit of time served), and the suspension of time for the victim to claim against them would be commensurately shorter.

[71] Fourthly, consider the position where the accused pleads guilty in relation to some victims but not guilty in relation to others (as can occur in historic sex offending cases) and is remanded in custody. Limitations would run differently even if the accused were eventually convicted at trial on the not guilty pleas. That would also be the position in the case of multiple defendants in relation to offending against a single victim if some defendants entered guilty pleas and others did not. We see no good reason to distinguish between these differently situated victims for limitation purposes.

[72] Fifthly, we record counsel assisting's acknowledgement that s 64 is silent on the subject of concurrent sentencing. Where sentencing is concurrent, a lead offence is identified and its sentence is uplifted to reflect the totality of the offending being sentenced. Non-lead offences then receive shorter concurrent sentences. The victim of a non-lead offence will find the limitation period for their claim restarts as soon as that shorter sentence is completed, despite the offender remaining in prison on the lead offence sentence. If that is the case, it seems illogical.

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