IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 26/2022**

BETWEEN	**ATTORNEY-GENERAL**
	First Appellant
AND	**CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS**
	Second Appellant
AND	**MARK DAVID CHISNALL**
	Respondent

APPELLANTS' SUPPLEMENTARY SUBMISSIONS

13 February 2023

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INTRODUCTION

1. Following the hearing of this appeal in October 2022, the Court sought further submissions on broader issues that may arise in the DOI jurisdiction. These further submissions address the Court's minute of 11 November 2022.

Key issues for the Court to determine

2. The initial hearing of this matter has clarified that the key issues requiring determination are as follows:

    2.1 Was the Court of Appeal correct to consider, in the abstract, whether Parliament's choice to adopt regimes permitting limits on s 26(2) BORA was justified?

    2.2 Does any aspect of the regimes as enacted lead inexorably to an unjustifiable breach of Mr Chisnall's s 26(2) right?

    2.3 To what extent does the respondent's assertion that Parliament could have adopted a more "therapeutic" model play a part in the justification analysis in relation to limits on s 26(2)?

Summary of argument

3. Parliament responded to the need to protect the public from the high risk of serious reoffending by sexual or violent offenders[1] by arming Courts with the discretionary power to make orders extending the supervision or detention of offenders and authorising the provision of rehabilitative and reintegrative treatment to those offenders. The exercise of those powers comes at a cost to the full scope of the rights and freedoms that ought usually be restored at the end of a sentence of imprisonment. But Parliament has left the Court free to withhold such orders if they are not, in the judge's opinion, a justified limitation of those freedoms.

4. The Court of Appeal erred by requiring the Attorney-General to justify Parliament's decision to create *these* powers, rather than some other approach that laid greater emphasis on therapy. Parliament is accountable

[1] (4 December 2014) 702 NZPD 1164-5 (**302.0417**); s 4 PPO Act.

only to the electorate for its legislative policy choices. Having made that choice, it is the resulting legislation that must be measured for its consistency with the BORA.

5. Courts apply BORA to litigants' cases through the processes of interpretation and application of legislation. A DOI is available as a remedy if an enactment is incapable of a rights-consistent interpretation and therefore inexorably breaches BORA when applied to a litigant's case.[2] Sections 4, 5 and 6 do not operate any differently where a DOI is sought as a remedy than in any other BORA claim before the Court. The DOI jurisdiction remains grounded in the judicial function.[3]

6. Section 10 Legislation Act and ss 4, 5, and 6 of the BORA allow to both Parliament and the Courts the full and unimpeded exercise of their constitutional functions. In the simplest terms: Parliament legislates, and Courts interpret.[4] The line between these arms of government is critical for continued legitimacy of both institutions. The emergence of the DOI jurisdiction has not changed this. Nor has the enactment of ss 7A-7B BORA.[5]

7. This case is unusual, in several respects:

   7.1 The DOI application was pursued in isolation from Mr Chisnall's challenge to the making of a PPO, and later an interim ESO (by consent). Mr Chisnall has also indicated he will consent to the final ESO. It is peculiar to consent , on the one hand, to a judicial order that the Act does not require be imposed but, if imposed will limit rights and, on the other, seek a remedy in the abstract for the alleged BORA-inconsistency of all such orders.

   7.2 The Court of Appeal correctly held there was no interpretive dispute about the statutory provisions that make PPOs and ESOs a

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2 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, at [52]-[53] per Ellen France and Glazebrook JJ, and [105]-[107] per Elias CJ. See also *R (T) v Secretary of State for the Home Department* [2014] UKSC 35, [2015] 1 AC 49 at [52].

3 *Attorney-General v Taylor*, ibid.

4 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [156]-[157] per Tipping J.

5 Indeed, ss 7A and 7B emphasise the importance of comity.

second penalty. The provisions decisive to that conclusion[6] are clear and are not capable of an interpretation giving them a different effect. But Parliament's enactment of a permissive (not mandatory) regime does not limit Mr Chisnall's rights.

7.3 There is no BORA cause of action to review legislative choices in the abstract. Courts engage with how enactments apply to real or reasonable hypothetical factual scenarios.[7] The Court of Appeal was wrong, the appellants submit, to find that justification was required for Parliament's "choice of regime".[8] This important aspect of comity is protected by parliamentary privilege, and the DOI jurisdiction has not changed it.

7.4 By contrast, when it comes to the application of the regime to Mr Chisnall and others, there is an orthodox interpretive solution that avoids unjustified rights limitations.[9] Section 26(2) is capable of reasonable limits. The discretions conferred by the enactments on the Court or on other decision-makers[10] responsible for imposing measures with a penal impact must be exercised in a rights-consistent manner.

8. The Court below fell into the error of concluding that Parliament shouldn't have adopted the law it did. That is not part of the judicial function; it strays impermissibly into Parliament's realm. This Court must correct the error by allowing the appeal.

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6 Namely, the eligibility criteria which rely on a prior conviction (s 107C Parole Act and s 7 PPO Act), and the restrictions on liberties inherent to each order.

7 *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA), at [31]: "The courts cannot, however, refuse to give or make a declaratory judgment or order on a ground which is inconsistent with the courts' essential function. Broadly speaking, that function is to interpret and apply the law to the facts of a particular case. With respect to statutes, the courts have the function of authoritatively construing legislation, that is, determining the legislation's legal meaning so far as is necessary to decide a case before it."

8 Court of Appeal judgment at [220]-[221] (**101.0093**).

9 See the discussion below at para 26 and following.

10 As well as the discretion for the Parole Board to impose special conditions of ESOs, which further limit rights including increasing the penal impact of the regime: Parole Act 2002, s 107K(1).

PART A: SECTIONS 4, 5, 6 BORA

9. It is trite that the lawfulness of the exercise of a statutory power falls to be assessed against BORA for rights-consistent application.[11] Where no particular outcome is mandated by the enactment, the orthodox approach is to examine the exercise of power, within the context of particular facts, for lawfulness. If a protected right is limited in the exercise of that discretion, the outcome must be rights-consistent (i.e., the limit must be justified). It is only where the enactment *requires* a rights-inconsistent outcome that s 4 will apply to require that outcome. Once the Court is satisfied that an enactment confers a power capable of rights-consistent application, there is no scope for a DOI to be made. Unless s 4 is reached, there can be no provision to declare inconsistent with rights.[12]

10. Here, the Crown has the burden of justification where rights are limited in the application of the enactments. That is to be done by the Court in considering an application for an ESO/PPO and not by the Court in a DOI application, divorced from its facts.

11. Sections 10 Legislation Act and 4, 5, 6 BORA drive that interpretive task for the Court. But just as there is no dispute as to the interpretation of the provisions that make ESOs and PPOs penalties, nor is there any apparent interpretive dispute over the scope of the discretionary powers to make those orders, or to impose special ESO conditions.[13] Instead Mr Chisnall submits that no ESO or PPO can ever be justified.[14] However, it is well-established that s 26(2) is not an absolute right.[15] Nor has Mr Chisnall pleaded any facts or brought any evidence to provide the Court a basis to

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11 See for example *Drew v Attorney-General* [2002] 1 NZLR 58 (CA); *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

12 As the Court of Appeal put it in *Drew*, "s 4 is not reached" (ibid, at [68]).

13 See below at paras 26-28.

14 Respondent submissions at para 15.1.

15 No Court below has accepted that s 26(2) is incapable of limitation, and for the reasons already canvassed in the primary submissions nor should this Court.

conclude that the application of the enactments would result in an unjustified limit. He has consented to the making of an ESO against him.[16]

12. Mr Chisnall seeks DOIs because he says there were alternative policy choices that Parliament could have pursued, and a more rights consistent one would be a treatment-based regime that didn't offend s 26(2).[17]

The constitutional framework for interpretation

13. Section 10 of the Legislation Act is the starting point for any interpretive task. Along with ss 4, 5 and 6 BORA, the constitutional scene is set. When determining the meaning of an enactment, Parliament instructs that the task is performed using the text, purpose, and context of that enactment. Purpose and context cannot be considered without also considering Parliament's instruction that rights and freedoms are affirmed (s 2 BORA), protected and promoted (Long Title), and that available rights-consistent meanings are to be preferred to rights-inconsistent meanings (s 6).[18]

14. Section 6 is a strong interpretive direction. But it does not drive the interpretative process; s 10 Legislation Act does. A rights-consistent meaning must be preferred, if the enactment can bear that meaning, to any inconsistent meaning. Reasonable limits on rights are not inconsistent with BORA (per s 5), so s 6's work is done where there is no justification that a limit is a reasonable one, judged against the s 5 standard. Parliament's power to legislate inconsistently with rights is unaffected: s 4.

The interpretive methodology

15. A DOI is a remedy, and so nothing about a DOI case is different interpretively from any other kind of case where BORA consistency is at issue. But different interpretive approaches, giving the intended effect to ss 4, 5, 6 BORA, are necessary and legitimate in any BORA case. The six-step *Hansen* interpretive methodology is useful and should remain the default guidance to interpret

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16 A PPO made in January 2021 was set aside by the Court of Appeal in August 2022 (**401.0028**).

17 It is not obvious that a civil mental health system could be designed as a feasible alternative that would avoid the low threshold definition of penalty for the purposes of s 26(2).

18 See for example *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [252] per McGrath J.

statutory provisions that limit rights qualified by s 5. But it must be departed from when rights are illimitable or internally qualified, or when the statute confers a discretionary power.

16. *Hansen* correctly reflects a view of rights as being limitable as the cornerstone to BORA interpretation. It reflects the dual roles of ss 5 and 6 in interpretation and sets s 6 in its proper context.[19] The fact Parliament has affirmed the importance of a right through BORA does not take on decisive importance at step 1, because rights are capable of justified limitation. The importance of the right becomes but one factor in statutory construction when determining the meaning of a statute. A provision authorising limits on rights is rights-consistent if those limits are justified: s 5.

17. The importance of *Hansen* is that "both the relevant right or freedom, and any reasonable and demonstrable justification for the limitation, bear on the interpretation of legislation using s 6."[20] The correct methodology does not require adoption of the *most* rights-consistent meaning that a provision can bear at step 1, unless the right is of a sort that is incapable of being later limited by s 5. Instead, rights-consistency is assumed in the construction of statutes.

18. The *Hansen* approach has been treated as a default interpretive methodology. It is now well-established in New Zealand law. But the usefulness of that methodology will be affected in two main ways, being the **nature of the right** and the **nature of the provision**:

    18.1 The *Hansen* interpretive methodology is unnecessary where the nature of the right is such that it is not subject to s 5 limitation, either because it is an absolute right or because limitation considerations are built into the right itself through some sort of

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19 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [186] per McGrath J, citing with approval Paul Rishworth 'Interpreting and Invalidating Enactments Under a Bill of Rights' in Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, 2004) 251, at 277.

20 *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65, at [46].

internal qualification rather than through s 5. Step 3 of *Hansen* cannot be applied in such cases.

18.2 When the provision confers a discretionary statutory power (one that does not have immediate effect on a given set of circumstances but instead delegates a power to make a rights-limiting decision), the *Hansen* analysis provides little assistance because the provision merely *authorises* limits but does not *directly* limit the right.

19. The result has been that the *Hansen* methodology provides the backbone to rights-consistent interpretation, with changes to accommodate deviations from its central assumptions, all reflecting the dual importance of ss 5-6, as shown in the following table:[21]

[21] Many of the cases referred to in this table are also summarised by Palmer J in *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65, at [37]-[53].

	Absolute or internally-qualified right	Externally qualified right
Self-executing provision	Step 1 of *Hansen,* including presumption of rights-consistency in s 6, and incorporating consideration of any internal qualification to the scope of the right Followed by steps 2, 5 and 6 of *Hansen*, to the extent necessary (modified to remove reference to s 5) Examples: *Fitzgerald*;[22] *Dotcom*[23]	All steps of *Hansen*, to the extent necessary Examples: *Hansen*; *Brooker* and *Morse*[24]
Provision conferring discretionary power	Step 1 of Hansen applied to empowering provision, including presumption of rights-consistency in s 6 And analysing exercises of the power in light of any internal qualification to the scope of the right[25] Examples: *Zaoui (No 2)*;[26] *Dotcom*;[27] *Cropp v Judicial Committee*[28]	Step 1 of Hansen applied to empowering provision, including presumption of rights-consistency in s 6 And analysing exercises of the power in light of s 5 Examples: *D v Police*;[29] *New Health New Zealand*;[30] *Mosen*[31]

22 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 (regarding interpretation of an exception from the apparent requirement in s 86D of the Sentencing Act to impose the maximum sentence on a "third strike" offender, to avoid inconsistency with s 9 BORA).

23 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745, at [146] (regarding interpretation of the scope of s 204 Summary Proceedings Act to save only defects of form, not substance, to avoid inconsistency with s 21 BORA).

24 Discussed below at paragraphs 21 and 28.

25 Provisions that override BORA rights are not normally expressed by requiring a decision-maker to exercise a power inconsistently with or without regard to BORA (for an example of such a case, see *A v Secretary of State for the Home Department* [2005] 2 AC 68; see too *RJE v Secretary to the Department of Justice* [2008] VSCA 265, (2008) 21 VR 526, where in respect of Victoria's ESO regime the Parole Board was specifically exempted from compliance with the Victorian Charter of Human Rights and responsibilities: at [111] per Nettle JA). Instead, rather than *delegating* a power to override BORA, Parliament has generally enacted statutory provisions that are self-executing, whether through their direct application to a set of circumstances, or because they limit the scope of a statutory power.

26 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 282, at [90]-[91] (regarding interpretation of the deportation power in s 72 of the Immigration Act 1987 consistently with fundamental rights under ss 8, 9 and 22 BORA).

27 At [161] (regarding interpretation of a broad power to authorise search and seizure in s 44 of the Mutual Assistance Act to avoid inconsistency with s 21 BORA).

29 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, at [101] (regarding interpretation of the discretionary power to make a sex offender registration order limiting ss 14, 17 and 18).

30 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948, per O'Regan, Ellen France and Glazebrook JJ (regarding the general competence of councils to pass bylaws, including water fluoridation, provided that limits on s 11 BORA are justified in terms of s 5).

31 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507, at [29]-[31] (regarding the making of ESOs only where there is strong justification for a limit on the freedom from second penalties in s 26(2)).

20. One aspect of this table that may appear counterintuitive at first is the suggestion that *Brooker* and *Morse* are consistent with the *Hansen* approach,[32] despite there being no consistent reference to the *Hansen* steps.[33] Those cases concerned self-executing provisions with a "constant" meaning,[34] such that it is sufficiently clear that certain conduct with objective impacts on reasonable persons are criminalised, but which amounts to a justified limitation on the s 14 freedom of expression. They recognise that the same conduct can have differing levels of impact on reasonable persons when the context changes, considering factors like timing, content, and location. *Brooker* and *Morse* therefore do not describe a delegated, discretionary power for judges to balance freedom of expression to give meaning to the offence provisions at issue in individual cases; rather they relate to certain, self-executing provisions setting objective tests to criminalise conduct in certain contexts, requiring an exercise of judgment by the criminal court to determine whether the conduct and context meets the definition of the offence.

21. The alternative, giving s 6 BORA a more influential role, is wrong.[35] Such an approach treats the mere fact of rights-limitation as an interpretive "trump", overlooking the impact of s 5, and, therefore, s 4. Reliance on s 6 without considering s 5 can of course be appropriate where the right in issue is illimitable, as in *Fitzgerald*.

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31 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507, at [29]-[31] (regarding the making of ESOs only where there is strong justification for a limit on the freedom from second penalties in s 26(2)).

32 Apart from Elias CJ's judgments, which reflected her minority *Hansen* approach of finding the most rights-consistent meaning the provisions could bear at the interpretive stage, in light of s 6 of BORA.

33 Although his Honour does not expressly reference *Hansen*, the steps are set out in narrative form in McGrath J's judgment in *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1, at [105]. Tipping J also affirms the application of *Hansen* in *Morse*, at [68].

34 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91, at [57] per Blanchard J.

35 For example, in Elias CJ's judgments in *Hansen*, at [6] and [10]-[25]; *Morse*, at [12]-[17]; *New Health*, at [300] (her Honour Elias CJ saying that "interpretation in conformity with s 6 is required whenever there are different available meanings").

22. Sections 5 and 6 must be worked together, so as to find an interpretation that achieves the objective that Parliament intends. The appellants respectfully adopt Palmer J's recent observation as correct within our constitutional system:[36]

> [51] Applying s 6 to interpret the meaning of legislation to uphold a right or freedom, irrespective of whether Parliament intended the right or freedom to be subject to a limit that is reasonable and demonstrably justified in a free and democratic society, would involve applying only half of the Bill of Rights to interpretation. It would involve requiring that legislation which, interpreted according to its text and in light of its purpose and context, empowers decisions to limit rights in a way which is reasonable and demonstrably justified in a free and democratic society, must be read down to invalidate those decisions. That would engender a more frequent and hostile constitutional dialogue between the executive, the judiciary and Parliament. I doubt it would bode well for the long-term sustainability of human rights in New Zealand.

23. All the interpretive methodologies outlined in the table above are legitimate and, indeed, necessary. They respond to different types of rights and statutory provisions and reflect New Zealand's particular constitutional arrangements. A DOI remedy is available once BORA-consistent outcomes are found to be unavailable. The real debate, then, is how courts ought to assess limits on rights qualified by s 5.[37]

The proportionality analysis[38]

24. There is no dispute that proportionality is inherent to whether a limit on a right will be justified under s 5. The question is whether to apply an *Oakes*

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36 *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65, at [51].

37 Of the comparable jurisdictions considered in Part B, only under Canadian law would one seem likely to regard ESOs and PPOs as criminal penalties and thus require justification of the limit on s 26(2). But the need for only proportionate limits on rights and freedoms through post-sentence orders is common to all jurisdictions.

38 These submissions are not concerned with the appropriate approach to proportionality to be adopted by the Court in judicial review of administrative action (that is, this case is not like *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138). This case is primarily about the *judicial* powers to make PPOs and ESOs. Of course, further limitations on rights will be imposed on offenders subject to the regimes in two ways: through the special conditions imposed by the quasi-judicial independent body continued by the Parole Act, the New Zealand Parole Board; and through the exercise of powers conferred on officials either by the Parole Act or the PPO Act, or by the Parole Board delegating certain functions to adjust special conditions to an official such as a probation officer. The setting of special conditions is, practically speaking, also a judicial power (it is imposed only on application, following an adversarial process, and by a statutory tribunal chaired by a Judge or former Judge), albeit

analysis, or an unstructured proportionality analysis, to the proposed limit. As the Crown says the proper target of the Court's consideration is the exercise of the discretionary judicial power, a wealth of authority supports an unstructured proportionality balancing approach conducted in the course of that exercise of power.

25. As is clear from three recent Court of Appeal judgments,[39] this is already the settled approach to proportionality testing of the limitations on rights imposed by making an ESO. After the application of the statutory procedure and criteria in relation to a respondent to an ESO application, the Court must then ensure that the limit on s 26(2) has a "strong justification". This approach was described recently in *Mosen* as follows:[40]

> [I]f the statutory criteria are met, a court must balance the right not to be subject to a second penalty (that is, being subject to an ESO when a person has served their sentence for a violent offence) against the statutory purpose to protect the public from the very high risk that an offender will commit a relevant violent offence. Put more simply in *R (CA586/2021) v R* [sic], and as adopted in *Wilson v Department of Corrections*, "strong justification" is required for an ESO and this is the "lens" through which this Court must assess whether the Judge erred in making the order.

26. It follows too that the Parole Board, in imposing special conditions on ESOs and thus increasing the penal impact of the order,[41] is obliged to only impose such conditions as can be demonstrably justified.

27. This balancing of rights limitation against the importance of achieving the statutory purposes in respect of the particular case before the Court was derived from the approach of Winkelmann CJ and O'Regan J in *D (SC 31/2019)*, which related to the similar discretionary power to make a

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one sitting outside of the Court hierarchy. The implementation of those conditions, and the exercise of other executive powers, has more of an administrative character. But in the factual vacuum arising from Mr Chisnall's pleadings, it is not necessary (or indeed possible) to engage with how the Court ought to supervise the exercise of those powers.

39 *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225; *Wilson v Department of Corrections* [2022] NZCA 289*; Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507.

40 *Mosen*, ibid at [31]; citing *R (CA586/2021)* at [53] and *Wilson* at [19]-[20].

41 Parole Act 2002, s 107K(1). This power may also be used to limit other rights, such as freedom of movement, freedom of association, and freedom of speech: see Parole Act 2002, s 15(3).

sex offender registration order, limiting a range of rights.[42] More broadly, it reflects the "development of common law discretions to meet Convention requirements" noted by the UK Supreme Court in *Kennedy v Charity Commission*.[43]

28. This balancing approach is often referred to, rather ungenerously, as "unstructured" proportionality. This nomenclature contrasts with "structured" proportionality, which in New Zealand is synonymous with the *Oakes* analysis. However, it is unfair to regard this analysis as a truly unstructured one. When a balancing approach has been adopted by the courts, it is because there is already a structure for decision-making provided by a legislative scheme.[44] Without the need to import a rights-based structure for decision-making, this more informal balancing of rights and interests tends to instead act as a cross-check, to ensure that the scheme is being applied only in the ways authorised by the enactment (that is, unless there is some indication to the contrary in the statute, only rights-consistent applications are presumed to be authorised).

29. In *D v Police (SC 31/2019)* Winkelmann CJ and O'Regan J concluded that their unstructured proportionality approach was consistent with *Brooker* "albeit in a different context".[45] The difference in context was the nature of the statutory provision – *D* concerned a discretionary power, whereas *Brooker* and *Morse* was self-executing, concerning the meaning of an offence. The similarity being noted by Winkelmann CJ and O'Regan J was the need for a broad balancing of rights and other interests by a judge, at the point of application of a legislative scheme that authorised limits on rights.

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42 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213, at [101], with which Glazebrook J agreed, [260]; *Mosen*, above n 39 at [29]-[30].

43 *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, at [38]; citing by way of example *Manchester City Council v Pinnock* [2011] 2 AC 104 where an unstructured proportionality analysis to ensure breaches of an ECHR right could be avoided was implied into a statutory tribunal's process for property possession proceedings (see discussion below at para 52).

44 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, at [88].

45 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213, at [102] and fn 122.

30. The *Oakes* analysis is generally rendered unnecessary where the statute is the framework for the exercise of power in any individual case.[46] In any event, the final *Oakes* step is where the "heavy conceptual lifting and balancing ought to be done",[47] which is the step privileged by an unstructured proportionality assessment.

31. The *Oakes* analysis is not well-suited to examination of individualised decisions made under a statutory scheme, where the power is discretionary and the outcome is not pre-ordained by Parliament.[48] A well-crafted statutory scheme will ensure that the technical elements of *Oakes* are addressed through the application of that scheme.[49] In a second penalty case, the signals of rights-consistency will be a discretionary power to impose a second penalty (rather than a mandatory provision), and a judicial process (rather than an administrative one).

32. The starting point is always statutory construction. It is because s 26(2) is capable of justified limitation that unstructured proportionality balancing at the point of exercise of the discretion whether to make an ESO or PPO (exemplified in *Mosen*) ensures that only demonstrably justified orders are made. The usual presumption that only rights-consistent orders are authorised has not been displaced.[50]

33. As set out in the Crown's principal submissions there is one way in which Parliament has directly limited rights by preventing courts from considering

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46 As this Court recently noted in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, an unstructured proportionality assessment "does not entail a lesser threshold" (at [91]).

47 *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, at [149] per Abella J; *R v KRJ* [2016] 1 SCR 906, at [78] per Karakatsanis J.

48 See for example *Doré v Barreau du Québec* [2012] 1 SCR 395, where Abella J discusses the inaptness of the *Oakes* analysis to assess the Charter consistency of both administrative decisions and common law rules: at [36]-[58].

49 As set out in the appellants' primary submissions, when a discretionary power deprives the decision maker the ability to ensure only justified limits on protected rights a structured proportionality approach is also appropriate (from para 75 ff).

50 In contrast to *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 (considered further below at paragraphs 61 ff) where the Victorian Court of Appeal held that the statutory discretion to make orders could not be so construed, there are no express processes or standards for judicial consideration of rights-consistency set down in New Zealand's statutory regimes and no requirement to sustain standard conditions that are unnecessary in light of an offender's risk: Parole Act 2002 ss 107K, 107O(1).

certain issues in the exercise of discretion – the retrospective application of the regimes.[51]

Burdens on the parties

34. Where, as here, a DOI application is made without an associated factually based claim (for example, an interpretive challenge to the exercise of a power or BORA damages claim) an applicant ought to match the level of detail required of an applicant under the Declaratory Judgments Act.[52] Pleadings should identify, with sufficient particularity to allow for cogent response:[53]

    34.1 The statutory provision(s) at issue;

    34.2 Where, as here, the pleading concerns a discretionary power, the specifics of the statutory scheme or the protected right that means the power cannot be exercised in a BORA consistent way;

    34.3 The factual circumstances in which the provision(s) will breach a right affirmed by BORA, in particular either:

        34.3.1 The facts of the applicant's own case, or

        34.3.2 If the applicant is a representative party or is at risk of being exposed to a rights-limiting measure in future, the facts of any reasonable hypothetical case.

35. The pleadings ought to allow the parties to identify the particular provision(s) that give rise to the alleged unjustified limitation on rights.

36. The Attorney-General ought to be named as a respondent[54] and will normally file a pleading in response, with sufficient specificity to respond to

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51 Appellants' submissions at para 75 ff.

52 This is not a case where the Court needs to determine whether the litigant has standing to pursue a DOI application, although standing may be an issue in other cases.

53 The detailed pleadings requirements for declarations of incompatibility in England and Wales are referred to in paragraph 41 below.

54 Consistent with the Human Rights Act 1993, s 92B(1)(b).

the application. The Attorney-General will indicate whether they oppose the DOI sought or concede to it being made.[55]

37. The Attorney-General carries the Crown's burden to justify a pleaded limit on protected rights. That burden may be discharged by:

37.1 filing evidence if appropriate; and/or

37.2 an interpretive argument that there is nothing in the statutory scheme that requires a BORA inconsistent outcome.[56]

38. Subject to the limits imposed by Parliamentary privilege, the Attorney-General is not limited by the development, and passage, of the enactment in discharging the justification burden. Evidence may be from the historic record or obtained contemporaneously with the challenge. The enactment itself may provide a sufficient basis to justify its limits.

39. However, adjudicating a broad claim like the respondent's application would require the Crown to bring evidence as to every aspect of a legislative regime in response to very general claims of rights-inconsistency. That level of evidential burden should only be imposed in response to suitably detailed pleadings from the applicant.

Wording of any declaration

40. The Court ought not give a DOI remedy in respect of a statutory scheme creating a discretionary power if none of the pleaded factual scenarios are authorised by the scheme or if the limits on the right at issue are justified in the pleaded scenarios. Where some aspect of the scheme leads inexorably to BORA-inconsistent outcomes such that no other remedy is available then:

40.1 the Court should phrase the DOI as precisely as possible (including specific section references) to make the nature of the inconsistency, and the circumstances in which it arises, clear; and

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55 It is anticipated that any such concession would be rare, since the executive's constitutional role is to implement legislation enacted by Parliament, and as the Court will require a contradictor to determine whether it ought to exercise its discretion to make a DOI.

56 As in, by way of example, *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.

40.2 unless the limit is of a kind that is not capable of any justification, the Court should phrase the declaration such that it reports the outcome of the case (e.g., that the limit had not been demonstrably justified, not that it *is not* or *could not* be justified).

PART B: COMPARATIVE CASELAW

41. The appellants find support for the position adopted above in United Kingdom, Australian, and Canadian caselaw.

42. The United Kingdom's long experience of declarations of incompatibility under the Human Rights Act 1998, in a similar context where parliamentary supremacy remains in place, is instructive as to the appropriate use of the new DOI remedy here. Australia's state regimes of post-sentence supervision or detention tend to be similar to New Zealand's in substance – and in states with statutory bills of rights, caselaw of relevance to this Court's task has developed.

43. Canadian law is already broadly drawn upon in the appellants' primary submissions, however the Canadian sentencing system which is akin to an amalgam of preventive detention and ESOs is described below in order to inform the Court of the system in that jurisdiction.

United Kingdom

Pleading requirements

44. Practice Direction 16 of the Civil Procedure Rules requires a claimant to "give precise details of the legislative provision alleged to be incompatible and details of the alleged incompatibility" if a declaration of incompatibility is being sought.[57] Practice Direction 54A, in respect of judicial review proceedings, imposes the same pleading requirement.[58] The appellants submit this rigorous approach to pleading ought to be required in

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57 Practice Direction 16 of the Civil Procedure Rules, para 15.1(2)(d).

58 At para 4.7: "Where the claimant is seeking to raise any issue under the Human Rights Act 1998, or seeks a remedy available under that Act, the Claim Form must include the information required by paragraph 15 of Practice Direction 16."

New Zealand, but admit that in this case they took no objection at the outset to the shortcomings in Mr Chisnall's pleading seeking a DOI.

Caselaw – declarations of incompatibility

45. A DOI is a remedy of last resort acknowledging a breach of a claimant's rights, which must be avoided unless it is impossible to give any other relief.[59] In *T* the Supreme Court confirmed that the British DOI jurisdiction is concerned with the real effect of a statute in the case before the Court:[60]

> …a declaration of incompatibility is not a declaration that the legislation *always* operates incompatibly with convention rights. It is a declaration only that it is *capable* of operating incompatibly and, almost always, that it *has* operated incompatibly in the case before the court.

46. Much of the leading caselaw concerns delegated legislation, which may actually be struck down by the courts but only if it is "incapable of being operated in a proportionate way" and thus "inherently unjustified in all or nearly all cases".[61]

47. As in New Zealand, UK caselaw has held that discretionary statutory powers must be lawfully operated, which means deployed only in conjunction with Convention rights and other statutory requirements such as non-discrimination duties.[62]

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59 *R v A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45, at [44].

60 *R (T) v Secretary of State for the Home Department* [2014] UKSC 35, [2015] 1 AC 49 at [52].

61 *R (Ali & Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, at [69] per Lord Hodge; see also [60] per Lady Hale: the rule "will not be an unjustified interference with article 8 rights in all cases. It is capable of being operated in a manner which is compatible with the convention rights." See also *Christian Institute v Lord Advocate* [2016] UKSC 51, at [88] (which concerned whether Scottish legislation was Convention compatible and thus intra vires); *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10, at [56]-[58]. The Court of Appeal and High Court have also on occasion applied this approach to primary legislation, but this seems to be inconsistent with the leading statement as to when a declaration of incompatibility will be made in *T*: *Secretary of State for the Home Department v R (Joint Council for the Welfare of Immigrants)* [2020] EWCA Civ 542, at [118] per Hinkinbottom LJ and [178] per Davis LJ; *Archer v Commissioner of Police for the Metropolis* [2020] EWHC 1567 (QB), [2020] 1 WLR 3164, at [9].

62 *R (Roberts) v Commissioner of Police for the Metropolis* [2015] UKSC 79, at [42] per Lady Hale and Lord Reed. See also at [2]: "There are many laws which are capable of being operated both compatibly and incompatibly, depending upon the facts of the particular case. The compatibility of the law itself has therefore to be judged in conjunction with the duty of the police to operate it in a compatible manner." And [47]-[48]: "The law itself is not to blame for individual shortcomings which it does its best to prevent…It would not, therefore, be right to

48. A self-executing provision admitting of no exceptions or review mechanism might attract a DOI. *R (F) v Secretary of State for the Home Department* concerned a mandatory registration provision following sexual offending convictions. This was a disproportionate limit on the article 8 right to private life because there was no way to discharge the registration order once someone could be shown to no longer pose any significant risk of committing further offences of that type.[63] The Supreme Court assessed the legislation on the basis of a now low-risk person who had been registered as the result of a conviction.[64] This group would inevitably be unjustifiably caught by the regime, necessitating a DOI.[65]

49. Even if the Court reaches the conclusion that a self-executing statutory regime may result in arbitrary outcomes, its approach to remedy will be grounded in the facts of the case before it unless there is good reason to hold otherwise. In *Chester* the Supreme Court refused a DOI in relation to a statutory scheme stripping prisoners of the right to vote. Baroness Hale explained that, while the statutory scheme was arbitrary and non-discretionary, the Convention right to vote was *capable* of being justifiably limited. The applicant Mr Chester was a life prisoner. Limits on *his* right to vote were within the scope of limitations previously recognised by the European Court. While s 4 of the Human Rights Act 1998 created the possibility of abstract declarations and there may be appropriate occasions for such a remedy:[66]

> …the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own

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make a declaration of incompatibility in this case." See to the same effect *R (Uttley v Secretary for State for the Home Department* [2004] 4 All ER 1 (HL), at [17] per Lord Phillips, explaining how an unconstrained discretionary judicial power (in that case sentencing) could not be found incompatible with a Convention right: "If it was necessary for [the sentencing judge to adjust a sentence] in order to avoid infringing article 7 (1) and the 1991 Act left him free to do so, it cannot be said that the 1991 Act is incompatible with article 7 (1)."

63 *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331, at [51].

64 *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331, at [52].

65 This was necessarily a "reasonable hypothetical" group. The applicant F might himself have fallen within that group, but this could not be assessed due to the lack of any review mechanism.

66 *R (Chester) v Secretary of State for the Home Department* [2013] UKSC 63, [2014] AC 271, at [102].

> rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims.

50. One interesting case, which has no apparent analogue in New Zealand, was *A v Secretary of State for the Home Department* where a discretionary power had been *expressly* framed to be exercised without reference to a Convention right.[67] While the power at issue was permissive, it was to be applied despite an otherwise relevant aspect of human rights law. This provision was found incompatible by a majority of the House of Lords because of that feature, and also because the detention powers only applied to foreigners and was therefore discriminatory. The case was not concerned with any particular decision made under the regime.[68] Instead the claimants argued (successfully) that the scope of the statutory discretion permitted detention on a ground not encompassed within art 5 ECHR.

Caselaw – justification analysis

51. Whether a limit on a qualified Convention right is justified is generally assessed under a structured proportionality test akin to *Oakes*, encompassing the following steps:[69]

    51.1 is the legislative objective sufficiently important to justify limiting a fundamental right;

    51.2 are the measures which have been designed to meet that objective rationally connected to it;

    51.3 are they no more than are necessary to accomplish it; and

    51.4 do they strike a fair balance between the rights of the individual and the interests of the community?

52. But the question of justified limitations arising in judicial proceedings might also be treated in an unstructured way akin to *D v Police*. *Manchester City*

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67 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, which concerned s 23 of the Anti-terrorism, Crime and Security Act 2001 (UK) that authorised detention of foreign nationals suspected of terrorism despite the effect of art 5 ECHR.

68 As Baroness Hale makes clear, ibid at [220].

69 *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 at [45]; and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [20] and [75].

Council v Pinnock was about whether the art 8 ECHR right to private and family life could be raised in council proceedings seeking to end a tenancy. The Supreme Court held that the court considering the Council's application was empowered to determine whether an order would be a proportionate limitation on the right in the circumstances, and to resolve any relevant issue of fact in doing so. Proportionality was treated in an unstructured way, within the statutory process engaged in by the court – "the question is always whether the eviction is a proportionate means of achieving a legitimate aim."[70] The Supreme Court again affirmed the value of developing discretions through the common law to ensure compatibility of legislative schemes in *Kennedy v Charity Commission*.[71]

53. A further gloss on the structured proportionality test is the "manifestly without reasonable foundation" standard. This modifies the proportionality test to allow for greater deference to democratically-elected institutions when "the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure."[72] As such, if there has been such consideration by the government or parliament, the Court will respect that assessment of proportionality unless it is manifestly without reasonable foundation.[73]

Caselaw – behaviour orders[74]

54. England and Wales have enacted a range of behaviour orders which may be imposed either without a conviction or subsequent to a criminal conviction, including anti-social behaviour orders, control orders, sexual harm prevention orders, serious offending prevention orders, and gang

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70 *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 at [52].

71 *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, at [38].

72 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at [93] per Lord Reed.

73 *SG*, ibid; *Humphreys v HM Revenue and Customs Commissioners* [2012] UKSC 18, at [19]; *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 at [65]; *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502, at [51]-[75]; *Secretary of State for the Home Department v R (Joint Council for the Welfare of Immigrants)* [2020] EWCA Civ 542, at [133]-[134].

74 For the sake of simplicity, this section deals only with the laws applying in England and Wales.

injunctions. In two respects, England and Wales caselaw is not parallel with New Zealand law on this point:

54.1 While freedom from double jeopardy and a requirement of proportionality in punishment form part of UK law, the "double punishment" right in Protocol 7, art 4 ECHR is not one of the Convention rights integrated into the UK Human Rights Act; and

54.2 These orders are regarded as civil in nature,[75] although Courts do not appear to have considered the situation where a person qualifies for a behaviour order *by reason of* a particular conviction.[76]

55. Regardless, behaviour orders have the inherent capacity to limit rights. Courts have therefore recognised an underlying requirement of necessity and proportionality where a behaviour order, albeit non-penal and preventive in nature, nonetheless limits a Convention right such as of freedom of movement, freedom of association, or the right to private and family life.[77]

Australia

56. Australia lacks any federal equivalent to BORA and operates within a constitutional system. But the substance of its state-level post-sentence order regimes is the most analogous to New Zealand out of all the jurisdictions surveyed, and states have increasingly adopted statutory bills of rights akin to BORA. Apart from one regime (which targeted a particular offender), Australian courts have never held a post-sentence order regime to be inconsistent with the Commonwealth Constitution.

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75 See for example *R v Crown Court at Manchester, ex parte McCann* [2002] UKHL 39, at [31]-[34] per Lord Steyn, [75]-[76] per Lord Hope, at [103] per Lord Hutton; *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, at [24] per Lord Bingham; *Chief Constable of Lancashire v Wilson* [2015] EWHC 2763, at [58].

76 For example, sexual harm prevention orders can be imposed on someone who has been convicted of a particular sexual offence, or diverted from the criminal justice system by reason of insanity or unfitness to stand trial: Sexual Offences Act 2003 (UK), s 103A.

77 See for example *Boness v R* [2005] EWCA Crim 2395, at [38]; *R (Richards) v Teeside Magistrates' Court* [2015] EWCA Civ 7, at [37].

Caselaw – post-sentence orders

57. Post-sentence orders are now common in Australian states, but they are not regarded as second penalties. After one early case where the Australian High Court struck down a post-sentence order regime targeted at a particular offender,[78] it has consistently upheld such regimes as constitutional and non-penal in nature. The leading case remains *Fardon*,[79] which was recently reaffirmed in *Garlett*.[80]

58. Despite the non-penal treatment of post-sentence orders in Australia, state courts have still been concerned to ensure that orders are merited and do not unjustly limit offenders' liberties after the conclusion of their determinate sentences. In *Bryde* the Queensland Supreme Court noted that imposing unnecessary conditions limiting liberties would be "to gratuitously impose a double punishment…without any identifiable benefit to the community.[81] In other words, despite *Fardon*, the Queensland court considered that excessive measures could have a penal impact. To a similar end, the Victorian Court of Appeal explained its restrictive interpretation of

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78 *Kable v Director of Public Prosecutions for New South Wales* [1996] HCA 24, (1996) 189 CLR 51. The High Court struck down a piece of legislation (the Community Protection Act 1994 (NSW)) providing a power for a court to make a post-sentence preventive detention order in respect of a particular offender, Gregory Kable. Mr Kable was the only possible subject of the regime created by that Act. That Act was struck down as inconsistent with the maintenance of the New South Wales Supreme Court's institutional integrity (contrary to Chapter III of the Constitution) in that it "conscripted" the Court to "procure the imprisonment of [Mr Kable] by a process which departed in serious respects from the usual judicial process": see *Fardon v Attorney-General (Queensland)* [2004] HCA 46, (2004) 223 CLR 575 at [100] per Gummow J. The result was serious damage to the Supreme Court's institutional impartiality by drawing it into a "political exercise": *Fardon* at [16] per Gleeson CJ.

79 *Fardon v Attorney-General (Queensland)* [2004] HCA 46, (2004) 223 CLR 575. The High Court upheld Queensland legislation (the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)) that authorised both continuing detention in prison (a stricter version of the PPO) and supervised release (the equivalent of an ESO) in respect of serious sexual offenders who had reached the end of their sentences. *Kable* was distinguished by noting the substantial differences in the legislation, namely that it was legislation of general application involving the exercise of a classically judicial power; the legislation conferred a discretion as to the appropriate type of order if the statutory test was met (detention, supervision, or no order); it required a high degree of probability to meet the statutory risk test; and was not designed to be penal in effect, being aimed at community protection: at [34] per McHugh J.

80 *Garlett v Western Australia* [2022] HCA 30. The majority reasoned that the Western Australia regime was non-punitive and thus did not amount to "double punishment": at [78].

81 *Attorney-General for the State of Queensland v Bryde* [2008] QSC 94, at [32].

the Victorian regime in the familiar terms of the principle of legality and presumption in favour of personal liberty in *Nigro*.[82]

59. Victoria has a Charter of Human Rights and Responsibilities, which essentially reflects the same structure as BORA. In *RJE* the Victorian Court of Appeal considered the level of risk of reoffending required before an ESO could be made under the Victorian regime. All members of the Court concluded that the word "likely" in the statute meant "more likely than not". In a concurring judgment, Nettle JA grounded this interpretation in its Charter consistency. "More likely than not" was an available meaning of "likely" which would ensure only demonstrably justified limits on rights to freedom of movement, privacy and liberty. Any other meaning of "likely" would result in limitations that were not capable of demonstrable justification.[83] This was an interpretive approach which sought to ensure that only justifiable post-sentence orders could be made.

60. The successor ESO regime was considered by the Victorian Court of Appeal in *Nigro*. The issue of interest was whether the residual discretion to make an ESO once the criteria were met needed to be construed as subject to human rights limitations. While accepting that in principle that there was a serious question to be determined as to whether the Charter limited the exercise of a broad discretion by a judicial officer,[84] it was not necessary to finally determine the issue because the Court found that an implied rights-

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82 *Nigro v Secretary to the Department of Justice* [2013] VSCA 213, at [66]-[68].

83 *RJE v Secretary to the Department of Justice* [2008] VSCA 265, (2008) 21 VR 526, at [105]-[119] per Nettle JA. The case is also notable for his Honour's express rejection of Elias CJ's approach to rights-consistent interpretation in *Hansen* (at [116]). A further case of note is *Secretary to the Department of Justice v AB* [2009] VCC 1132 which was decided after a legislative amendment following *RJE*, which expressly permitted ESOs to be made *even if* the risk of reoffending was thought to be *less* likely than not. The County Court held that this was unjustifiably inconsistent with the Charter, endorsing Nettle JA's reasoning. The County Court is roughly equivalent to the District Court in New Zealand's judicial hierarchy, and the case has since been overtaken by a new legislative regime and by *Nigro*.

84 *Nigro v Secretary to the Department of Justice* [2013] VSCA 213, at [185]. Of relevance to this finding was the Australian High Court's conclusion in *Wotton v Queensland* [2012] HCA 2, (2012) 246 CLR 1, that a broad discretionary power (in that case to set parole conditions) could be exercised consistently with the Constitution and thus was a valid power. The unanswered question in *Nigro* was whether the same principle applied to Victorian state legislation in light of the Victorian Charter. In New Zealand the general principle is the same as in *Wotton*: *New Health; Cropp*.

consistency limitation on that particular discretion was inconsistent with the statutory scheme.[85] That wasn't because rights were unimportant – in fact the scheme specifically provided procedures by which rights should be taken into account – but the scheme also included certain inflexible features, such as a set of "core conditions" that were always operative and which may not be the minimum interference with rights necessary to address an offender's risk. As a result of these and other indicators in the statute, the Court held it would be inconsistent with the statutory regime to read the Court's discretionary power as subject to an implied limitation of Charter consistency.[86] Notably the contrary conclusion was reached in New Zealand in *Mosen*, and it is also relevant to note that in New Zealand even the standard ESO conditions are not fixed, as an offender can apply to the Parole Board to have them discharged.[87]

61. The level of risk needed before an order could be made was defined as "unacceptable risk". This was expressly permitted to be less than "more likely than not", but the Victorian Court of Appeal concluded it was a Charter-consistent definition because it took into account "both the severity of the apprehended conduct and the likelihood that that conduct will occur" (that is, the *nature* of any possible offending was a legitimate factor in whether a limitation on an offender's liberty was merited).[88]

62. Most recently, in light of Queensland's new and similar statutory bill of rights,[89] the Queensland Supreme Court held contrary to *Nigro* that those rights *do* influence the exercise of the Court's discretion to make a post-sentence order under the Queensland regime.[90]

Caselaw – justification analysis

63. Australia has recently affirmed the application of a structured proportionality test when considering whether a limit on a constitutional

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85 *Nigro v Secretary to the Department of Justice* [2013] VSCA 213, at [179].
86 *Nigro v Secretary to the Department of Justice* [2013] VSCA 213, at [193]-[204].
87 Parole Act 2002, s 107O(1).
88 *Nigro v Secretary to the Department of Justice* [2013] VSCA 213, at [101]-[102].
89 Human Rights Act 2019 (Qld).
90 *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 252, at [144].

right authorised by a statute is justified.[91] But, as in other jurisdictions, less structured proportionality considerations come into play in the judicial application of statutory regimes to particular facts, including post-sentence orders.[92]

Canada

64. Canada differs from New Zealand, Australia, and the United Kingdom in that it does not have any regime to impose fresh supervision orders linked to continuing offending risk after a custodial sentence has been served. Instead, Canada permits designation of offenders as "dangerous offenders" or "long-term offenders" at the time of sentencing. These designations allow the sentencing judge to make a "long-term supervision order" for up to 10 years, on top of a determinate sentence of imprisonment of at least two years. In the case of a "dangerous offender", the sentencing judge may impose either an indeterminate sentence or long-term supervision order, or otherwise impose a sentence in accordance with normal sentencing principles. This process is roughly analogous to preventive detention sentencing, except that instead of considering the availability of an ESO as a relevant consideration as to whether a determinate sentence will be effective, the Canadian judge may instead directly impose that sentence as an alternative to preventive detention.[93] As in New Zealand, the conditions of a long-term supervision order are set and managed by the Parole Board.[94]

65. In a very recent case, the Canadian Supreme Court confirmed and expanded upon its prior approach to pleading hypothetical scenarios to test lawfulness against the Charter.[95]

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91 *Palmer v Western Australia* [2021] HCA 5.

92 See for example *Wotton v Queensland* [2012] HCA 2, (2012) 246 CLR 1 where the High Court held that proportionality of limits on the Constitutional right of political communication was "imported…into a parole board's decision-making process" (at [91]).

93 Criminal Code, Part XXIV (ss 752-761); *R v Boutilier* [2017] 2 SCR 936.

94 Corrections and Conditional Release Act (S.C. 1992, c. 20), s 134.1.

95 *R v Hilbach* 2023 SCC 3, per Martin J: "[R]easonably foreseeable scenarios are situations that may reasonably be expected to arise as a matter of common sense and judicial experience" (at [87]). They "ought not to be 'far-fetched or marginally imaginable cases', nor should they be 'remote or extreme examples'" (at [88]).

PART C: FURTHER SUBMISSIONS AS PER COURT'S MINUTE AT [4]

Answer to the key issues[96] in this case

66. Mr Chisnall's case is unusual. A litigant would usually seek (and be entitled to) a remedy to avoid the application of a rights-breaching provision where the enactment doesn't require its rights-breaching effect. But, now that the PPO has been quashed, Mr Chisnall consents to an ESO being made. Nonetheless, Mr Chisnall says that his rights are inexorably breached, even by an ESO he consents to, and that the remedy he is entitled to is a DOI.

67. The Court of Appeal should have been focused on the application of the regimes to Mr Chisnall's circumstances. Mr Chisnall is arguing for this Court to take the same abstract approach to the regimes as the Court below did. He says that because lesser-infringing alternative legislative regimes were available that could have been enacted, it follows that nothing done under the current regimes can be justified. But addressing this question abstractly – to challenge the entire "therapeutic orientation" devoid of factual context – is wrong. Doing so necessarily invites the Court to criticise Parliament's objective and to substitute another, preferred by the Court. It relies on an absolutist submission that Parliament *cannot* act for the purpose it has chosen – that instead of targeting a risk of serious violent or sexual *reoffending*, the regimes could just target risk more generally.

68. By contrast, it is of course perfectly legitimate to raise through litigation the issue of whether, through the application of the regimes to Mr Chisnall, appropriate therapeutic treatment that will address *his* imminent serious sexual reoffending risk is available or required by law, and is deliverable or delivered in fact. But as the recent Court of Appeal judgment quashing the PPO shows, that rehabilitative and reintegrative treatment has in fact occurred.[97]

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96 Above at paragraph 2.

97 *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402, at [44]-[51] (**401.0028**).

69. Further, another putative regime does not avoid limits on rights. Freedom of movement, association, and expression, and other important interests such as privacy, would all be inherently limited by a "therapeutic" regime even where such a regime might manage to avoid limiting s 26(2). But all of those rights are capable of justified limits. The abstract justification approach preferred by the Court of Appeal opens the door to requiring justification of Parliament's decisions to authorise limits on rights through all types of permissive statutory frameworks.

70. It was wrong to grant Mr Chisnall a remedy that does not speak to his circumstances. As applied, nothing in the two regimes has been shown to have unjustifiably limited his rights. Section 4 BORA has not been reached (or even argued).

The unpleaded s 26(2) claim – 12-month limit on intensive monitoring ESO

71. For the first time in his appeal submissions, Mr Chisnall has raised the 12 month lifetime limit on intensive monitoring (**IM**) ESO special conditions.[98] Mr Chisnall says this deprives the court of the discretion to make an ESO in circumstances where the 12-month limit has been reached and an ESO with IM would be sufficient to manage the offender's risk. Instead, the Court would only be able to make a PPO.[99]

72. The appellants accept that if a person meets the test for a PPO but also could be safely managed under an ESO with IM, then the 12-month IM limit in the Parole Act may remove a lesser rights-infringing alternative option from the court considering the PPO application. But no evidence has been developed with a view to defending this aspect of the regime. There is no Crown duty to anticipate and defend every provision of a statutory regime that a DOI claimant might point to. Instead, the claimant must plead the relevant facts and statutory provisions that inexorably give rise to a rights-inconsistent

98 Parole Act 2002, s 107IAC(3) and (5).

99 Respondent's appeal submissions at para 59.

outcome. As this issue has only been raised as an issue through submissions in the apex court, the Court ought not adjudicate it.[100]

Section 22 BORA

73. Arbitrary detention became an issue at the first hearing before this Court. The starting point is the pleadings, where no s 22 claim has been particularised. Instead, Mr Chisnall says that the manner and method of obtaining information for a psychological report in support of the applications, and the making of a PPO or an ESO against him, would breach his rights.[101] There is no basis for a DOI revealed by these pleadings, so it is unsurprising that no court adjudicated such a claim.

74. Second, Mr Chisnall's arbitrary detention claim has already been pursued in the course of his PPO hearing, being thoroughly considered and dismissed by Gordon J.[102] Mr Chisnall's appeal to the Court of Appeal did not challenge the High Court's arbitrary detention findings.

75. Mr Chisnall's reliance on upon European caselaw where art 5 ECHR was at issue in relation to successive German post-sentence preventive detention regimes has already been addressed before the Court in oral submissions.[103] While in *Ilnseher* the Court concluded that the applicant's deprivation of liberty was positively authorised under the "unsound mind" ground provided by art 5.1(e) ECHR:

    75.1 New Zealand law does not import exhaustive grounds for detention into s 22 BORA.

    75.2 Challenging the legitimacy of any second punishment constituting detention for the purposes of s 22 BORA would have the effect of

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100 The evidence before the Court was generated during the policy process to implement PPOs and reform ESOs in 2011-2014. Lack of pleading of this issue means the Crown has not been able to provide any other evidence such as, for example, the current operational costs of different types of monitoring, and the efficacy and impact of prolonged monitoring on offenders.

101 Application for declarations of inconsistency, at paras 3 and 6 (**101.0009**).

102 *Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32, at [127]-[132] (**101.0241**).

103 At page 77 and following, Transcript.

elevating s 26(2) to be an illimitable right, which would ignore the fact that it is subject to s 5.

75.3 *Ilnseher* does not in any event describe a substantively different system from the PPO regime.[104]

76. Questions of system design are only relevant to rights breach insofar as the statute inexorably gives rise to unjustified limits. But, in examining the facts of Mr Chisnall's case, any concern as to an insufficient "treatment" focus is evidently misplaced.[105]

13 February 2023

U R Jagose KC / M J McKillop / T Li
Counsel for the appellants

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The respondent / cross-appellant.

104 *Ilnseher v Germany* [2018] ECHR 991, at [200].

105 *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402, at [44]-[51] (**401.0028**).

LIST OF AUTHORITIES

Legislation

Human Rights Act 1993, s 92B

New Zealand Bill of Rights Act 1990, Long Title, s 2, 3, 4, 5, 6, 7A, 7B, 8, 9, 14, 17, 18, 21, 22, 26

Parole Act 2002, s 107C, 107IAC, 107K, 107O

Public Safety (Public Protection Orders) Act 2014, s 7

Caselaw

A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68

Adoption Action Inc v Attorney-General [2016] NZHRRT 9

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