**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 12/2025**
**[2026] NZSC 82**

| | |
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| BETWEEN | TYSON WADE FRANCIS REPIA<br>Appellant |
| AND | THE KING<br>Respondent |

| | |
|---|---|
| Hearing: | 14 August 2025 |
| Court: | Winkelmann CJ, Glazebrook, Ellen France, Kós and Miller JJ |
| Counsel: | P K Hamlin, S J Gray and S J R Baird for Appellant<br>M J Lillico and I L M Archibald for Respondent |
| Judgment: | 23 June 2026 |

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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**REASONS**

**ELLEN FRANCE, KÓS AND MILLER JJ**
(Given by Kós J)

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## Introduction

[1] Section 10(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) provides that if before trial a defendant is found unfit to stand trial:[1]

> The court must decide whether the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant *caused the act or omission that forms the basis of the offence* with which the defendant is charged.

This "involvement hearing"—the second of the three steps prescribed where unfitness to stand trial is in issue—is critical to the eventual disposition of the defendant. If s 10(2) is not satisfied, the charge against the defendant must be dismissed, and he or she must be released.[2]

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1 Emphasis added.

2 Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], s 13(2). The tripartite fitness-involvement-disposition process is explained in more detail in this Court's recent decisions in *T (SC 95/2024) v Te Whatu Ora Health New Zealand* [2025] NZSC 119, [2025] 1 NZLR 590 at [7]–[15]; and *Bailey v R* [2026] NZSC 20 at [37]–[44] per Glazebrook, Ellen France, Williams and Kós JJ.

[2] How then does s 10(2) apply to the crime of sexual violation, with which Mr Repia has been charged? He is a defendant found unfit to stand trial. The essential elements of sexual violation are three: (1) intentional penetration; (2) absence of complainant consent; and (3) *absence of reasonable belief by the defendant that the complainant consented*.[3] Only the third element is in issue here.

[3] The question posed by this appeal is whether the Crown is required, at a s 10 involvement hearing, to establish that third element.

[4] The Crown says absence of reasonable belief in consent is not part of the s 10(2) causation inquiry. It says the words of s 10(2) can capture only the first two elements—penetration and absence of consent—and that it would be undesirable and impractical to consider mens rea elements such as reasonable belief in consent when their absence may have been due to the very condition rendering the defendant unfit to stand trial.

[5] Mr Repia says absence of reasonable belief in consent is an essential part of the guilty act addressed by s 10(2), which is not limited to the actus reus of the offence. So, the Crown needed to establish, on the balance of probabilities, that he also lacked a reasonable belief that the complainant was consenting at the relevant time.

[6] This issue has been addressed by all three Courts below prior to this appeal. All adopted the Crown's interpretation.[4] The Court of Appeal held that the s 10(2) inquiry is confined to the actus reus and, where relevant, "a mental element integral to the actus reus or a defence of mistake, accident or self-defence".[5] That did not include absence of reasonable belief in consent in a case of sexual violation.

[7] This Court granted Mr Repia leave to appeal.[6] The approved question was whether the Court of Appeal was correct to dismiss Mr Repia's appeal on the basis

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3 Crimes Act 1961, s 128. See further below at [64].

4 *R v Repia* [2021] NZDC 7278 (Judge Gibson) [DC judgment]; *Repia v R* [2022] NZHC 1441 (Harvey J) [HC judgment]; and *Repia v R* [2024] NZCA 677 (French, Courtney and Collins JJ) [CA judgment].

5 CA judgment, above n 4, at [54].

6 *Repia v R* [2025] NZSC 59 (Ellen France, Williams and Kós JJ).

that his reasonable belief in consent was excluded from inquiry in the involvement hearing under s 10 of the CPMIP Act.

## Background

[8] Mr Repia faced three charges of sexual violation (one by rape and two by unlawful sexual connection). They arose from an incident in October 2019 when he and the female complainant were inpatients at the same mental health unit. A nurse at the unit gave evidence of finding Mr Repia on his bed, on top of the complainant. It is not necessary to record the precise details here; it is not in issue that intentional penile and digital penetration occurred and that the complainant did not consent to any of it. Those acts would constitute sexual violation, so long as the Crown could also prove Mr Repia did not believe on reasonable grounds that the complainant consented.[7]

[9] In August 2020, Judge P J Sinclair found Mr Repia unfit to stand trial.[8] Expert evidence by two psychiatrists confirmed he suffered from schizophrenia that was continuous and treatment-resistant and characterised by auditory hallucinations, as well as persecutory and grandiose delusions.[9] He also suffered from psychosis. His thought processes were disorganised, and he had poor insight into his mental illness. He had had six prior admissions to psychiatric care in the last seven years, and three admissions to respite care. Judge Sinclair found he had a mental impairment.[10]

[10] The judgment traversed difficulties arising particularly from Mr Repia's disordered thought processes. While he had a basic understanding of pleading, he denied having a mental illness at all. His capacity to follow, concentrate on and participate in a criminal trial was precluded by his cognitive impairment and disordered understanding and speech.[11] The Judge found:

> [25] I am quite satisfied Mr Repia would not be able to perform simple trial functions. He certainly would not be able to effectively participate in

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7 Crimes Act, s 128(2)(b) and (c). We set the relevant evidence out in more detail below at [72]–[74].

8 *R v Repia* [2020] NZDC 16001 [Fitness judgment].

9 Persecutory delusions involve fixed beliefs that one is going to be harmed, harassed and so on; and grandiose delusions, that one has exceptional abilities, wealth or fame: American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (5th, revised ed, Washington, 2022) at 101.

10 Fitness judgment, above n 8, at [7].

11 At [8]–[28].

> trial, and given his likely plea, he may elect to give evidence. His capacity to understand the Court proceedings, to understand the effect of the prosecution evidence and his ability to cope with cross-examination would be severely hampered by his thought disorder.

[11] There was no challenge to this finding of unfitness. In accordance with s 10(1), Mr Repia was then referred to an involvement hearing. That took place in March 2021 before Judge Gibson. Before discussing that decision, and the appellate decisions that followed it, we will describe the legislative framework in more detail.

## Legislative framework

[12] We start with the words of the legislation, and then move to the relevant legislative history preceding it.

### *Legislation*

[13] Section 8A of the CPMIP Act, which deals with assessment of a defendant's fitness to stand trial, provides relevantly as follows:

> **8A Determining if defendant unfit to stand trial**
>
> (1) The court must receive the evidence of 2 health assessors as to whether the defendant is mentally impaired.
>
> (2) If the court is satisfied on the evidence given under subsection (1) that the defendant is mentally impaired, the court must record a finding to that effect and—
>
> …
>
> (b) find whether or not the defendant is unfit to stand trial; and
>
> (c) record the finding made under paragraph (b).
>
> (3) The standard of proof required for a finding under subsection (2) is the balance of probabilities.
>
> …
>
> (5) If the court records a finding under subsection (2) that the defendant is unfit to stand trial, the court must inquire into the defendant's involvement in the offence under section 10, 11, or 12, as the case requires.

[14] Subsection (5) thus provides that a finding of unfitness will lead to an involvement hearing.[12] Here, the relevant provision is s 10:[13]

> **10 Inquiry before trial into defendant's involvement in the offence**
>
> (1) This section applies if, before trial, the defendant is found unfit to stand trial.
>
> (2) The court must decide whether the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant *caused the act or omission that forms the basis of the offence* with which the defendant is charged.
>
> (3) For the purposes of subsection (2), the court may consider—
>
> (a) any formal statements that have been filed under section 85 of the Criminal Procedure Act 2011:
>
> (b) any oral evidence that has been taken in accordance with an order made under section 92 of the Criminal Procedure Act 2011:
>
> (c) any other evidence that is submitted by the prosecutor or defendant.

[15] Comparably, where a defendant is acquitted on grounds of insanity, the relevant verdict being "act proven but not criminally responsible on account of insanity", the jury must first have found the defendant "caused the act or omission that forms the basis of the offence with which the defendant is charged"—the same words used in s 10(2).[14]

*Legislative history*

[16] The close historical association between insanity and unfitness to plead has influenced the treatment of mens rea in the context of the latter doctrine. For instance—and as we return to later—the requirement under the Trial of Lunatics Act 1883 (UK) that the jury determine whether an insane defendant "did the act or made the omission charged" had been interpreted as requiring only satisfaction that the actus reus of the offence was carried out, and was imported in that form into the

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12 Though there may be cases in which that course is not appropriate: see *Bailey*, above n 2.

13 Emphasis added. Section 10 provides for pre-trial involvement hearings: subs (1). Sections 11 and 12 deal with involvement hearings held after trial has commenced.

14 Section 20(1); and s 4(1) definition of "act proven but not criminally responsible on account of insanity", para (a)—inserted by s 4 of the Rights for Victims of Insane Offenders Act 2021.

involvement test in cases of unfitness to stand trial.[15] The relevant history of unfitness to stand trial as a distinct juristic response is explained in this Court's recent judgment in *Bailey v R.*[16] This decision follows the approach we adopted in *Bailey* to s 10 involvement hearings. We focus the following discussion on the rationale for the involvement hearing.

[17] In New Zealand, a confluence of events in the 1990s led to major reform of the legislation governing fitness to stand trial. First, the enactment of the New Zealand Bill of Rights Act 1990 (Bill of Rights) brought renewed attention to the rights implications of the regime then in place.[17] Secondly, serious offending by former psychiatric patients generated public concern, prompting the Government urgently to refer a number of issues to the Law Commission in 1994.[18] The CPMIP Act was the ultimate product of this programme of review and reform. In its report, the Law Commission referred to the "trial of the facts" procedure enacted in the United Kingdom by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (UK).[19] It noted that procedure was "limited to determining whether the defendant *committed the physical act* involved in the offence".[20] The Commission's own recommendation was for "a special hearing … to establish the defendant's innocence of or *factual responsibility for* the alleged crime".[21]

[18] There is some suggestion in the legislative history of the CPMIP Act that the involvement hearing was to be concerned with determining physical responsibility only, to the exclusion of mens rea elements. That was, e.g., the conclusion reached by Professor Brookbanks after canvassing policy documents which informed the

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15 Trial of Lunatics Act 1883 (UK) 46 & 47 Vict c 38, s 2; Criminal Procedure (Insanity) Act 1964 (UK), s 4A(2)—as inserted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (UK), s 2; and *Attorney-General's Reference (No 3 of 1998)* [2000] QB 401 (CA) at 407–411. See further below at [53]–[56].

16 *Bailey*, above n 2, at [27]–[44] per Glazebrook, Ellen France, Williams and Kós JJ. See also Penelope Brown "Unfitness to plead in England and Wales: Historical development and contemporary dilemmas" (2019) 59 Medicine, Science and the Law 187 at 190; and, as to insanity, *Cook v R* [2025] NZSC 44, [2025] 1 NZLR 75 at [36]–[41].

17 See e.g. Law Commission *Community Safety: Mental Health and Criminal Justice Issues* (NZLC R30, 1994) at [3], [B12] and [B47].

18 See at [43]–[45].

19 At [156].

20 Emphasis added.

21 At [20(4)] and [174(3)] (emphasis added).

development of the legislation.[22] The parliamentary record contains a number of references to such a limitation of scope.

[19] In its report on the Bill which was to become the CPMIP Act, the Health Committee said:[23]

> The procedures by which the court determines fitness to stand trial have been augmented to require the court, before making a determination of unfitness to stand trial, to be satisfied that the person is *physically responsible for an act or omission* that formed the basis of the offence with which he or she is charged. This will ensure that those people who, to the satisfaction of the court, are *physically responsible* for the offences with which they are charged may be detained under the principal Act.

[20] The then Minister of Justice, the Hon Phil Goff, made the following observations when the Bill was returned from the select committee:[24]

> The bill … contains a significant new safeguard for defendants who are unfit to stand trial. Current legislation allows the detention of people found unfit to stand trial without any inquiry into their *actual responsibility for the offence*. This creates a risk that people may be detained in circumstances where they did not commit the offence with which they are charged. The bill includes a new provision so that people cannot be detained following a finding of unfitness to stand trial, unless there is sufficient evidence, on the balance of probabilities, that they are *responsible for the offence*.

[21] The Minister later added, at third reading, that the involvement hearing would be concerned with determining whether "there is sufficient evidence of [the] person's *physical responsibility for the offence* with which they are charged".[25] But the terminology used by the Minister varied: in the same third-reading speech, he said the objective was to address "the risk … that a person can be found unfit to stand trial and placed into secure care, even though that person *has not committed the alleged offence*".[26]

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22 Warren Brookbanks "'Special hearings' under New Zealand's Criminal Procedure (Mentally Impaired Persons) Act 2003" (2014) 65 NILQ 215 at 216 and 224. See also Warren Young *Criminal Justice Amendment Bill (No 7): Report of the Ministry of Justice* (Ministry of Justice, MIN/CJA/3, 26 July 2000) at 7.

23 Criminal Justice Amendment Bill (No 7) 1999 (328-2) (select committee report) at 3 (emphasis added).

24 (21 October 2003) 612 NZPD 9512 (emphasis added).

25 At 9546 (emphasis added).

26 At 9546 (emphasis added).

[22] Such comments provide only limited assistance, given that the text of s 10(2) of the CPMIP Act does not refer expressly to physical or mental elements of the offence:[27]

> The court must decide whether the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant *caused the act or omission that forms the basis of the offence* with which the defendant is charged.

As the Court of Appeal observed in *R v Te Moni* (and as we discuss below at [43]–[52]), while there is "some indication" in Hansard that Parliament may have envisaged a procedure focused solely on physical acts, that approach would not meet the objective of the provision to ensure a finding of criminal culpability is made before the sanctions applicable to a person found unfit to stand trial are imposed.[28]

**Decisions below**

[23] We now summarise the three decisions below that rejected Mr Repia's construction of s 10(2).

*District Court judgment*

[24] In the District Court, Judge Gibson found the evidence was sufficient to establish Mr Repia's involvement in the alleged offending under s 10. It was not contested that penetration had occurred or that the complainant had not consented.

[25] The Judge held that the central purpose of an involvement hearing is to ascertain whether the actus reus of an offence is established on the balance of probabilities before turning to remedial disposition options, rather than to determine criminal culpability by conducting "a full trial with a lower threshold of proof".[29] The prosecution was therefore only required to prove non-consensual penetration; whether Mr Repia had a reasonable belief the complainant was consenting was not relevant to the inquiry.[30]

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27 Emphasis added.
28 *R v Te Moni* [2009] NZCA 560 at [79].
29 DC judgment, above n 4, at [17].
30 At [18] citing *R v R* [2015] NZHC 783 at [9].

[26] The Judge also observed that even if a different legal approach were adopted, a defendant's own statements were not a sufficiently objective form of evidence to put reasonable belief in consent in issue.[31]

[27] Having noted the earlier finding that Mr Repia was unfit to stand trial and being satisfied as to his involvement in the alleged offending, the Judge remanded him for inquiries into his most suitable disposition under the CPMIP Act.[32]

*High Court judgment*

[28] On appeal to the High Court, Harvey J upheld Judge Gibson's finding of involvement, dismissing the appeal. He identified the primary issue as being whether a lack of reasonable belief in consent is relevant to the s 10 inquiry in cases of sexual violation.[33]

[29] He observed that while New Zealand law has seen divergent interpretations regarding the consideration of mental elements at involvement hearings, recent authorities have increasingly focused on the physical components of the offence (though objective evidence of accident, mistake or self-defence should still be considered where it arises).[34] In cases of penetrative sexual violation, the involvement inquiry is limited to whether non-consensual penetration took place.[35] The Judge reasoned that including a mens rea element like reasonable belief in consent would exceed the intended scope of s 10, noting that Parliament had declined to alter the wording of the provision in amendments made in 2018. Even if this left the law in "an unsatisfactory state", Judge Gibson could not be faulted for applying the law as it was.[36]

[30] Because the question of reasonable belief was not relevant, he found no error in the District Court's earlier refusal to admit a doctor's file note containing Mr Repia's

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31 At [18] citing *R v Wells* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [15].
32 At [19].
33 HC judgment, above n 4, at [5] and [45].
34 At [48].
35 At [51] citing *Te Moni*, above n 28, at [81]; *R v R*, above n 30, at [9]; and *R v Wira* [2016] NZHC 869 at [17].
36 At [54].

statements regarding that matter.[37] He agreed in any case that the contents of the file note could not be characterised as objective evidence.[38]

*Court of Appeal judgment*

[31] The Court of Appeal granted leave for a second appeal to determine the scope of s 10 involvement hearings and the admissibility of the doctor's file note. Ultimately, however, the Court dismissed the appeal.

[32] The Court held that while an involvement hearing may extend to mental elements integral to the actus reus, or defences like mistake or self-defence when supported by objective evidence, proof of subjective mental states is not required.[39] In relation to sexual violation, it held that a lack of reasonable belief in consent is not inherent in the actus reus and therefore does not arise for consideration at the involvement hearing stage.[40]

[33] The Court rejected the argument that an unfit defendant's own statements could serve as objective evidence, holding that inquiring into the subjective beliefs of a person who is unfit to stand trial was neither feasible nor consistent with the text and purpose of the statutory procedure.[41] The issue regarding admissibility of the doctor's file note fell away with the conclusion that reasonable belief in consent could not be raised at the involvement hearing.[42]

**Submissions on appeal**

*Mr Repia*

[34] Counsel for Mr Repia submitted that the court in an involvement hearing should conduct a meaningful inquiry into the mental elements of an offence where they are part of the proof required for the relevant unlawful act, and reliable evidence exists. In cases of alleged sexual violation, such an inquiry is required in respect of

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37 At [55].
38 At [56].
39 At [44] and [52]–[54].
40 At [53].
41 At [50]–[52].
42 At [55].

reasonable belief in consent because the prosecution must prove the absence of such reasonable belief in order to establish an unlawful act. While acknowledging that an involvement hearing is not a criminal trial, counsel contended that it serves as the functional equivalent for many unfit defendants. A rights-consistent approach in such cases requires a procedure that is as close as possible to the trial process, albeit with a lower standard of proof.

[35] Mr Repia's counsel identified two conflicting conceptions of the unfitness regime: a "relaxed evidential enquiry" focused on treatment; and a rights-based approach that acknowledges the reality of detention and the need for procedural protections. It was submitted that the Court of Appeal's focus on physical responsibility is in line with the former conception and an unduly restrictive interpretation that ignores the legislative intent to prevent the unjust detention of those who would otherwise be acquitted if fit to stand trial. Counsel also challenged the so-called "treatment fallacy", arguing that disposition as a special patient involves secure detention and punitive features not readily distinguishable from standard criminal outcomes, and that safeguards for those at risk of detention without trial are therefore warranted.

[36] Turning to feasibility of the proposed approach, counsel submitted it is a misconception that unfitness to stand trial necessarily implies a lack of requisite mens rea at the time of the offence, justifying the exclusion of such factors at the involvement hearing stage. Likewise, it is wrong to assume that proving intent will be inherently more difficult where a defendant is found unfit. Judges are well-equipped to inquire into subjective beliefs, provided they are not the product of mental impairment. Expert evidence is also available to assist in understanding the mental state of an unfit defendant.

[37] Regarding the evidence in this case, counsel for Mr Repia maintained that there is a range of evidence available which could provide a sufficient basis for finding he had a reasonable belief in consent. To exclude this inquiry entirely is a breach of equal protection under the law and a violation of the minimum procedural standards guaranteed by s 25 of the Bill of Rights.

*The Crown*

[38] The Crown submitted that Parliament's choice of the word "caused" and the phrase "act or omission that forms the basis of the offence" clearly signalled that something less than proof of the full commission of the offence is required. Crown counsel emphasised that the CPMIP Act regime provides a non-criminal alternative path for defendants who cannot participate in a standard trial, focusing on "physical responsibility" rather than criminal guilt.

[39] Regarding sexual violation, the Crown contended that the law is settled: the "act" forming the basis of the offence is non-consensual penetration. While the physical act is penetration, it is the complainant's lack of consent that then makes it an "injurious act". The defendant's reasonable belief in consent is a mens rea element, relating to his or her own state of mind, and does not alter the objective nature of the non-consensual act. The Crown submitted that requiring the prosecution to prove absence of a reasonable belief in consent would effectively require it to prove the full charge, contrary to the summary purpose of the involvement hearing. Counsel argued that Mr Repia's proposed interpretation would do violence to the statutory scheme and require the Court to legislate rather than interpret.

[40] The Crown further submitted that excluding an unfit defendant's thought processes from consideration is appropriate in principle because such inquiries are often "unrealistic and contradictory". In Mr Repia's case, his severe and treatment-resistant schizophrenia—characterised by disorganised thought and delusions—made it impractical to determine if a purported belief in consent was independent of his impairment. The Crown rejected the claim that the CPMIP Act regime is discriminatory: there is no material disadvantage compared to fit defendants, as the regime offers significant health-related advantages, regular reviews of detention and no risk of a criminal conviction or punitive imprisonment.

[41] Finally, the Crown maintained that Mr Repia's involvement was appropriately proved in this case, based on his uncontested physical acts and the complainant's uncontested evidence of lack of consent.

**Discussion**

[42] We begin by discussing the text, purpose and context of s 10(2), then consider the implications of the Bill of Rights for the construction of that provision, go on to address the limits of the provision (including its potential application to the absence of reasonable belief in consent element) and then consider the provision's application in the present case.

*The text, purpose and context of s 10(2)*

[43] The meaning of legislation must be ascertained from its text, in light of its purpose and context.[43] Here, it must be noted that the text of s 10(2) does not necessarily confine the involvement inquiry to proof of physical elements only of the offending. The critical expression is "caused the act or omission that forms the basis of the offence". As noted above, the Minister described the purpose of the provision in differing ways, as protecting a person who "has not committed the alleged offence" or who is not physically responsible for it.[44] While the text of s 10(2) does not necessarily confine the involvement inquiry only to proof of physical elements of the offending, it does make clear that something less than full proof of the relevant offence was intended. As French J concluded in *R v Cumming*, had the latter been intended the Act would simply have provided for proof the defendant "committed the offence".[45] The legislative history and text adopted by Parliament clearly suggest a more limited probative burden. We accordingly differ in this respect from the approach of Winkelmann CJ.

[44] To the extent the proper construction of s 10(2) imposes an extended probative burden on the Crown that goes beyond the pure actus reus—a matter we go on shortly to consider—the scope of that burden must then be defined by the essential purpose of the provision. This is not a simple, semantic, boundary-drawing exercise based on whether or not an element forms part of the actus reus. Nor, as we have just said, does s 10(2) embrace every element of the offence—physical and mental. The extended burden may, however, involve proof of a mental element integral to the injurious act,

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43 Legislation Act 2019, s 10(1).
44 See above at [20]–[21].
45 *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009 at [64].

or it may require disproof of a defence (for which foundation has been laid) directed, at least to some extent, against mens rea.[46] The exercise, therefore, is not necessarily simple.

[45] Purpose is not immediately clear from the statutory text: s 3 of the CPMIP Act, entitled "Purpose", simply echoes s 10(2), saying a purpose of the Act is to:[47]

> … provide that a defendant found unfit to stand trial for an offence must be the subject of an inquiry to determine whether the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence …

[46] It is, however, clear from the legislative history, canvassed above, that the broad purpose of s 10(2) is to remove from the CPMIP Act process those persons whose continued subjection to the criminal justice process—and the compulsory therapeutic processes under the CPMIP Act—cannot reasonably be justified by reference to their proven conduct.[48] In our view, therefore, the Court of Appeal captured that purpose correctly in *Te Moni* when it concluded that the objective of the provision is to ensure a finding of criminal culpability is made before the sanctions applicable to a person found unfit to stand trial are imposed.[49]

*The necessity for a Bill of Rights-consistent construction*

[47] The rights of those found unfit to stand trial lie at the heart of the proper construction of s 10(2). To the general interpretive task set out above at [43], s 6 of the Bill of Rights adds a presumption that legislation is generally intended to be rights-consistent, in the form of a requirement that a rights-consistent (or less rights-*inconsistent*)[50] meaning be preferred where available.[51] At common law,

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46 See below at [63]–[67].

47 Paragraph (b).

48 Above at [16]–[22].

49 *Te Moni*, above n 28, at [79].

50 *R v Poumako* [2000] 2 NZLR 695 (CA) at [37] per Richardson P, Gault and Keith JJ; and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [16].

51 *Anderson v R* [2017] NZCA 293, [2017] 3 NZLR 717 at [34] citing *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [89] per Tipping J and at [251]–[252] per McGrath J. See also *R v Pora* [2001] 2 NZLR 37 (CA) at [53] per Elias CJ and Tipping J; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [48]–[55] per Winkelmann CJ.

similar presumptions apply in respect of consistency with New Zealand's international obligations.[52]

[48] Section 19(1) of the Bill of Rights provides relevantly that everyone has the right to freedom from discrimination on the basis of intellectual disability or mental impairment.[53] Also relevant here is the Convention on the Rights of Persons with Disabilities, which provides in art 5 that all persons are equal before and under the law and are entitled without discrimination to the equal protection and benefit of the law, and that states parties are to guarantee persons with disabilities equal and effective protection against discrimination.[54] Article 13 further provides that states parties are to ensure persons with disabilities enjoy effective access to justice on an equal basis with others.[55]

[49] Further, s 25 of the Bill of Rights sets out relevantly the following minimum rights for those charged with an offence: the right to a fair hearing; the right to be presumed innocent until proved guilty according to law; and the right to present a defence.[56] The need for consistency with these rights raises powerful considerations here. Their application in the context of a s 10 involvement hearing was confirmed in this Court's recent decision in *Bailey*.[57]

[50] The fact of the defendant's established unfitness, the exclusion of fitness-based defences from consideration and the lowered standard of proof required to be met by the Crown all set the involvement inquiry apart from a criminal trial and its fair trial rights. But "the full force of the protections enshrined in our criminal justice system,

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52 *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] and [32] per Blanchard, Tipping, McGrath and Anderson JJ; and *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96].

53 By reference to s 21(1)(h)(iii)–(v) of the Human Rights Act 1993. The expressions used in the latter enactment are "psychiatric illness", "intellectual or psychological disability or impairment" and "any other loss or abnormality of psychological … function".

54 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 5(1)–(2).

55 Article 13(1). See also the additional Convention rights catalogued in *J v Attorney-General* [2025] NZSC 103, [2025] 1 NZLR 485 at [80] per Ellen France and Miller JJ and [179] per Winkelmann CJ.

56 Paragraphs (a), (c) and (e).

57 *Bailey*, above n 2, at [45], n 91 and [66].

and most importantly those found in the … Bill of Rights" applies, notwithstanding.[58] An affirmative conclusion to the s 10 involvement hearing retains the defendant within the criminal justice system, and exposes them to sanction—including continued detention—all without a formal verdict of guilt, and without the entirety of available defences—particularly those relating to mens rea—being presented and tested. For such defendants, the involvement hearing will be the sole forensic evaluation of their culpability.

[51] There are sound reasons—themselves grounded in human rights—for diverting unfit defendants from the usual criminal trial process. But it follows from the principles set out above that rights-affirming safeguards inherent in the ordinary process—among them, the burden of proof in respect of each element of the charged offence and the right to present a defence—cannot lightly be weakened or set aside on the basis of disability or mental condition, where, as this Court noted in *Bailey*, the consequences involve significant restrictions on liberty (notwithstanding that the possibility of conviction and sentence are averted).[59] Crown counsel sensibly conceded as much before this Court. By definition, if a defendant is unfit to stand trial, he or she will have a significant mental impairment. Subject to the express words of s 10(2) of the CPMIP Act, and to demonstrable reasonable limitation under s 5 of the Bill of Rights, a defendant should be entitled to challenge freely the case advanced by the Crown. Section 10(2) should therefore be interpreted so as to preserve such safeguards unless clearly excluded.

[52] Where the Crown cannot meet its s 10(2) probative burden, the criminal justice process has no just cause to continue to hold the defendant, and he or she must be acquitted. That is the effect of s 13(2)(a). Regardless of his or her unfitness to plead, such a defendant is entitled to be removed from the criminal justice process. That is the first public interest protected by s 10(2): as the Minister put it, protecting a person who "has not committed the alleged offence".[60] If a therapeutic response is still required for the condition which has resulted in his or her unfitness to stand trial, that

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58 *Rafferty v R* [2024] NZCA 217 at [25] quoting with approval *R v Tongia* [2020] NZHC 2382, [2021] 2 NZLR 743 at [48]. See also *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [31] per Glazebrook and Hammond JJ.

59 *Bailey*, above n 2, at [68(a)] per Glazebrook, Ellen France, Williams and Kós JJ.

60 See above at [21]. See also *Te Moni*, above n 28, at [68] and [79].

should be a civil response under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

*The s 10(2) evaluation cannot be limited to actus reus elements alone*

[53] Prior to enactment of s 10(2) in New Zealand, difficulties had already arisen with attempts in the United Kingdom to confine the equivalent provision—s 4A of the Criminal Procedure (Insanity) Act 1964 (UK)—to actus reus elements alone. *R v Antoine*, a 2000 decision of the House of Lords, concerned a defendant who had been charged with murder but found unfit to plead. The s 4A issue was whether he was able to rely on the defence of diminished responsibility at the trial of facts.[61] Lord Hutton, who delivered the sole speech (joined by Lord Nicholls, Lord Mackay, Lord Nolan and Lord Hope), observed:[62]

> The purpose of section 4A, in my opinion, is to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea. … I consider that the section strikes this balance by distinguishing between a person who has not carried out the actus reus of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite mens rea.

Lord Hutton stated, however, that if objective evidence puts mistake, accident or self-defence in issue, the prosecution must negative that defence.[63]

[54] That opinion has been criticised for being simplistic and self-contradictory.[64] As Lord Hutton himself noted, the elements of some offences simply do not divide conveniently into actus reus and mens rea.[65] Take Professor Brookbanks' 2009 example—also referred to by French J in *Cumming*—of the offence of possessing an offensive weapon, where the actus reus is possessing an offensive weapon but whether

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61 See above at [17].

62 *R v Antoine* [2001] 1 AC 340 (HL) at 375–376.

63 At 376.

64 See David Ormerod, Karl Laird and Matthew Gibson *Smith, Hogan, and Ormerod's Criminal Law* (17th ed, Oxford University Press, Oxford, 2024) at 303–304; and JJ Child and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (8th ed, Hart, Oxford, 2022) at 825.

65 *Antoine*, above n 62, at 376.

the weapon qualifies as offensive is dependent at least sometimes on the defendant's intention.[66]

[55] The stark divide suggested, but not endorsed emphatically, in *Antoine* could not hold. While mens rea per se might be excluded from the Crown's probative burden, later English case law supports the Crown's s 4A burden extending to a mental element of the offence that is "integral" to the actus reus and which, together with the physical component, comprises the relevant "injurious act". In *R v B(M)*, the defendant was charged with voyeurism, a statutory offence.[67] That required proof that the defendant, "for the purpose of obtaining sexual gratification, … observe[d] another person doing a private act", knowing "the other person does not consent to being observed for his sexual gratification".[68] Aikens LJ held for the Court that the purpose of sexual gratification was "central" to the offence: "Although the activity has two components, they are indissoluble; together they are the relevant [injurious] 'act'."[69] Thus if the Crown could not establish that purposive dimension of the act beyond reasonable doubt—that being the standard in the United Kingdom[70]—the defendant would be entitled to acquittal under s 4A(4) of the 1964 UK Act, rather than being retained within the criminal justice process. As for the further element—the defendant's knowledge that the person observed did not consent—the Court held that was not directly linked to the outward component of the "act" but rather referred to the observer's state of mind alone and was not therefore relevant to the trial of facts.[71]

[56] Similarly, in *R v Goldsmith*, concerning a charge of possession of class A drugs with intent to supply, the Court of Appeal of England and Wales held s 4A did not apply to the element of intent to supply, stating relevantly:[72]

> (d) There is no "bright line" between the actus reus and the mens rea; depending upon the nature of the offence charged, the former may involve mental elements. A proper consideration of the "acts"

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66 Warren Brookbanks "Special hearings under CPMIPA" [2009] NZLJ 30 at 33; and *Cumming*, above n 45, at [73].

67 *R v B(M)* [2012] EWCA Crim 770, [2013] 1 WLR 499.

68 Sexual Offences Act 2003 (UK), s 67(1). In this instance, the other *persons* were children changing their swimming togs in a bathing shed.

69 *R v B(M)*, above n 67, at [64] and [65].

70 *R v Chal* [2007] EWCA Crim 2647, [2008] 1 Cr App R 18 at [25].

71 *R v B(M)*, above n 67, at [66].

72 *R v Goldsmith* [2024] EWCA Crim 780, [2024] 4 WLR 79 at [28]. In the United Kingdom, the trial of facts is a jury matter, in contrast to New Zealand's involvement hearing.

required to prove an offence requires an offence-specific consideration of its ingredients …

(e) In some cases, there are practical difficulties in distinguishing between the act of the crime (the "actus reus") and the mental element (the "mens rea"), it being the case that, in some instances, the act of the crime might include a mental element …

(f) In each case, it will be necessary to analyse, with care, the gravamen (that is, the essence) of the allegation which constitutes the act or omission for the purposes of section 4A. Where the offence charged is statutory, that will require interpretation of the language used and of the pleaded particulars of the offence. That exercise may result in a conclusion that the "act" of which the jury must be sure, goes beyond physical acts and encompasses some aspect of the defendant's intention or purpose at the relevant time. In such circumstances, it is that intention or purpose which results in the act in question being, in the language of Lord Hutton, "an injurious act", in which the two components are indissoluble and only a consideration of all matters provides real meaning to the jury's verdict …

(g) A state of mind which is not directly linked to the outward component of the act — that is, which is not the reason for it — does not form part of the act charged as the offence and, accordingly, will not be a matter for the jury to determine …

[57] New Zealand case law post the 2003 enactment of s 10(2) has not demonstrated a single direction of travel. As we have noted, we agree with the Court of Appeal in *Te Moni* that a procedure focused solely on physical elements of the offending would be problematic and not meet the objective of the provision—i.e., to ensure a finding of criminal culpability is made before the sanctions applicable to a person found unfit to stand trial are imposed.[73] That Court did not however need to address the issue in detail, as the appeal there was allowed for other reasons.

[58] Among the array of High Court decisions, the leading authority arguably is the 2009 decision of French J in *Cumming*.[74] The defendant there had been convicted after trial of sexual violation and attempted sexual violation, abduction and assault, but the conviction was set aside by this Court by reason of his unfitness to stand trial.[75] This Court ordered retrial, and French J found he continued to be unfit for that course. As to involvement, the Crown argued the statutory inquiry under s 9—the then-equivalent of s 10—was limited to actus reus elements of the offences.

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73 See above at [22] and [46].
74 *Cumming*, above n 45.
75 *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433.

Crown counsel contended an unfit defendant who had caused the actus reus was likely to lack the further requisite mens rea; the provision was not intended to secure complete discharge in such a case. As we noted above at [43], French J concluded s 10(2) did not require proof of all elements of the offence; had it, it would simply have provided for proof the defendant "committed the offence". Rather:[76]

> (a) [S]o far as possible, the inquiry should focus on an accused's actions as opposed to his state of mind.
>
> …
>
> (c) [T]he distinction cannot be rigidly adhered to in every case because of the diverse nature of criminal offences and criminal activity. In particular, it cannot be adhered to when mens rea is a composite element of the actus reus. In those circumstances, the finding an accused caused the act or omission may of necessity include some element of mens rea.
>
> (d) [I]f there is objective evidence which raises the issues of mistake, self defence and accident, then the Court should not find the accused caused the act or omission unless satisfied on the balance of probabilities that the prosecution has negatived that defence.
>
> (e) [I]t is not open to an accused to argue absence of mens rea by reason of mental impairment …

[59] On that basis, for sexual violation, the Crown would need to demonstrate penetration and the absence of complainant consent, and existence or absence of a reasonable but mistaken belief the complainant was consenting would only be relevant if there was some objective evidence which put that in issue. French J continued, "Evidence Mr Cumming was labouring under such a belief because of mental impairment is not admissible for that purpose."[77]

[60] While some subsequent authorities suggest a more restrictive approach (confined to actus reus or physical acts or omissions only),[78] others broadly follow

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[76] *Cumming*, above n 45, at [89], adapting the English Court of Appeal decision in *R (Young) v Central Criminal Court* [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12.

[77] *Cumming*, above n 45, at [91] and [93].

[78] See e.g. *R v Lyttleton* HC Auckland CRI-2008-044-9466, 4 November 2009 at [37]–[44]; *R v RTPH* [2014] NZHC 1423 at [5] and [7]; and *R v Tongia* [2019] NZHC 3278 at [18].

*Cumming*.[79] The Court of Appeal decision in *Te Moni* at least suggested a broader approach, arguably consistent with *Cumming*.[80]

[61] In our view the general approach taken by French J in *Cumming*, in the passage quoted above at [58], was correct and supplies the proper analytical basis for the determination of this appeal. We say so for these reasons.

[62] First, limitation of the subject matter of a s 10 involvement hearing to actus reus elements alone would be neither practicable, consistent with the statutory purpose nor consistent with protected rights under the Bill of Rights. It is unnecessary therefore to construe s 10(2) so narrowly, and wrong to do so in the face of s 6 of the Bill of Rights. In that respect we depart from French J's suggestion that "so far as possible", the inquiry should focus on an accused's actions as opposed to state of mind.

[63] Secondly, composite elements of an offence that raise both actus reus and mens rea elements—sometimes called elements "integral" to the actus reus—cannot sensibly be detached and excluded from assessment of whether the defendant caused "the act or omission that forms the basis of the offence". The more rights-consistent approach is to insist the Crown demonstrate a composite element also. We endorse that construction of s 10. That would mean that the Crown would need to prove (on the balance of probabilities) offensive purpose in an offensive weapon case—see above at [54]—or the purpose of deriving sexual gratification in a voyeurism case like *B(M)*—see above at [55]. Absent such demonstration by the Crown, the defendant's retention in the criminal justice system would be unjustified.

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79 See e.g. *R v R*, above n 30, at [9]; *Wira*, above n 35, at [14]–[15]; and *Tongia*, above n 58, at [33] and [51]–[52].

80 See above at [22].

[64] In the present case, the actus reus of sexual violation involves two elements: (1) penetration (2) without consent—each of which the Crown must prove.[81] Two mens rea or mental elements are also engaged: (1) intent to penetrate and (2) absence of *reasonable* belief in consent.[82] The first is a question of specific intent and, as a matter of practical reality, will seldom be in doubt.[83] The second is harder to classify and involves a mixture of subjective and objective belief. The Crown may meet it by establishing the absence of honest belief in consent, but the usual and simpler route is to establish that any belief in consent could not on all the evidence be *reasonable* anyway. That approach involves an assertion of objective fact, and only proof of that objective fact criminalises the physical act of non-consensual penetration—which otherwise is lawful as the law stands. Likewise, only the possession of a particular sexualised purpose criminalised the voyeur's act in *B(M)*.

[65] It follows that the mens rea element of absence of reasonable belief in consent involves an assertion of objective fact that the Crown must also establish, to the limited required standard, in a s 10 involvement hearing. If it cannot do so, and subject to the important limit discussed below at [68], the defendant's retention in the criminal justice system would not be justified. Furthermore, to deny a mentally impaired person the right to exit the criminal justice system where the Crown cannot establish the absence of reasonable belief in consent as an objective fact, when an unimpaired person in the same situation would be entitled to acquittal, would involve unjustifiable discrimination contrary to the Bill of Rights.

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81 AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [3.1] and [18.2.1]; and Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at [3.4.1.1]–[3.4.1.5]. See also *KSB v Accident Compensation Corp* [2012] NZCA 82, [2012] NZAR 578 at [17]–[18]. The same approach is taken in other jurisdictions: see e.g. Child and others, above n 64, at 539; Ormerod, Laird and Gibson, above n 64, at 845 and 850–852; *R v Olugboja* [1982] QB 320 (CA) at 330–331; *Malone* [1998] 2 Cr App R 447 (CA) at 457; *R v Ewanchuk* [1999] 1 SCR 330 at [25]–[27] and [61] per Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ; and *Director of Public Prosecutions (Vic) v Yeong* [2022] VSCA 179, (2022) 301 A Crim R 312 at [90] per Niall and Forrest JJA.

82 Simester and Brookbanks, above n 81, at [18.2.2]; Tolmie and others, above n 81, at [3.4.1.6]; and Mathew Downs (ed) *Adams on Criminal Law – Offences and Defences* (looseleaf ed, Thomson Reuters) at [CA128.04]. See also *R v L* [2006] NZSC 18, [2006] 3 NZLR 291 at [48] per Henry J as cited in *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [46] per McGrath, Glazebrook and Arnold JJ.

83 Unless, e.g., automatism is in issue: see *Cook*, above n 16, at [43].

[66] While we acknowledge that a different view was taken by the Court of Appeal of England and Wales in *R v Wells*—where absence of belief in consent was treated as an "investigation into the state of mind of the unfit person", lying beyond the scope of the s 4A of the 1964 UK Act[84]—we are satisfied for the reasons already given that that approach should not be applied in a context in which protected rights under the Bill of Rights are engaged. As we have already observed, High Court authority in New Zealand, prior to this appeal, was divided.[85]

[67] Thirdly, we consider French J was probably correct to suggest that if there is reliable evidence providing foundation for a defence or excuse such as mistake, self-defence or accident, then the court should not find the accused caused the act or omission unless satisfied that the prosecution has negatived that defence or excuse.[86] A similar conclusion was reached, in that respect at least, in *Wells*.[87] The same considerations noted above at [65] would apply: if such defence or excuse is available, the defendant's retention in the criminal justice system would not be justified, and to deny access to it would involve rights-inconsistent discriminatory treatment based on disability. The limit below at [68] would also apply. However, as no such defence or excuse is in issue here, it is unnecessary for us to say more about it.

[68] Fourthly, the foregoing conclusions are subject to this important qualification: for the same reason Parliament limited the scope of the Crown's burden under s 10(2), a defendant unfit to stand trial will ordinarily be unable to rely on evidence of the same mental condition rendering him or her unfit as evidence negating involvement and responsibility. That is, in a case of alleged sexual violation, he or she cannot ordinarily rely on it to contest absence of reasonable belief, or by way of defence or excuse negating involvement and responsibility. Very similar considerations underlay this Court's recent conclusion in *Bailey* that a stay or discharge application wholly reliant on the condition rendering the defendant unfit could not displace the s 10 involvement hearing.[88] In neither case is removal of the defendant from the criminal justice process justifiable. Correspondingly, in both cases the CPMIP Act's therapeutic response to

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84 *Wells*, above n 31, at [68].
85 Above at [57]–[60].
86 See above at [58].
87 *Wells*, above n 31, at [12].
88 *Bailey*, above n 2, at [72].

unfitness to stand trial remains justifiable. Where the condition is causative of sexual violation of the complainant, the CPMIP Act continues to govern disposition.

[69] On the other hand, where an objective, independent basis exists for asserting reasonable belief in consent, a defendant ought to be able to make that case at a s 10 involvement hearing, and the Crown must disprove that possibility on the balance of probabilities. For instance, the condition making the defendant now unfit may be intermittent or have arisen after the alleged offending. Alternatively, objective evidence unconnected to the condition may exist, laying a foundation for reasonable belief at the time of offending.

[70] Fifthly, for reasons given above at [43]–[44], we do not consider the legislative text and history permit an interpretation that would have the effect of removing what we see as the deliberate limitation of scope expressed in s 10(2) and require proof of all elements of the offence by the Crown, even to the lesser probative standard of probability. It follows in our view that is not an available construction under s 6 of the Bill of Rights.

*Summary of principles*

[71] The scope of s 10(2) is not confined only to actus reus elements alone. Nor does it embrace all mens rea elements—so that s 10(2) would then require every element of the offence to be proved. Composite (or integral) elements which include both physical and mental aspects fall within s 10(2). So do mens rea elements involving an assertion of objective fact—such as the absence of reasonable belief in consent. Where an objective basis exists for asserting a reasonable belief in consent, independent of the mental condition rendering the defendant unfit to stand trial, it may be relied on to negate involvement and responsibility, and the Crown must disprove it on the balance of probabilities under s 10(2).

*Application of principles in this case*

[72] The hearing in the District Court involved viva voce evidence from the complainant and from a nurse working in the ward at the time of the alleged

offending.[89] Counsel for Mr Repia elected not to call evidence. Written submissions were given over the course of the next fortnight, and a month later the Judge's reserved decision was delivered. It is not suggested that Judge Gibson's ultimate ruling—that the prosecution needed only to prove non-consensual penetration—was given before the involvement hearing. While the Judge's ruling was understandable given the uncertain state of High Court authority, it is not one we agree with at the level of principle.

[73] As noted above at [8], it was not contested in evidence that intentional penetration had occurred, and that the complainant had not consented. The evidence established that on a prior occasion the complainant had gone into Mr Repia's room. Nothing relevant could be inferred from that fact. The evidence as to what occurred at the time of the alleged offending established the use of physical force to get the complainant to come into the room and to push her onto the bed. It further established that the complainant protested repeatedly (albeit her voice was subdued) and attempted to push Mr Repia away. Judge Gibson noted the complainant was not challenged in cross-examination as to non-consent.[90]

[74] Defence counsel did seek to adduce a file note from a psychiatrist who assessed Mr Repia's capacity on the day of the alleged offending, detailing an account given by him which is inconsistent in several major respects with the evidence of the complainant and the sole other eyewitness.[91] That evidence raises the very objection noted above at [68]–[69] as to the irrelevance (and therefore inadmissibility) of self-reporting evidence affected by the mental impairment resulting in the finding of unfitness to stand trial. In Mr Repia's case, that impairment is described above at [9] and involves persistent difficulties arising from schizophrenia. On the clear evidence of resistance, refusal and protest by the complainant, only such impairment might explain Mr Repia's contrary apprehension as to consent. In this case, taking the notes

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89 The evidence of the complainant included an evidential video interview.

90 DC judgment, above n 4, at [9].

91 The key inconsistencies are that the complainant came into his room of her own volition and initiated sex (inconsistent with the complainant's evidence); that the complainant undressed herself (inconsistent with both the complainant's and the nurse's evidence); that he and the complainant did not have "full intercourse" (inconsistent with the complainant's evidence); and, implicitly, that the complainant consented (inconsistent with both the complainant's and the nurse's evidence).

of evidence as a whole, the Judge would certainly have been entitled to conclude that the Crown had demonstrated an absence of reasonable belief in consent.

[75] There is, therefore, a somewhat illusory quality to Mr Repia's appeal. While we reach a different view on legal principle from the Court of Appeal, Mr Repia's appeal lacks the evidential substratum on which any different result could have been reached by the Judge.

[76] For these reasons, the appeal must be dismissed.

**Result**

[77] The appeal is dismissed.

**WINKELMANN CJ**

[78] I agree with Ellen France, Kós and Miller JJ that the appeal should be dismissed. I agree that the District Court Judge erred as to the matters requiring proof for the purposes of s 10(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act). I also agree that, given the evidence before the Court, we can be confident that no different outcome would have resulted had the Judge applied the correct legal analysis.

[79] I write separately, however, because I take a different view of the proper interpretation of s 10(2) of the CPMIP Act. In particular, I take a different view as to what, in any given case, s 10(2) requires to be proved if the court is to be satisfied as to involvement.

[80] The CPMIP Act operates to limit the fundamental rights of some of the most vulnerable people in our community.[92] But it offers incomplete guidance in respect of the extent of the limitations that it authorises.[93] In the present case, s 10(2) is at issue. That provision applies where, before trial, a defendant has been found unfit to stand

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92 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103, [2025] 1 NZLR 485 at [170] per Winkelmann CJ.

93 At [170].

trial.[94] Once a pre-trial unfitness determination has been made, the court must determine whether it is satisfied the evidence against the defendant suffices to establish the defendant's involvement in the offence. A determination of involvement requires the court to deal with the defendant under subpt 3 of the Act.[95] Under s 23(1), inquiries must next be made to determine the most suitable method of dealing with the person.[96] The outcome of those inquiries may then necessitate the making of orders authorising detention under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.[97]

[81] Notwithstanding the procedural and substantive importance of the issue to be determined, the text of s 10(2) does not clearly convey what lies within the Crown's probative burden and what lies beyond it. It is therefore necessary to interpret the provision.

[82] Section 10(1) of the Legislation Act 2019 provides that "[t]he meaning of legislation must be ascertained from its text and in the light of its purpose and its context." As the majority note, in construing the text and in ascertaining the purpose, the court must also give effect to the directive in s 6 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) that wherever an enactment can be given a meaning that is consistent with affirmed rights and freedoms, that meaning shall be preferred to any other meaning.[98] Relevant to that exercise is s 5 of the Bill of Rights, which provides that the affirmed rights and freedoms "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[83] I agree with Ellen France, Kós and Miller JJ that the operation of s 10(2) engages affirmed rights. Specifically, it engages the guarantees to certain minimum standards of criminal procedure in s 25 of the Bill of Rights: the right to a fair trial (para (a)), the right to be presumed innocent until proved guilty according to law

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94 Section 10(1). Compare ss 11–12, which are engaged where during a trial a finding is made that the defendant is unfit to stand trial.

95 Section 13(4).

96 See *T (SC 95/2024) v Te Whatu Ora Health New Zealand* [2025] NZSC 119, [2025] 1 NZLR 590 at [38], [67] and [77].

97 Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], ss 24–25.

98 Above at [47].

(para (c)), the right to present a defence (para (e)), and the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution (para (f)). The operation of s 10(2) also engages the right, affirmed in s 19 of the Bill of Rights, to freedom from discrimination on one of the prohibited grounds as defined in s 21 of the Human Rights Act 1993. Section 10(2) of the CPMIP Act authorises differential treatment on the basis of psychiatric illness and intellectual or psychological disability or impairment, which are prohibited grounds of discrimination under s 21(1)(h)(iii)–(iv) of the Human Rights Act. A defendant only becomes subject to the pre-trial determination scheme in s 10 where the court has, before trial, received the evidence of two health assessors and is satisfied on that evidence that the defendant is "mentally impaired".[99]

[84] While a s 10 involvement hearing is not a criminal trial, it has implications for defendants who are found to be involved and to be unfit to stand trial. As counsel for the appellant submitted, these implications are not readily distinguishable from standard criminal outcomes if measured in terms of loss of liberty. It is clear also that s 10(2) has a differential effect in that it expressly provides for determination on the balance of probabilities, which is a lesser standard of proof than applies to the Crown in a criminal trial. It also departs from the usual matters for proof in a criminal trial. The usual requirement is that all of the elements of the offence are proved by the Crown beyond a reasonable doubt. Under s 10(2), however, the Crown is only required to prove that the defendant "caused the act or omission that forms the basis of the offence". Taken together, this is a requirement only for proof on the balance of probabilities that the defendant caused the relevant act or omission. Further, the various rights of the defendant under s 25 of the Bill of Rights (as set out above) are limited. In particular, the defendant's right to present a defence and to present and cross-examine witnesses may be subject to limits. The interpretation of s 10(2) that is settled upon by this Court in the present appeal determines the extent to which s 25 rights are able to be limited at an involvement hearing.

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[99] CPMIP Act, s 8A(1)–(2) and (5).

[85] It follows that there is differential treatment between those found not fit to stand trial on the grounds of mental impairment and other defendants. The defendant found unfit to stand trial on the grounds of mental impairment is also materially disadvantaged in terms of procedural protections and the lesser standard of proof (and potentially the lesser *proof*) required by the Crown. But it is important to acknowledge that a limitation of rights, including discrimination, is permissible where that can be justified for the purposes of s 5 of the Bill of Rights.[100]

[86] As Ellen France, Kós and Miller JJ identify, New Zealand's international obligations under the Convention on the Rights of Persons with Disabilities are also relevant to interpreting s 10(2).[101] Of particular relevance are art 5(1), which recognises that "all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law", and art 5(2), which provides that: "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds." It is a well-established principle that domestic legislative provisions are to be interpreted, where possible, so as to enable compliance with New Zealand's international obligations.[102] That presumption of consistency applies even where New Zealand's obligations under the relevant international instrument arose after the enactment of the relevant legislation — as is the situation in the present appeal.[103]

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100 As to justification of discrimination, see *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

101 Above at [48] citing Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 5(1)–(2).

102 See, for example, *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96] citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] and [32] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J. See also *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [41]–[42] per Winkelmann CJ citing *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270 per Cooke P; *Fleming v Attorney-General* [2025] NZSC 188, [2025] 1 NZLR 973 at [79]–[80]; and *J v Attorney-General*, above n 92, at [178] per Winkelmann CJ.

103 *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [94] per Winkelmann CJ and O'Regan J citing Legislation Act 2019, s 11. See also *J v Attorney-General*, above n 92, at [178] per Winkelmann CJ.

[87] As to statutory purpose, I agree with Ellen France, Kós and Miller JJ that the purpose of requiring a determination as to involvement under s 10(2) is to ensure that those who are not responsible for criminal offending are not subject to the detention and treatment regime that may flow from such a determination.[104] However, that does not take us far in understanding the purpose behind s 10(2). As noted above, a different procedure and a different legal standard from those used in a standard criminal trial are provided under s 10(2). What purpose lies behind this bespoke scheme? Section 10(2) appears intended to foreclose the possibility of a defendant arguing that their involvement in the offending has not been proved by reason of an absence of mens rea due to mental impairment. It thereby ensures that those who are in this category receive the treatment and rehabilitation they require, pursuant to the disposition options set out in ss 24 and 25. This is a justification for the limitations on both the ss 19 (freedom from discrimination) and 25 (minimum standards of criminal procedure) rights in the Bill of Rights.

[88] In the present appeal, the Crown also submitted that to require the prosecution to prove the full charge would be contrary to the summary purpose of the s 10(2) procedure. But a purpose of achieving summary disposition is less clear — and altogether less supportable — in light of art 5(1)–(2) of the Convention on the Rights of Persons with Disabilities. It is not a purpose that I would be prepared to find.

[89] I consider that the statutory purpose, when construed in accordance with the directive in s 6 of the Bill of Rights and with New Zealand's international obligations, supports a construction of s 10(2) that requires the Crown to satisfy the judge of all the elements of the offence including mens rea elements. This requirement is subject only to the proviso that the Crown need not prove a mens rea element where the deficiency in proof in the Crown case in that regard, or any doubt raised by the defence in that regard, is attributable to the defendant's mental impairment. My reasons for this interpretation are as follows.

[90] The language of s 10(2) is both opaque and incomplete. As a consequence, it provides no clear guidance as to the operation of the provision in all of the

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[104] See above at [46] and [57].

circumstances in which it will come to be applied. On one interpretation, all that need ever be proved is the physical act or omission that forms the basis of the offence. But, as Ellen France, Kós and Miller JJ conclude, that is an improbable interpretation since it would capture those who are not responsible for the crime, even if the issue of mental impairment is set aside.[105] Such an interpretation is certainly not rights-consistent. Indeed, it is discriminatory — without apparent justification for the extent of that discrimination — and it would place New Zealand in breach of its international obligations.

[91] To avoid authorising such an approach, Ellen France, Kós and Miller JJ have therefore arrived at an interpretation that allows for exceptions where the mens rea is an integral part of the actus reus or where mens rea is relevant to a defence.[106]

[92] I consider that the interpretation that I have set out above is a more principled one, having regard to matters that bear upon that interpretation. The starting point is that s 10(2) limits affirmed rights and freedoms by providing for some departures from the usual s 25 protections, and by providing for a degree of discrimination. Section 10(2) only applies where the court has determined that the defendant is unfit to stand trial due to the defendant's mental impairment. The language of the provision makes clear that the standard of proof is the balance of probabilities. It also makes clear that the section permits less than full proof of all elements in some circumstances; that is the most sensible reading to be given to the expression "the act or omission that forms the basis of the offence". As Ellen France, Kós and Miller JJ note, the phrase "committed the offence" was not used in the statutory drafting.[107]

[93] The present appeal is not addressed to whether the limitation of affirmed rights by s 10(2) is justified under s 5 of the Bill of Rights. In this sense, the appeal does not engage the question of whether the existence of the limitation is reasonable, necessary or in due proportion to the importance of the statutory objective.[108] As a corollary, the constitutional hard-stop in s 4 — whereby the court may not decline to apply a

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105 Above at [62]–[63].
106 Above at [62]–[63], [67] and [69].
107 Above at [43] and [58].
108 See *Grinder v Attorney-General* [2025] NZSC 165, [2025] 1 NZLR 1062 at [50] per Winkelmann CJ, Ellen France and Williams JJ citing *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and [104] per Tipping J.

statutory provision — is not in issue.[109] The appeal does, however, concern the degree of the limitation that can be justified by the statutory purpose. This is because s 6 requires the court to apply the most rights-consistent interpretation that can be given to the text and that achieves the statutory purpose.[110] This approach to interpretation reconciles the interpretive imperatives provided by ss 4–6 of the Bill of Rights and by s 10 of the Legislation Act.

[94] In my view, a less rights-infringing interpretation than the one settled upon by Ellen France, Kós and Miller JJ remains available on the statutory language used in s 10(2). The interpretation that I propose is consistent with both the text and purpose of the provision. At the same time, it gives effect to the directives in ss 5 and 6 of the Bill of Rights to prefer a rights-consistent meaning which imposes only such reasonable limits on affirmed rights as can be demonstrably justified in a free and democratic society.

[95] Given the requirement under ss 5 and 6 for the extent of the limitation to be justified, I consider that proof of mens rea should only be dispensed with where the deficiency in proof in the Crown case, or any doubt raised by the defence in that regard, is attributable to the defendant's mental impairment. This provides a simple and workable framework. Since the standard of proof is only the balance of probabilities, in many circumstances adequate proof of any mens rea element of the offence will lie in the nature of the act relied upon for the purposes of s 10(2). The defendant is not, in any case, compellable by the Crown.[111] Putting to one side the proviso that I have identified as being necessary to achieving the statutory purpose, it is unclear why the defendant's disability should justify a reduction in the Crown's probative burden. Or to put it another way, to the extent that the fitness of the defendant does not bear upon the ability of the Crown to discharge its burden, there is no justification for relieving the Crown of that burden. If the defence can challenge the Crown's case as to mens rea — either through cross-examination or by calling evidence — then, provided that challenge does not depend upon the defendant's mental impairment, they should be able to do so. This interpretation of s 10(2) gives due effect to the Bill of

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109 See *Fitzgerald*, above n 102, at [244] per Glazebrook J.

110 *J v Attorney-General*, above n 92, at [174] and [176] per Winkelmann CJ. See also *Fitzgerald*, above n 102, at [48] per Winkelmann CJ and [207]–[209] and [217] per O'Regan and Arnold JJ.

111 Evidence Act 2006, s 73(1).

Rights and to New Zealand's obligations under the Convention on the Rights of Persons with Disabilities.

**GLAZEBROOK J**

[96] I write separately because, although I agree with the result, I prefer to approach the issue solely on the basis of principle.[112]

[97] As a matter of general principle, the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) must be interpreted to accord fair trial protections and other rights (such as freedom from discrimination) to persons held to be unfit to stand trial,[113] except to the extent that departure is justified in terms of s 5 of the New Zealand Bill of Rights Act 1990 or where s 4 of that Act applies. This approach is consistent with this Court's decision in *Bailey v R*.[114]

[98] I agree with Ellen France, Kós and Miller JJ that a finding of involvement under s 10(2) of the CPMIP Act may result in significant restrictions on the person's liberty (notwithstanding that conviction and sentencing are averted).[115] Such consequences cannot be justified if a fit defendant in the same position would be acquitted. I thus agree with them that the broad purpose of s 10(2) of the CPMIP Act is to remove from the CPMIP Act process those persons whose subjection to the compulsory therapeutic processes under the CPMIP Act cannot reasonably be justified by reference to their proven conduct.[116]

[99] In the context of sexual violation, the principles set out above mean that the Crown must prove a lack of reasonable belief in consent where there is an evidential foundation for the proposition that there may have been such an honest belief on

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112 I limit my consideration to cases of sexual violation and leave the question of how the principles I discuss would operate in other circumstances in which they may arise.
113 In accordance with s 6 of the New Zealand Bill of Rights Act 1990. See also ss 19, 25 and 27(1).
114 *Bailey v R* [2026] NZSC 20.
115 See above at [51].
116 See above at [46].

grounds that do not relate solely to the person's incapacity.[117] As a practical matter in most cases this could be done by proving that any honest belief (even if held) cannot have been reasonable.

[100] Evidence tending to show honest belief in consent could include a person's statement before they became incapacitated, text or social media messages, or evidence elicited from other witnesses, including the complainant.[118]

[101] In this case, I agree with Ellen France, Kós and Miller JJ that, in light of the clear evidence of resistance, refusal and protest by the complainant, Mr Repia's contrary apprehension as to consent could only have resulted from his impairment.[119] There is thus no proper evidential foundation for any assertion of honest belief in consent unrelated to his impairment. I therefore agree that the appeal must be dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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117 I agree with Ellen France, Kós and Miller JJ above at [68] that similar considerations underlay this Court's recent conclusion in *Bailey v R* that a stay or discharge application wholly reliant on the condition rendering the defendant unfit cannot displace the requirement to proceed to the s 10 involvement hearing: see *Bailey v R*, above n 114, at [72] per Glazebrook, Ellen France, Williams and Kós JJ.

118 It could also include evidence elicited from the unfit person.

119 Above at [74].