IN THE SUPREME COURT OF NEW ZEALAND **SC 26/2022**

I TE KŌTI MANA NUI Ō AOTEAROA

BETWEEN	**ATTORNEY-GENERAL**
	First appellant/cross-respondent
AND	**THE CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS**
	Second appellant/cross-respondent
AND	**MARK DAVID CHISNALL**
	Respondent/cross-appellant

SUPPLEMENTARY SUBMISSIONS FOR RESPONDENT/CROSS-APPELLANT: (1) METHODOLOGY FOR DECLARATIONS OF INCONSISTENCY (2) COMPARATIVE HUMAN RIGHTS LAW CONCERNING POST-SENTENCE ORDERS

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MAY IT PLEASE THE COURT

1. These supplementary submissions are filed further to paragraphs [5]-[6] of the Court's 11 November 2022 minute (**Minute**) and address the questions the Court directed around how declaration of inconsistency cases should be determined.

    1.1. First, the respective roles of sections 4, 5 and 6 of the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**) in the context of declaration of inconsistency proceedings in interpreting whether impugned legislation can be interpreted to permit only justified limitations.

    1.2. In particular:

        1.2.1. Whether the claim of justification under section 5 falls to be assessed against that given by the Court in *Hansen*; the standard for discretionary decisions given in *D*; or another standard;

        1.2.2. What if any burden falls on an applicant for a declaration of inconsistency;

        1.2.3. What if any burden falls on the Crown;

    1.3. If justification is not made out, how a declaration of inconsistency should be phrased.

    1.4. Finally, what comparative human rights jurisprudence says concerning justified limitations on rights.

2. In addition, the Court also sought further comparative material concerning post-sentence orders; and allowed written submissions on other matters not previously canvassed arising from the cross-respondents' submissions and in the course of argument.

UPDATE ON CASELAW: *CHIEF EXECUTIVE OF CORRECTIONS V PORI* AND *GARLETT V WESTERN AUSTRALIA*

3. Since submissions were prepared for the substantive hearing, two further relevant cases have arisen. By way of a Public Safety (Public Protection Orders) Act 2014 (**Public Safety Act**) caselaw update, the first Prison Detention Order was made in *Chief*

Executive of Corrections v Pori[1] returning New Zealand to the days of the Māori Land Wars, or English WWII defence regulations, imprisoning Mr Pori, potentially indefinitely, without charge, without a trial, and without the right to a jury,[2] (to which Mr Chisnall was equally entitled), and without consideration of New Zealand's international obligations, or section 6 of the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**), and only because s 85 of the Public Safety Act, in the Judge's analysis, required it. Whether or not such an odious[3] form of imprisonment will be overturned on appeal, it is provided for in the Public Safety Act and so unreasonably conflicts with the Bill of Rights Act.

4. Second, the High Court of Australia gave judgment in *Garlett v Western Australia*,[4] concerning that state's equivalent to the post sentence detention regimes already held by the United Nations Human Rights Committee (**UNHRC**) to constitute arbitrary detention, and retrospective criminal penalties in breach of arts 9 and 15 of the International Covenant on Civil and Political Rights (**Covenant**).[5]

5. Four members of the Court simply followed that Court's decision in *Fardon*, without reference to the UNHRC. Of the three other judgments, two dissenting and the third holding the scheme to be unjust punishment but not unconstitutional, that of Gordon J – though framed within the narrow provisions of the Australian Constitution – is striking:[6]

> "Labelling the HRSO Act scheme, and the role of the Supreme Court, as 'preventive justice' is a misnomer. It is not justice. The HRSO Act scheme, at least in its operation with respect to robbery, is contrary to Ch III and undermines the two key rationales — or constitutional values — underpinning Ch III's strict separation of Commonwealth judicial power from executive and legislative power: first, the historical judicial protection of liberty against incursions by the legislature or the Executive; and second, the protection of the independence and impartiality

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1 [2022] NZHC 3581, 21 December 2022, [1]: "…a prison detention order. Such an order will require his continued detention in prison when he has not been charged with any offence for which he could be imprisoned and when he is not subject to a sentence of imprisonment."

2 *Siemer v Solicitor-General* [2010] 3 NZLR 767 (SC).

3 Winston Churchill, quoted AWB Simpson *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Clarendon, 1992) 391, and note in that context the reference by Glazebrook J in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, [290] to *Liversidge v Anderson* [1942] AC 206.

4 *Garlett v Western Australia* [2022] HCA 30.

5 *Fardon v Australia* CCPR/C/98/D/1629/2007 (2010); *Tillman v Australia* CCPR/C/98/D/1635/2007 and see relevant excerpts respondent's primary submissions (**RS**) [4] n 3.

6 Above n 4, [163] & [174], **emphasis** added, and see further below n 61.

> of the judiciary so as to ensure that the judiciary can operate effectively as a check on legislative and executive power."

6. Her Honour continues:

> "… the potential normalisation of regimes that override individuals' liberty on the grounds of legislatively asserted 'preventive' or 'protective' imperatives, unrelated to the adjudgment and punishment of criminal guilt, inevitably presents risks to the institutional integrity of courts — institutions established for the administration of justice — and the separation of powers. The coercive preventive justice regimes that are enacted must reflect and respect the two key rationales — or constitutional values — that underpin, and are protected by, Ch III's strict separation of federal judicial power. Those core constitutional values — 'conventions of [the] "rule of law"' — cannot be waived or set aside for the protection of the community against what is asserted to be a "growing number of 'predators'" …
>
> **The Court, therefore, must be cognisant of, and vigilant to protect against, laws that are corrosive to or erode those key rationales** – or constitutional values – underpinning the separation of judicial power. **That cognisance and vigilance is not limited to laws that involve some overt or "outright conscription"** of the judiciary to do the work of the legislative or executive branches of government. **The Court must be cognisant of, and vigilant to protect against, "the creeping normalisation of piecemeal borrowing of judicial services to do the work of the legislature or the executive" that gradually erodes judicial independence**."

7. That creeping normalisation has spread to New Zealand. The "preventive justice" is no more just here.

APPLICATION OF SECTIONS 4, 5 AND 6 OF THE NEW ZEALAND BILL OF RIGHTS ACT IN DECLARATION PROCEEDINGS

Overall approach to sections 4, 5 and 6 in seeking rights-consistent interpretations

8. The broad question put by the Court concerns the respective roles of sections 4, 5 and 6 of the Bill of Rights Act in determining whether the impugned legislation can, here, be interpreted to permit only justified limitations.

9. The starting point is that, as observed by the Court of Appeal in *Taylor*, the task of the Court in its declaration jurisdiction is not akin to a judicial review of Parliament's own decision: "in assessing questions of rights consistency and justification the court must follow its own processes and form its own opinion."[7] That distinct role was also more fully explained in *Wilson*, one of the first decisions under the declaration jurisdiction conferred by the Human Rights Act 1998 (UK) (**HRA-UK**):[8]

> "The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation.

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7 *Attorney-General v Taylor* [2017] 3 NZLR 24 (CA), [131] cited respondent submissions (**RS**) at [32].

8 *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, [61]-[62].

> The courts are now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. In carrying out this evaluation the court has to compare the effect of the legislation with the Convention right. If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective which under the Convention may justify a prima facie infringement of the Convention right. …
>
> The legislation must not only have a legitimate policy objective. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court …"

10. The functions of section 4, 5 and 6 in undertaking that assessment are well-settled.

11. First, and as recently restated in *Fitzgerald*, the effect of section 4 is that:[9]

> "Parliament is able to legislate in breach of the affirmed rights and freedoms, and if it does so, the courts must apply that law."

and, under the declaration jurisdiction, a finding that section 4 is engaged will – subject to any discretionary consideration – lead to a declaration of inconsistency. Materially, the experience of the United Kingdom courts in making declarations of incompatibility is instructive: even on the broad approach to interpretation permitted by section 3(1), a significant proportion of the declarations made to date have followed findings that the relevant legislation simply cannot be reinterpreted so as to achieve compatibility.[10]

12. Second, and also noting the Court's request for submissions concerning comparative approaches to justified limitations on rights, there is broad commonality across civil rights regimes.[11] The steps set out by this Court in *Hansen* and subsequently, though subject to continuing debate, reflect that broad consensus.[12]

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9 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, [39] (and see also [50]; [66] & [119]) per Winkelmann CJ; and see also: [173] per O'Regan & Arnold JJ; [244] n 347 per Glazebrook J; and [292] per William Young J, though note disagreement from other members of the Court with the latter's characterisation of section 4 as the "starting point": see Winkelmann CJ at [48] n 71 and Glazebrook J at [244] n 347.

10 See for specific examples below at nn 42-45 and, more broadly, the useful survey and analysis in Alison Young "Is Dialogue Working under the Human Rights Act?" (2011) Pub L 773, appendix 2, setting out 14 such cases.

11 Minute at [6].

12 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1, [64] & [70] per Blanchard J; [92] per Tipping J; [190]ff per McGrath J, though note dissents of Elias CJ & Anderson J at [6]-[15] and [266]; and see, for instances of recent discussion, *D (SC 31/2019) v New Zealand Police* [2021] 1 NZLR 213 , [166] per Glazebrook J; *New Health New Zealand Inc v South Taranaki District Council* [2018] 1 NZLR 948, [103] per O'Regan & E France J, though see dissent per Elias CJ at [298]; *Fitzgerald* above n 7, [44]-[47] per Winkelmann CJ and [174]-[175] per O'Regan & Arnold JJ, both noting academic criticism.

13. The Human Rights Committee has stated, in its role as the preeminent interpreter of states parties' obligations under the Covenant:[13]

> "States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."

14. Similarly, the European Court of Human Rights has expounded four general permissible limitations necessary in a democratic society:[14]

> "(a) the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' …;
>
> (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention …;
>
> (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued' …;
>
> (d) those paragraphs of … the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted …"

15. At a national level:

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[13] *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant C*CPR/C/21/Rev.1/Add. 13 (2004), [6]. As to the standing of Committee dicta, see, particularly, the observation of the International Court of Justice in *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* 2010 ICJ Rep 639, [66]:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States parties obliged to comply with treaty obligations are entitled."

and see also, in respect of New Zealand, *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, 21:

> "The views of the Human Rights Committee acquire authority from the standing of its members and their judicial qualities of impartiality, objectivity and restraint. Moreover, there is much force in the provisional view … that its functions are adjudicative. As … pointed out, when it reaches a final view that a state party is in breach of its obligations under the covenant, it makes a definitive and final ruling which is determinative of an issue that has been referred to it."

and, in the particular context of declarations of inconsistency, *Attorney-General v Taylor* [2017] 3 NZLR 24 (NZCA), 48-49.

[14] See for example *Silver v United Kingdom* (1983) 5 EHRR 347, [1983] ECHR 5.

15.1. As noted in *Hansen*, above, the approach set out there followed the Supreme Court of Canada (**SCC**) in *Oakes*;[15]

15.2. As set out below, the United Kingdom courts have also applied *Oakes*, as well as noting ECtHR precedent;[16] and

15.3. The Crown's supplementary submissions place some reliance on Australian precedent, both for the proposition that post-sentence detention is not in fact punishment and for what is termed "unstructured proportionality review" in judicial review of administrative decisions. As addressed below, that material is of marginal relevance.[17] The High Court of Australia has, however, adopted a proportionality standard in terms similar to *Oakes* and *Hansen* in respect of those limited rights affirmed by the Australian Constitution as limitations upon legislative power.[18]

16. Last, it appears generally accepted that the scope for rights-consistent interpretation under section 6 is limited, including by reference to section 4. While members of the Court have differed as to whether section 6 authorises the "strained" interpretation

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15 Above n 12, [64] per Blanchard J; [103] per Tipping J; [185] & [203] per McGrath J.

16 See below n 33.

17 Below n 61.

18 See, for example, *McCloy v New South Wales* [2015] HCA 34, 257 CLR 178, a challenge to electoral statutes as inconsistent with the implied constitutional right to political communication, at [2] per French CJ & Kiefel, Bell & Keane JJ.:

> "(1) Does the law effectively burden the freedom in its terms, operation or effect?
>
> (2) If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government ...;
>
> (3) If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object[5]? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified. The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> *suitable* — as having a rational connection to the purpose of the provision[6];
>
> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom."

permitted by section 3(1) of the Human Rights Act 1998 (UK),[19] it appears sufficient here to note that:

16.1. The interpretative exercise cannot go so far as to displace fundamental elements of the relevant statute, be incompatible with the underlying thrust of the legislation", "not go with the grain of it" or change or remove its substance;[20] and

16.2. As noted above, and contrary to the broad approach urged by the Crown, it regularly proves impossible to read down legislation, whether or not conferring discretionary powers.[21]

17. From that broad starting point – and, as noted, it is accepted that these matters are not simple, and will doubtless continue to be refined – three particular methodological issues appear to arise under sections 4, 5 and 6 in the context of this proceeding:

17.1. As noted by the Court, the question of whether claimed justification for legislation that is inconsistent with affirmed rights is to be assessed against *Hansen*, as above; against the more flexible standard applied in judicial review proceedings, as in *D*, above; or another standard;[22]

17.2. The related question, as pressed for the Crown, of whether a discretionary power can be interpreted to avoid inconsistency with affirmed rights, and so preclude a declaration of inconsistency;[23] and

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19 Cf, for example, *Fitzgerald* above n 9, [71]-[72] per Winkelmann CJ and [253] per Glazebrook J.

20 See for example above n 9, [67] per Winkelmann CJ citing *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264 [28] (though see [208] per O'Regan & Arnold JJ); and *D (SC 31/2019) v New Zealand Police* [2021] 1 NZLR 213, [2021] NZSC 2 at [168]ff & [180] n 233 per Glazebrook J, noting the view of the majority in R v Hansen [2007] NZSC 7; [2007] 3 NZLR 1 but leaving open the issue of whether purpose might be displaced.

21 See, for instances of discretionary powers held to be inconsistent with affirmed rights, *Anderson* below n 44 and *KRJ* below n 45.

22 Minute at [5](b)(i).

23 See appellants'/cross-respondents' supplementary submissions (**ACRSS**) at [3], [7.4], [31] & [32]:

> "… 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.

17.3. The particular claim, as also pressed for the Crown, that the provision for what are conceded to be punitive measures in the impugned Acts is itself the legislative policy objective, such that the Court may not question that or, particularly and as in the court below, find that the substantive objective of protecting individuals who suffer from dangerous personality disorders and the wider public could be met by other, rights-compliant means.[24]

(1) Whether claim of justification falls to be assessed against *Hansen*; against the requirements for discretionary decisions in *D*; or another standard

18. The first specific question identified by the Court is whether, where a power conferred by impugned legislation is accepted to limit one or more affirmed rights but the Crown has sought to defend that limitation as justifiable under section 5 (leaving aside any question of non-derogable rights) that claim of justification is to be assessed according to *Hansen*; the different standard for judicial review of statutory decisions on rights grounds; or another standard.

19. The starting point is that, while this Court did for example apply a *Hansen* analysis to an administrative decision in *New Health*, it has since developed a distinct approach to such decisions with reference to the decision of the Supreme Court of Canada in *Doré* and subsequent authorities.

… The discretions conferred by the enactments on the Court … must be exercised in a rights-consistent manner.

… In a second penalty case, the signals of rights-consistency will be a discretionary power to impose a second penalty (rather than a mandatory one), and a judicial process (rather than an administrative one.

… [U]nstructured proportionality balancing at the point of exercise of the discretion … ensures that only demonstrably justified orders are made."

[24] See in particular ACRSS at [67]:

"[T]o challenge the entire [lack of] "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."

20. Notably, in *D*, three members of this Court adopted a less complex standard than *Hansen* to assess the justifiability of the particular decision in issue:[25]

> "[Section 6] requires the power to make a registration order conferred by [the Act] to be exercised consistently with the Bill of Rights to the extent possible: the level of risk that the offender poses must be of sufficient gravity to justify the making of a registration order with the consequent impacts on the rights of the offender. We do not consider any more complex an analysis is required to ensure that section 6 of the Bill of Rights is applied …"

and the Court has adopted and further developed that approach in *Moncrief-Spittle*, holding with reference to *Doré* and the 2018 SCC decision in *Trinity Western*:[26]

> "We agree that it is necessary to adjust the steps undertaken as part of the proportionality inquiry to reflect the particular context. As the Supreme Court of Canada said in *Doré*, a 'more flexible administrative approach' to assessing the compatibility of an individual decision with rights, is 'more consistent with the nature of discretionary decision-making'. …
>
> A less structured approach may accordingly be more workable in assessing the reasonableness of a limit in cases involving the review of an administrative decision of the nature of that in issue here. There is however no immutable rule. We should also make it clear that not applying the *Hansen* structured approach does not entail a lesser threshold."

21. The present question, however, is whether that method – or a variation of that method – applies to or in some way limits the declaration of inconsistency proceedings that involve discretionary powers.

22. Put short, it does not.

23. The starting point is that, as reflected by the reasoning of the Court in *Moncrief-Spittle*, the distinct approach developed in *Doré* and subsequent cases follows the need to reconcile the principles – and practicalities – reflected in the law of judicial review with the distinct task of ensuring compliance with affirmed rights.

24. As canvassed in *Doré*, the background to that approach was that that Court had first, in *Slaight*, raised the question of how Charter rights-compliance and conventional

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25 *D v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213, [100]-[101] noting citations including *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 per Winkelmann CJ & O'Regan J (having decided on other grounds: see [75] & [84]) and [259], n 361 per Glazebrook J; see, however, [166], [182] & [251]-[2552] per Glazebrook J (dissenting as to result and holding no rights-compliant interpretation possible, such that sections 5 and 6 in substance inapplicable given section 4 prevailed; also contrasting the scope for interpretation with that found under section 3 of the Human Rights Act 1998 (UK)); [282] per W Young J (dissenting as to result and holding no rights-compliant interpretation).

26 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [89] & [91], citing *Doré* and also Law Society of British Columbia v Trinity Western University 2018 SCC 32, [2018] 2 SCR 293.

administrative law were to be reconciled;[27] second, in *Baker*, had sought to address Charter rights as mandatory considerations;[28] and then, undertook what the Court termed "vacillating" between those approaches.[29]

25. In developing a new approach, the Court in *Doré* observed:[30]

> "[A]n adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional section 1[31] analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? …
>
> … In assessing whether an adjudicated decision violates the Charter, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a Charter right."

26. As was also noted by this Court in *Moncrief-Spittle*, the Supreme Court of Canada subsequently explained in *Trinity Western* that the standard for rights-based review of a discretionary power is not "watered-down": the onus remains on the public decision-maker to show that it "gives effect, as fully as possible to the Charter protections at stake" but that is to occur in the context of "the particular statutory mandate".[32]

27. The United Kingdom courts have also acknowledged the question, applying an *Oakes* analysis to individual decisions are to be reviewed but also indicating a degree of

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27 *Doré* at [25]-[27], citing *Slaight Communications Inc v Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, including (at 1049) Dickson CJ for the majority that "[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases" and Lamer J at 1081ff applying *Oakes* analysis to address the inability of conventional Canadian administrative to address Charter inconsistencies.

28 *Doré* at [28]-[30] &[32], citing *Baker v Canada (Minister of Citizenship and Immigration)* 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

29 *Doré* at [31]-[32] listing decisions that, respectively, did and did not apply *Oakes*.

30 And see further in *Doré* at [23]-[58], including (at [34]-[35]) the rejection of *Oakes* in this context in favour of "a richer conception of administrative law, under which discretion is exercised 'in light of constitutional [*Charter*] guarantees ...'" and (at [43] & [51]-[52]) the concern to avoid correctness review in accordance with the Canadian administrative law doctrine of deference to the expertise of decision-makers.

31 That is, a justification analysis under section 1 following *Oakes* (and, in New Zealand*, Hansen*).

32 *Law Society of British Columbia v Trinity Western University* 2018 SCC 32, [2018] 2 SCR 293, [80], citing *Loyola High School v Quebec (Attorney General)* 2015 SCC 12, [2015] 1 SCR 613, [39], cited *Moncrief-Spittle* above n 28.

difference in approach, and the potential for further development of that difference.[33]

28. The United Kingdom Supreme Court has stressed that while the assessment requires the decision-maker to demonstrate proportionality, that does not mean that the reviewing court substitutes its own view.[34]

29. As with the acknowledgement by the Supreme Court of Canada of criticism of (and difficulty in) the *Doré* approach, the United Kingdom court has also acknowledged, but not to date resolved, the broader implication for judicial review method.[35]

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[33] See, for example, *R (on the application of Lord Carlile of Berriew QC) v Home Secretary* [2014] UKSC 60, [2015] AC 945, [87] per Hale DP:

> "[A]lthough the decision in question is, by definition, one which the Secretary of State (or other statutory decision-maker) was legally entitled to make, so that in that sense she is the primary decision-maker, the court has to decide whether that decision is incompatible with a convention right. ... the court has to form a judgment as to whether or not a convention right has been violated. I agree with Lord Sumption that it is not helpful to ask whether or not this process involves 'merits review'. We have moved on from that question now."

and going on to apply a proportionality analysis following European Convention on Human Rights principles, which are in similar terms to *Oakes* and *Hansen*: see [90]-[94] (whether Convention right limited); [95] (whether limitation prescribed by law); [96]-[97] (whether legitimate aim); [98]-[104] (whether necessary in a democratic society, including whether measure no more than necessary and whether proportionate; and see also [19] & [27]-[29] per Sumption SCJ; [67] per Neuberger SCJ; [147]-[148] per Kerr SCJ, citing *Oakes*; each citing the detailed exposition of proportionality analysis as applied to individual decisions in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, [20] per Sumption SCJ and [74] per Reed SCJ, the latter citing *Oakes*.

[34] See, for example, *Bank Mellat (No 2)*, above, [21] and [71] and, more recently, *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, [272]:

> "… a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense."

though that is itself contentious: see, for example, Kerr SCJ (in dissent) in *Berriew*, above, [152]-[154]: "assessment of compliance "requires the courts not only to examine the reasons given for the interference but also to decide for themselves whether that interference is justified" and, noting ECtHR caselaw, "... the court in each of those cases reached its own independent view as to the significance of the interference and, consequently, whether the interference was justified".

[35] See, particularly, *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457, [55] (citations omitted):

> "In *Keyu* ... this court had occasion to consider arguments, in the light of *Kennedy* and *Pham*, that this court should authorise a general move from the traditional judicial review tests to one of proportionality. Lord Neuberger (with the agreement of Lord Hughes) thought that the implications could be wide-ranging and 'profound in constitutional terms', and for that reason would require consideration by an enlarged court. There was no dissent from that view in the other judgments. This

30. The emergence of the distinct approach in *Moncrief-Spittle* and *Doré*, and the concerns raised in the United Kingdom cases, has two consequences for the Court's approach in declaration proceedings.

31. First, that distinct approach is not itself applicable to declaration proceedings, a point emphasised by the Supreme Court of Canada in its survey of *Doré* and related caselaw in its significant decision in *Vavilov*:[36]

> "[I]t is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the Canadian Charter of Rights and Freedoms (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the Charter …"

that is, that the concerns that drive the *Doré* – both at a level of administrative law doctrine, and more practically, as in the difficulty of defending a given statute in the context of an individual decision – do not apply to challenges to the statute itself. Those challenges remain governed by *Oakes*.

32. The second, and more important for present purposes, is that the distinct standard does envisage that the inquiry into a given individual decision is more circumscribed. While that raises some tension in terms of protection of the affirmed rights, as can for example be seen in the different views in the United Kingdom Supreme Court, the material point here is that:

    32.1. As reflected by the reference to the important distinction between the two forms of scrutiny in *Vavilov*, as set out above, there is no suggestion that scrutiny of individual decisions following *Doré*/*Moncrief-Spittle* excludes or limits systematic scrutiny of the statutory scheme; and

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is a subject which continues to attract intense academic debate (see, for example, the illuminating collection of essays in Wilberg and Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015). It is to be hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such imprecise concepts as 'anxious scrutiny' and 'sliding scales'."

[36] *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65, [2019] 4 SCR 653, [57] and see also and for example *Trinity Western*, above, [82], differentiating challenges "to an administrative decision where the constitutionality of the statutory mandate itself is not at issue."

32.2. More practically, the premise of the *Doré*/*Moncrief-Spittle* standard is that inquiry into individual decisions, though no less rigorous, is comparatively circumscribed: that is, *Doré*/*Moncrief-Spittle* scrutiny is not a substitute for due scrutiny of the statutory scheme following *Hansen* and *Oakes*.

(2) Whether discretionary powers avoid inconsistency / not susceptible to *Hansen* analysis

33. The further broad argument for the Crown, repeated in the supplementary submissions, relies upon the statutory discretions conferred by the impugned Acts as pre-empting or precluding any finding of inconsistency. It is said, for example, that:[37]

> … The discretions conferred by the enactments on the Court … must be exercised in a rights-consistent manner.
>
> … In a second penalty case, the signals of rights-consistency will be a discretionary power to impose a second penalty (rather than a mandatory one), and a judicial process (rather than an administrative one. … [

and that "unstructured proportionality balancing at the point of exercise of the discretion … ensures that only demonstrably justified orders are made."

34. The submissions also repeat the distinction sought to be drawn earlier for the Attorney-General between what are termed "self-executing provisions with a 'constant' meaning" and "delegated, discretionary powers for judges".[38] It is also said that the courts below erred in taking an "abstract approach", rather than the application of the two Acts to Mr Chisnall's own circumstances.[39]

35. The suggested distinction between "self-executing" and "delegated, discretionary" powers does not assist for several reasons.

36. Most simply, the premise that a discretionary power of itself ensures justification is correct only if the relevant power can be interpreted in that way, but:

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37 ACRSS, [7.2] & [32].

38 ACRSS, [20]; also table at p 8; [29]; [48] and see also appellant submissions at [51]-[54].

39 ACRSS, [67]; see also [70] "wrong to grant Mr Chisnall a remedy that does not speak to his circumstances" and [7.1], asserting – incorrectly – that the present proceeding is "unusual" in being pursued separately from substantive proceedings under the two Acts. In fact, far from being unusual, none of the declaration of inconsistency cases has proceeded in that way.

36.1. That can, clearly, be done in some instances: notably, in *Brooker* – though described for the Attorney-General as "self-executing" – the Court was able to interpret disorderly behaviour under the Summary Offences Act 1981 as incorporating a justification analysis:[40]

> "A characterisation of the behaviour of the defendant as disorderly then cannot be made without an assessment against the overriding requirement of section 5 of the Bill of Rights that the exercise of any guaranteed right may be subjected only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The value protected by the Bill of Rights must be specifically considered and weighed against the value of public order. The Court must ask itself whether treating the particular behaviour in the particular circumstances as disorderly constitutes a justified limitation on the defendant's exercise of the right in question."

and, straightforwardly enough, the offence provision was then held inapplicable. That is also true of *Pinnock*, the first of two authorities cited in support for the Crown, which concerned the procedure by which a court was to make a possession order following a determination against a tenancy made by a local authority. The statutory procedure was challenged on the basis that it did not uphold the right to private life under article 8 of the European Convention and the Court therefore considered whether incorporation of article 8:[41]

> "… would go against the whole import of the section and would amount to amending rather than interpreting it."

but found that the statutory language could be interpreted to accommodate such consideration.

36.2. However, as reflected by the reasoning in *Pinnock*, it is necessary for the Court to determine whether the statute can be so interpreted. For example, in *Kennedy*, the second of the authorities cited for the Crown and said to concern discretions, the Court found that it the impugned provision could not be read down to comply

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40 *Brooker v Police* [2007] NSC 30, [2007] 3 NZLR 91 [59] per Blanchard J, applying section 4(1) of the Act; also Elias CJ at [42], applying section 6 of the Bill of Rights Act, and Tipping J, [91]-[92], applying both sections 5 and 6.

41 *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, [75] & [77]; [83]; & [87]. The Court also found that, under the statutory scheme, the local authority ought to have considered the facts relevant to art 8 and also noted the desirability of avoiding parallel review proceedings on the art 8 ground.

with Convention rights, as to do so would "depart from the statutory scheme and run contrary to the grain of the legislation".[42] [43]

37. The same point is more clearly put in several rather more closely related precedents.

37.1. The first, *Anderson*, one of the earliest declarations of incompatibility made under the Human Rights Act (UK), concerned a statutory discretion by which a minister confirmed or varied the minimum non-parole period for offenders under mandatory sentence of life imprisonment. The declaration, though relating to a discretionary power, was made on the basis that the power was of itself inconsistent with the right to an independent and impartial tribunal: an argument that the ministerial power could be read down in order to comply with that right was rejected as "not … interpretation but interpolation inconsistent with the plain legislative intent".[44]

37.2. The second, which was cited for the Crown, but not on this point is the decision of the Supreme Court of Canada in *KRJ*. The decision concerns a discretionary power conferred upon a sentencing judge to impose certain post-release restrictions upon an offender, which had been amended to apply retrospectively. Approaching the statute on the basis that, unlike under the ICCPR, the Canadian right against retrospective penalty is capable of justified limitation, the Court

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42 *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, [41] per Lord Mance and [137] per Lord Toulson, Lords Neuberger; Sumption and Clark concurring, but see per Lords Wilson and Carnwath, dissenting at [191] & [224].

The majority judges also placed some reliance on potential access under common law, but – plainly – the current case is not amenable to that.

43 *R (on the application of Wright and others) v Secretary of State for Health* [2009] UKHL 3, [2009] AC 739.

44 *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, [56] & [59]; and see also [30]:

> "some things emerge clearly from this not very perspicuous section ... It cannot be doubted that Parliament intended this result when enacting section 29 and its predecessor sections. An entirely different regime was established, in the case of discretionary life sentence prisoners. ..."

and concluding that reading down would "would not be judicial interpretation but judicial vandalism". And see similarly R (on the application of Wright and others) v Secretary of State for Health [2009] UKHL 3, [2009] AC 739, concerning an unfair "listing" scheme for medical staff working with the vulnerable [39]:

> "I would not make any attempt to suggest ways in which the scheme could be made compatible. There are two reasons for this. First, the incompatibility arises from the interaction between the three elements of the scheme—the procedure, the criterion and the consequences. It is not for us to attempt to rewrite the legislation."

found part of the power – the making of post-release restrictions upon internet access – to be a justified limit on a general analysis following *Oakes*. Others were not, and were struck down: in particular, that finding was not dependent upon any particular facts, and the discretionary nature of the power did not exclude the *Oakes* analysis, though did figure in it.[45]

37.3. The third is the leading decision of the House of Lords in *A (No 1)*, which is also cited though unfortunately somewhat misdescribed in the Crown's supplementary submissions.[46] The case arose from two executive government actions – the first, a statutory instrument that formally derogated from part of the right against arbitrary detention, made under public emergency powers, and the second, statutory certificates for individuals' detention made by the Home Secretary in reliance on that derogation. Materially, the decision – citing *Oakes* – held the derogation to be disproportionate and so breached the Convention on systemic grounds, in particular that – as also pleaded here – the derogation targeted some individuals but not others posing the same risk and that the Crown had failed to show why less rights-impairing steps would not suffice.[47]

38. A final and instructive United Kingdom precedent is the declaration decision in *Wright*, which concerned an unfair "listing" procedure by which medical personnel and others could be disqualified from working with vulnerable patients on the basis of alleged misconduct.

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45 *R v KRJ* 2016 SCC 31, [2016] 1 SCR 906, [58] per Karakatsanis J, for the majority; [124] per Abella J (dissenting, finding all restrictions unjustified) & [134] (per Brown J, dissenting, finding all restrictions justified) (*Oakes* analyses); [72] & [157] (relevance of discretion); cited to other points ACRSS [31] n 47 and also AS [72] n 93; [90] n 110; [92] n 115.

46 *A v Home Secretary (No 1)* [2004] UKHL 56, [2005] 2 AC 68, cited ACRSS, [50], describing the case as "interesting", with "no apparent analogue in New Zealand" and involving a finding of incompatibility because "it was to be applied despite an otherwise relevant aspect of human rights law". To clarify:

- See, for the scope and terms of the decision, n 47 below; and
- The derogation in issue in *A* is comparable to, for example, the notwithstanding clause in section 107C(2) of the Parole Act 2022, which "confirms" the retrospective scope of the ESO regime despite any contrary law.

47 Above n 46 (at [11] per Lord Bingham; Lords Nicholls, Hope, Scott, Rodger, Carswell and Baroness Hale concurring at [85], [97], [139], [189], [238] & [217]). The challenge was upheld on the basis that the instrument of derogation failed a proportionality analysis, including because the derogation was applied only to non-citizens despite citizens posing no less risk ([33]-[34], and see also [67], finding discrimination) and because the Home Secretary had not shown why measures short of detention could not suffice ([35]).

39. It is also appropriate here to address two related points made by Crown. First, it is said that it is "peculiar", and in some sense unviable for Mr Chisnall to contend that the impugned Acts are inconsistent with affirmed rights, because he has now consented to the making of an extended supervision order, an earlier public protection order having been successfully set aside.[48] The submission is not only irrelevant but, in the context of draconian legislation, should not have been made: the fact that Mr Chisnall has, through extensive proceedings, lessened the adverse impact of the two impugned Acts in his own case does not alter that draconian character.

40. Mr Chisnall's application for a declaration of inconsistency is argued on the basis that all public protection orders (and all extended supervision orders) limit a range of rights in the New Zealand Bill of Rights Act, and that those orders can never be a justified limit on those rights. He says that this would apply in every hypothetical scenario. The Court of Appeal agreed.

41. Mr Chisnall has indicated his consent to an extended supervision order because he recognises that section 4 of the New Zealand Bill of Rights Act means that Courts will continue to give effect to both the Public Safety Act and part 1A of the Parole Act, and that even if he establishes his claim for declarations of inconsistency on the basis just described – that given the legislative scheme it is impossible for courts to exercise their jurisdiction in ways that only justifiably limit rights – Courts will nonetheless continue to exercise their discretion to order both public protection orders and extended supervision orders when the statutory tests are fulfilled.[49]

42. Second, reference is to made the scope for a proportionality assessment within each individual decision, as in the recent decision of the Court of Appeal in *Mosen*.[50] As has been set out, that does not address the question before this Court. As in fact observed

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48 ACRSS, [7.1]; also [11] (respondent/cross-appellant has not made out inconsistency, in part because of consent); and [66] (declaration proceeding pursued "nonetheless", despite consent).

49 Mr Chisnall would welcome a concession from the Crown, that if he succeeds on the basis described, the Chief Executive will be bound to withdraw his application, but does not anticipate one, even though that is the logical consequence. The reasons why a person who is subject to a concurrent applications for public protection and extended supervision orders would consent to an extended supervision order has already been addressed in oral argument: [2022] NZSC Trans 23 at 185.

50 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507, cited ACRSS pp 8, 9, 10, 11, 13 and 24.

in *Mosen*, that assessment can only go so far as the relevant statute can properly be interpreted.

43. The limits of that approach, in terms of addressing the inconsistency of the two Acts with affirmed rights, can also be seen in *Mosen*: all that can be done is to require a particularly stringent case, and as in the excerpt given above from *Vavilov*, the simple point is that the proportionality assessment does not address the consistency of the Acts with affirmed rights or preclude that proper analysis.

44. The simple point remains that, as required by sections 4 and 6, the question in the Court's inconsistency jurisdiction is whether the statutory provision can or cannot be interpreted to comply with affirmed rights. Whether the provision is discretionary is not determinative:

    44.1. Plainly, as with for example *Make It 16* and *Taylor*, statutory provisions framed in fixed terms will at least on occasion preclude reading down, but such provisions can also be read to comply, as in *Fitzgerald*; but

    44.2. It is also possible, as in, for example, *Anderson, KRJ* and *A*, to find that a discretionary power is on its terms inconsistent with affirmed rights, and cannot properly be interpreted so as to comply.

Appellants' claim that punitive measures are an unreviewable legislative policy choice

45. The third specific issue that arises under section 5 is the contention now made for the Crown that the Court below, and Mr Chisnall, are wrong to point to rights-compliant alternatives. It is said that:[51]

> "… to challenge the entire [lack of] 'therapeutic orientation' [in the two impugned Acts] 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."

and, further to the same point, that the court below was wrong

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[51] ACRSS, [67] & [7.3].

> "… to find that justification was required for Parliament's 'choice of regime'. This important aspect of comity is protected by parliamentary privilege …"

46. These positions, for which no authority is cited, are untenable. First, this simply is not what the Court below did. The Court of Appeal did not criticise Parliament for the choices it made, it declared that the Public Safety Act, and Part 1A of the Parole Act are inconsistent with the New Zealand Bill of Rights Act. They are.

47. The basic starting point of each of the models of human rights-based review of legislation under the ICCPR, and in the national and supranational jurisdictions set out above, is that the legislative means and the limited right is considered against a legitimate social or other objective.[52] The suggestion that the two Acts have, as their purpose, the acknowledged punitive regimes is circular, if not nihilistic.

48. The further point, as also found in each of those models is that if a less rights-restrictive or, as here, rights-compliant alternative exists, then the legislative means is not proportionate: in short, the claimed compromise between rights and other objectives is shown to be unnecessary.

49. It is also untenable to claim that either comity or privilege is engaged by those criticisms. As set out in, for example, *Wilson* and *Taylor* above,[53] but also in the broad practice of human rights review of legislation as seen in the various examples discussed here, the very premise of that review is that the Court can and must consider whether legislation – not parliamentary proceedings – is or is not human rights-compliant.

50. The Court did not criticise Parliament's objective. It observed that the Crown had not established that the means by which the *statutes* sought to achieve their objectives was justified.

What is required of the parties to declaration proceedings?

51. The further question posed by the Court is what burden, if any, falls upon the parties to declaration proceedings. Subject to one point raised by the Crown, that can be simply answered:

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52 Above nn 12-18.

53 Above nn 7-8.

51.1. It is for a claimant to show that the impugned statute limits rights under the Bill of Rights Act. If that is not – unlike here – evident on the face of the statute, as in for example in a claim that ostensibly neutral legislation is indirectly discriminatory, further exposition and evidence of that disparate impact may be necessary.[54]

51.2. Once shown and as is well-settled, it is then for the Crown to meet the onus of showing the limitation to be justified.[55]

52. The one further point is the claim by the Crown that a claimant must show that the impugned act infringes his or her rights, or those of a reasonable hypothetical person and show that that cannot be avoided by available discretion.[56] In short:

52.1. The broad point is that, as above, a claimant can show legislation to be inconsistent with affirmed rights on the face of the legislation, its context and the policy record and that is the case here.

52.2. As already pointed out, the "reasonable hypothetical" standard cited by the Crown with reference to Canadian cases has there arisen in one specific context, that of claims that mandatory sentences are cruel and disproportionate, contrary to s 12 of the Charter (and s 9 of the Bill of Rights Act, as in *Fitzgerald*): it is not, as suggested, a general requirement in Charter cases.[57] In that context, it has been held necessary to show that those subject to the mandatory sentence are subject to disproportionate punishment.

52.3. The reliance on statutory discretions has been addressed above.[58]

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54 See for example *Sharma v Canada* 2022 SCC 39, [29]-[36], a challenge to restrictions on the availability of the equivalent of home detention made on the basis of disparate impact upon indigenous offenders.

55 Above nn 12-18.

56 ACRSS, [7.3]; [34.3]; [65].

57 ACRSS [65] n 95, citing *R v Hilbach* 2023 SCC 3 and see AS, [57]ff citing *R v Nur* 2015 SCC 15, [2015] 1 SCR 773 and see respondent's submissions at [55]-[56].

58 And see also dicta in the context of discretions *Trinity Western*, above, [117]:

> "the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society."

and see also [195]-[196]; [206] and [312].

JURISPRUDENCE CONCERNING RIGHTS ISSUES AND ORDERS SIMILAR TO EXTENDED SUPERVISION ORDERS AND PUBLIC PROTECTION ORDERS

53. The Court's minute had further requested any relevant comparative jurisprudence concerning similar orders.

54. As set out in Mr Chisnall's primary submissions, and also briefly canvassed in some of the policy record, orders similar to those made under the two impugned Acts, and other measures for those assessed to pose dangers as a result of personality disorders have been considered at length by the European Court of Human Rights; national constitutional courts, including those in France and Germany; the United Nations Human Rights Committee, the preeminent interpreter of the International Covenant on Civil and Political Rights; the Committee on the Rights of Persons with Disabilities; and the Working Group on Arbitrary Detention, a "special procedure" established by the United Nations Human Rights Council.[59]

55. Further, and noting the assertions in the supplementary submissions for the Crown that:[60]

> "Australian courts have never held a post-sentence order regime to be inconsistent with the Commonwealth Constitution …
>
> [T]he Australian High Court … has consistently upheld such regimes as constitutional and non-penal in character."

the primary submissions for Mr Chisnall had also observed the narrow basis of those findings, which reflect the absence of any provision for relevant rights in that Constitution, and that the primary decision of the High Court of Australia – that in *Fardon* – was noted, and rebutted, as inconsistent with the Covenant.[61]

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59 See CAS, [2]-[3] nn 3-4 (ECtHR; UNHRC; UNCRPD); [36] (WGAD) and RS, [23.1] at n 25 (Bundesverfassungsgericht (Germany) [54.2] at n 63 (Conseil Constitutionnel (France)).

60 ACRSS, [56].

61 *Fardon v Attorney-General (Qld)* [2004] HCA 46, (2004) 223 CLR 575 discussed CAS, [3] n 1 & [4] n 3. The supplementary submissions do refer to the further decision of that Court in *Garlett*, above n 4, and to *Nigro & Ors v Secretary to the Dept of Justice* [2013] VSCA 213, (2013) 41 VR 359, (2013) 304 ALR 535. However, though not mentioned for the Crown:

56. To supplement those here:

56.1. The appendix to these submissions sets out the decisions of the ECtHR that preceded *Ilnseher*, which usefully shows the evolution of practice against the requirements of the Convention; and

56.2. The authorities filed with these submissions include a survey article of comparative legislative preventive detention and regimes, including human rights considerations, in the context of personality disorders.[62]

PLEADINGS IN DECLARATION PROCEEDINGS

57. The Crown's supplementary submissions raise several further points. First, the supplementary submissions again raise the question of how a claim is to be pleaded, including:

57.1. How the relevant discretionary power cannot be exercised in a rights-consistent way; and

57.2. "The facts of the applicant's own case" and/or "a reasonable hypothetical case.[63]

58. Mr Chisnall agrees that any pleading in an application for a declaration of inconsistency, should identify with particularity the statutory provision(s) at issue. He considers he has done so here. The Crown should be in no doubt the sections of the Public Safety Act,

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Garlett was (i) argued and, in the majority judgments, decided on the same narrow basis that the Court's decision in *Fardon*, above, was settled law (see [69] and [8], [60] & [291]); and (ii) the contrary decision of the United Nations Human Rights Committee was not addressed, albeit that – in contrast to the single dissent in *Fardon*, above, two members of the Court dissented and a third found the view of the majority that these measures are not punishment to be a fiction and unjust, but not unconstitutional: see [136]-[150] per Gageler J; [186]-[201] per Gordon J; [253]-[254] per Edelman J.

Nigro, though decided under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (i) followed *Fardon*, above; (ii) did not address any of the rights in issue in this proceeding; and (iii) more broadly, followed (at [82]-[85]) the holding of the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1 that the Charter does not permit any different approach to statutory interpretation:

such that none of this material can assist the Court.

62 Kirstin Drenkhahn & Christine Morgenstern "Preventive Detention in Germany and Europe" in *The Wiley International Handbook on Psychopathic Disorders and the Law: Volume II Diagnosis and Treatment* (Wiley, 2021) 87 and see, particularly, 90 (survey of different forms of detention); 93 & 95 (national caselaw); 96-100 (EctHR caselaw).

63 ACRSS, [34]

and Part 1A of the Parole Act that Mr Chisnall complains that empower Courts, and the Parole Board to impose second punishments.

59. The impugned provisions are those provisions are the provisions of the Public Safety Act that permit the courts to make: public protection orders,[64] prison detention orders,[65] protective supervision orders[66] and interim detention orders,[67] the sections of Part 1A of the Parole Act that permit Courts to make extended supervision orders,[68] interim supervision orders,[69] to order intensive monitoring,[70] and the section of Part 1A of the Parole Act that permits the Parole Board to order punitive special conditions.[71]

Standalone Declaration Proceedings

60. The Crown's submission on the proper procedure to be followed in declaration cases is fundamentally at odds with itself.

61. It both evinces a preference that declaration proceedings in respect of discretionary provisions should be considered alongside intensely factual assessments against statutory criteria (like those in the Public Safety Act), and also argues that declaration proceedings should be commenced in detailed statements of claim raising not only hypotheticals but also legal argument.

62. The Crown's preference for a case like this one to be argued alongside a specific fact scenario belies its approach to this case at first instance.

63. First, Mr Chisnall took all the steps needed to allow the Crown's apparently conjoined hearing to occur. The bringing together of the two cases, in the same file, with the same CIV, directly arises from the way he pleaded the case. His cross-pleading responded to the Chief Executive's originating application so that the two matters would be linked.

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64 Public Safety Act, s 13(1).

65 Public Safety Act, s 85(1).

66 Public Safety Act, s 93(1)(b). Protective Supervision Orders are post-PPO orders, akin to ESOs.

67 Public Safety Act, s 107.

68 Parole Act, s 107I.

69 Parole Act s 107FA.

70 Parole Act, ss 107IAC and 107IA.

71 Parole Act, s 107K.

64. Second, it was at the Crown's request that the two cases were heard apart. In both its guises– as the Attorney-General and the Chief Executive – the Crown argued in the High Court that the cases should be separate. It was the Crown position after the application for a declaration was commenced, that the question of the application of the Public Safety Act to Mr Chisnall, and the question of whether a declaration should be issued were distinct: one was about Mr Chisnall, and the other was about the statute, with Mr Chisnall's circumstances irrelevant.[72] Mr Chisnall agreed with the Crown and the two matters went different ways, albeit the Crown has at times relied on evidence given in the public protection order proceedings.

65. Mr Chisnall considers that conception remains the correct one. Under New Zealand's Constitutional system, the question of whether a statute unreasonably limits a right in the New Zealand Bill of Rights Act will never turn on the facts of an individual case. In a case involving a statutory discretion, the Crown may be able to point to a particular case and say "there's a case where this discretion was exercised lawfully, in a way that did not unreasonable limit rights", but equally, the Crown could simply invent a hypothetical, and argue that that would.

66. Any case which seeks a declaration in respect of a statute *as applied*, is not a declaration of inconsistency case. It isn't entirely apposite, but re-entituling our recent declaration cases as *Re: the Public Safety (Public Protection Orders) Act*, *Re: the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010*, and *Re: the Electoral Act 1993 (the voting age case)*, would give a sense of what declaration of inconsistency cases are about: they are not judicial reviews of Parliament or the House of Representatives, and they are not cases about the application of law to individuals; instead, they raise questions of law over whether two statutes are inconsistent in a way in which unjustifiably limits protected rights.

67. Given the way that this matter has proceeded, without objection,[73] the Crown's suggestions for process likely has no impact on Mr Chisnall's case, but we appreciate that the Court will want to give guidance for future cases, including potentially different

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72 At one call for the matter, the Crown did express a concern about the nature of the pleading, but did not pursue this further, with, for example, an application for further and better particulars.

73 ACRSS at [44].

guidance depending on whether the legislation complained about involves the exercise of a discretion.

68. As the Crown notes, the rules in England and Wales are contained in its Practice Direction 16 of the Civil Procedure Rules; the adoption of rules may be an appropriate resolution here, to be guided by such observations as the Court considers appropriate.

Arbitrary Detention

69. *Allegation that "no basis for" s 22 arbitrary detention claim*: The Crown asserts that "[a]rbitrary detention **became an issue** at the first hearing before the Court" and make various criticisms concerning pleadings, including in the parallel judicial review proceedings.[74] These are incorrect.[75]

70. The simple point, as put for Mr Chisnall from first instance, is that:

    70.1. As held by both the UNHRC and the ECtHR, non-therapeutic post-sentence detention is arbitrary because its lacks a relevant and legitimate purpose;[76] and

    70.2. Further, and as was in fact noted in the Department of Corrections *Regulatory Impact Assessment* in respect of the then proposed Public Safety Act, the limitation of these regimes only to certain offenders when others who pose the same level of risk are not detained or restricted is again arbitrary under s 22 and art 9 ICCPR.[77]

71. *Substantive response to s 22 claim:* The response now made for the Crown is that the ECtHR caselaw follows from the more detailed terms of the arbitrary detention right under the European Convention, which s 22 is said not to follow; that applying s 22 here would indirectly elevate s 26(2) to an illimitable right; and that the therapeutic regime

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74 ACRSS, [72]-[73], **emphasis** added.

75 See Case 101.0009 (declaration sought under s 22); 101.0082 (notice of appeal to the Court of Appeal under s 22); & 05.0008 & 11-13 (application for leave to appeal to this Court); and see submissions below.

76 See *Fardon v Australia* CCPR 1629/2007 (2010), [7]; UNHRC *General Comment No. 35: Article 9 (Liberty and security of person)*, [21]; *Ilnseher v Germany* [2018] ECHR 991 (GC), [100]-[171], cited in this Court at CAS [3] n 3; [29]; and [8] but also – noting the incorrect assertions for the Crown – in the High Court (applicant submissions, 31 May 2019) at [12.2]; [17]; and [18].

77 See Case 304.852, cited cross-appeal submissions at [5] n 7 and [12].

finally upheld in *Ilnseher* is not "substantially different" from the Public Safety Act.[78] However:

71.1. The Crown does not address, or in fact mention, the parallel findings of the UNHRC as set out above and previously, as made under art 9 ICCPR, to which s 22 of the Bill of Rights Act gives effect, the most recent being in *Miller and Carroll v New Zealand*.[79] Further, the reasoning in *Ilnseher* and the preceding decisions is similarly directed at whether there is legitimate reason for detention and that is not dependent upon the detailed terms of the European Convention.[80]

71.2. The objection that a finding of arbitrary detention indirectly elevates s 26(2) to an illimitable right is immaterial, in two respects. First, and as was put for the respondent/cross-appellant, the s 26(2) right against double jeopardy is of fundamental importance and can be displaced only in narrow circumstances[81] and, second, and as stated in the UNHRC and ECtHR precedents, both rights are engaged.

71.3. The claim that the therapeutic regime upheld *Ilnseher* is not substantially different from the Public Safety Act is – despite *Ilnseher* having been addressed throughout the proceeding – new, not substantiated and incorrect. Further, the passage relied upon from *Ilnseher* is a reference to a submission made by the European Prison Litigation Network, not the findings of the Grand Chamber of the ECtHR: the relevant findings of the ECtHR were that the regime was distinct from prior imprisonment and directed towards safe clinical care for an identified and dangerous personality disorder.[82]

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78 ACRSS, [73]-[75].

79 CCPR/C/121/D/2502/2014, 21 November 2017.

80 See below n 82.

81 Respondent submissions at [17] and see authorities at n 19.

82 See above n 76, [227]:

> "having regard to the setting in which preventive detention orders are executed under the new regime, the Court is satisfied that the focus of the measure now lies on the medical and therapeutic treatment

TERMS OF DECLARATIONS OF INCONSISTENCY

72. The declarations presently ordered are those in the Court of Appeal:

> "Part 1A of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under section 5 of that Act.
>
> The Public Safety (Public Protection Orders) Act 2014 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under section 5 of that Act."

73. The Court of Appeal also left in place a separate declaration ordered in the High Court:

> Section 107C(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990, to the extent that it permits the retrospective application of section 107I(2) of the Parole Act 2002.

74. Given the Court of Appeal's judgment Mr Chisnall considered that a broad declarations were appropriate. He still does. Of course, the nature of any final declarations will depend on the result of not only the appeal, but also the cross-appeal.

75. The Crown has implicitly criticised the declaration made by the Court of Appeal for failing "to make the nature of the inconsistency, and the circumstances in which it arises, clear". Mr Chisnall disagrees. The declaration itself is general, but it is preceded by a 232 paragraph judgment. It is not unreasonable to expect anyone considering a response to have regard not only to the declaration, but also to the reasons expressed in the judgment the precedes it. Indeed, there is essentially a four paragraph summary of the Court of Appeal's reasons starting at paragraph 223. If the Court considers there is an accessibility of law concern, it might be reasonable in some circumstances for the declaration to refer by paragraph numbers that contain summaries.

76. Given the finding of the Court of Appeal, which Mr Chisnall impresses upon this Court, the issue is really the whole scheme: it is public protection orders (an extended supervision orders) which are punishments (which is now accepted), which gives rise to the limitation on the section 26(2) right.

> of the person concerned. The medical and therapeutic provision was central to the specific measures of care provided to the applicant. This fact altered the nature and purpose of the detention of persons such as the applicant and transformed it into a measure focused on the medical and therapeutic treatment of persons with a criminal history."

and further [150]-[158] (disorder); [164]-[168] care, including that "all detainees are provided with individualised treatment tailored to their specific disorders".

77. As set out in the notice of cross-appeal and addressed in the cross-appellant's submissions, Mr Chisnall seeks further orders that the two Acts are also inconsistent with sections 9, 22, 23(5), 25(a), (c) and (d) and 26(1). The three broad points made for Mr Chisnall are that:

77.1. As set out further below, the detention and other restrictions on liberty under the two Acts amount to arbitrary detention, contrary to section 22;

77.2. The effect of that detention is in substance a second conviction and sentence for the requisite qualifying offence and, for those offences committed prior to the relevant enactments, a retroactive penalty, contrary to sections 25 and 26(1); and

77.3. Because the two Acts are premised upon personality disorders but are not therapeutically directed, the result is inhumane detention or other restriction, compounded by the potential that the lack of therapeutic direction will see those affected detained for life, contrary to sections 9 and/or 23(5).

78. The meaning of the two declarations made in the court below is clear. It would be somewhat artificial to separate each of the provisions of the Act which gives rise to the conclusion that public protection orders breach other protected rights. For example, the arbitrary detention finding that Mr Chisnall seeks in respect of public protection orders might be said to arise from section 20 of the Public Safety Act, which is the provision that mandates detention of those subject to public protection orders. If section 20 was repealed, those on public protection orders would not be arbitrarily detained.

79. There are, of course, non-punitive therapeutic regimes that permit or require detention, including those in the Mental Health (Compulsory Assessment and Treatment) Act, the Intellectual Disability (Compulsory Care and Rehabilitation) Act, and those in other countries.[83] The *detention* arises from section 20, but its *arbitrariness* arises from the fact detention isn't therapeutic, that conditions and reviews aren't clinically driven, and the fact the detention is a second punishment for something which

[83] Eg *Ilnseher* above n 76.

isn't a crime, along with the other matters already addressed in submission. It is the regime as a whole which means the detention required by section 20 is arbitrary.

80. However, if the Court considers it preferable to cite particular provisions of the two Acts, the relevant provisions are:

80.1. Sections 13(1), 85(1), 93(1)(b) and 107 of the Public Safety (Public Protection Orders) Act 2014; and

80.2. Sections 107I, 107FA, 107IAC, 107IA and 107K of the Parole Act 2002.

81. These are the provisions of the two acts that empower Courts and the Parole Board to impose second punishments, as detailed at paragraph 59, above.

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These submissions are certified as suitable for publication by the Court under cl 7(2) of the Supreme Court Submissions Practice Note 2021.

To: The Registrar of the Supreme Court
And to: Una Jagose KC, Solicitor-General; Matt McKillop; and Taoran Li, counsel for the appellants/cross-respondents

Appendix

Case	Challenged detention/other measures	Held:
M v Germany [2009] ECHR 2071	Challenge to provision in arts 66/67 Criminal Code for "preventive detention" on the basis of "serious mental disorder" and risk to the public, following completion of finite sentence; provision in art 63 for placement in psychiatric hospital inapplicable as "no longer … qualified as pathological and did not have to be treated medically": see [12]; [18]; [24]; & [26]-[39] and (for terms of Criminal Code provisions) [45]-[56]. Challenge to constitutionality of arts 66-67 rejected by German national courts. Note, under German Constitution as interpreted on final appeal to the Constitutional Court, that: "longer a person was held in preventive detention, the stronger ... the requirements concerning … proportionality" ([29]); extension of sentence "the exception … as a measure of last resort" ([29]); and provision for extension by preventive detention part of sentence ([35]); "detention conditions [must be] improved to the full extent compatible with prison requirements ([30]). Sentencing legislation provides for different conditions/treatment: preventive detention within prison but in a separate building from sentenced offenders; detainees had privileges – own clothing, additional outside time, "more comfortable cells"; "treatment on offer", including consultation with psychologist on request: see [41]-[42] and [62]-[66]. Detention reviewable at any time, including at least every two years: [56]. Note also cited criticisms by European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (mentioned in appellant's oral submissions): (at [77]) "need for on-going support to deal with indefinite detention, as well as to address the legacy of serious past histories of aberrant behaviour and apparent psychological problems. Psychological care and support	**Breach of art 5(1) of the European Convention on Human Rights** (right against arbitrary detention) because detention not authorised as part of original sentence ([99]-[101]); not authorised as preventive of further offending ([102]); not authorised on basis of "unsound mind" because no longer considered pathological ([103]). **Breach of art 7(1), second sentence** (non-derogable right against heavier penalty: see [106] and [117], including comment that to be interpreted so as to provide effective safeguard): question of whether retrospectively legislated extended term of preventive detention ([123]) a penalty – relevant that (i) only available to sentenced offenders ([124]); (ii) characterisation by national legislation not determinative ([125]-[126]); (iii) differences in treatment "minor" and governing legislation in part that applicable to sentences; and (iv) " no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences" (128]); (v) endorsement of CPT criticisms ([129] and see [77] cited to the left): "… particular endeavours are necessary in order to support these detainees who, as a rule, will be unable to make progress towards release by their own efforts. It finds that there is currently an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned." and, given also its indefinite duration; involvement of sentencing courts; and severity, a penalty, contrary to art 7: see [129]-[133]. Not exempted as a matter of sentence administration (see [134]-[136]) as in excess of available finite sentence. Note, particularly, (at [130]): "as the Court has previously

Case	Challenged detention/other measures	Held:
	appeared to be seriously inadequate … The approach requires high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option".	found, the aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment." **Note also:** - reference to 2008 decision of French Conseil Constitutionnel (copy in bundle), holding that specialist preventive detention as there provided permissible but not in respect of offences committed prior to enactment: see [75]. - reference to concerns of United Nations Human Rights Committee over compliance of preventive detention with article 9, 14 and 15 ICCPR: [78].
Glien v Germany [2013] ECHR 1206	Further challenge to preventive detention provisions, decided following *M* and attempted remedial steps by Germany: preventive detention here following completion of finite sentence on the basis of psychopathy and "dissocial personality, which could not be considered as pathological": [10] & [14]-[16]. New governing "Therapy Detention Act" enacted in response to *M v Germany*, above, providing for (at [39]): "place in a suitable institution" for "therapy detention" of persons suffering from a mental disorder and highly likely to harm others. Under legislation, "therapy detention" institutions must (at [40]): " guarantee, by their medical and therapeutic offers, an adequate treatment of the mental disorder of the person concerned on the basis of an individualised plan for treatment and aimed at keeping the therapy detention to a minimum. Furthermore, the institutions concerned must allow detention to be executed in the least burdensome manner possible for the detainee, having regard to therapeutic aspects and to the interests of public security." German Federal Constitutional Court (copy in bundle) held in 2011, in light of *M v Germany* ([46]), unconstitutional "both on the retrospective prolongation of preventive detention and on the	**Breach of article 5(1)** (see [106] & [107]): unnecessary to determine whether established that applicant subject to a mental disorder/unsound mind within the meaning of the Convention [90]; under " well-established case-law" that detention permissible only in "a hospital, clinic or other appropriate institution" [92]; detention in a separate wing of prison under different conditions, as in *M*, but these and lack of substantial change in care such that not "the therapeutic environment appropriate" to a person detained on such grounds" [95]; and note, particularly (at [96], citations omitted): "The Court does not overlook in this connection that the applicant did not undergo any treatment in prison because attempts to motivate him to do so had not yielded success. However, it would refer to its findings in previous cases that the applicant's conduct or attitude does not exempt the domestic authorities from providing persons detained (solely) as mental health patients with a medical and therapeutic environment appropriate for their condition …. It can be reasonably assumed that such an environment would be more suited for motivating these persons to participate in treatment aimed at changing their condition." Further, legislation did not provide for necessary alternative environment treatment [104].

Case	Challenged detention/other measures	Held:
	retrospective ordering of such detention" ([42]); insufficient legislated distinction between sentence and preventive detention([43]) requirement to review detainees under Therapy Detention Act ([44]); necessity for: "… an individualised and intensified offer of therapy and care to the persons concerned. In line with the [European] Court's findings in the case of *M v Germany*, it was necessary to provide a high level of care by a team of multi-disciplinary staff and to offer the detainees an individualised therapy if the standard therapies available in the institution did not have prospects of success …" and only constitutional if administered in "a hospital, clinic or other appropriate institution": [48]. Further Constitutional Court holdings that "mental disorder … not limited to mental illnesses which could be treated clinically, but extended also, in particular, to dissocial personality disorders" ([50]) and " detention of a person for being "of unsound mind" could be justified provided that the detention was effected in an appropriate psychiatric institution, which, in turn, necessitated a corresponding intensity of the mental disorder" ([52]), citing other ECtHR caselaw.	**Breach of article 7:** as to whether retrospectively legislated extension of preventive detention term a "penalty", following *M* (above), "very weighty factor" that detention consequent on conviction [121]; failure to apply alternative Therapy Detention Act, which did not give rise to a penalty [122]; conditions of detention and inappropriate facility– "in particular, the lack of special measures for detainees in order to reduce the danger they present" ([126]) - such that a penalty: [130].
Bergmann v Germany [2016] ECHR 47	Further challenge to preventive detention, following further attempted remedial steps by Germany: see [33] ("transitional concept" for detention adopted following *M*) and [35] (new separate building and regime/conditions instituted by legislative change and Constitutional Court judgments, above: see [43]; [52]-[60] and [66]-[76])	**No breach of article 5(1)** because of legislative amendment to art 66 that "preventive detention must be executed in institutions that offer the detainee individual and intensive care. Detainees must be encouraged to participate, in particular, in psychiatric, psychotherapeutic or sociotherapeutic treatment aimed at reducing the risk they pose to the public" [122]; staffing similar to that in a psychiatric hospital that " put the authorities in a position to address the applicant's mental disorder" [125]; repeated offers of therapy and other measures [126]-[127]. **No breach of article 7** because, although precondition of offending a "weighty factor" [155], material that governing legislation amended to require distinct purpose of preventive detention [161]-[163] and ([166]; see

Case	Challenged detention/other measures	Held:
		also[174]) " individual and intensive psychiatric, psychotherapeutic or sociotherapeutic treatment aimed at reducing the risk they pose to the public, as prescribed by" art 66c and by provincial legislation amounts to "fundamental" change: [167]; nature and purpose changed as a result of amendments such that "punitive element .. eclipsed to such an extent that … no longer to be classified as a penalty [182].