IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI Ō AOTEAROA **SC 12/2025**

BETWEEN **TYSON WADE FRANCIS REPIA**
Appellant

AND **THE KING**
Respondent

APPELLANT'S SUBMISSIONS ON APPEAL

Dated: 29 JULY 2025

Next event date: 14 August 2025

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COUNSEL FOR THE APPELLANT CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION.

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APELLANT'S SUBMISSIONS ON APPEAL

MAY IT PLEASE THE COURT, Counsel for Mr Repia ("the Appellant") respectfully submits:

I Introduction – summary of argument

1. Mr Repia appeals the decision of the Court of Appeal dated 18 December 2024.

2. The approved question of law in this case is:

> Whether the Court of Appeal was correct to dismiss the appeal on the basis that Mr Repia's reasonable belief in consent was excluded from inquiry in the involvement hearing under s 10 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the 'Act').

3. Counsel for the Appellant respectfully submits the following:

   a. The court should embark on a meaningful inquiry into the mental element of the offence if this is a part of the proof of the offence required and there is reliable evidence of the mental element before the court.

   b. A charge of sexual violation requires such an analysis. At trial, the prosecution is required to prove the absence of the defendant's reasonable belief in consent.

   c. While the involvement hearing is not a criminal trial, the hearing has hallmarks as such and, for many unfit defendants, serves as the functional equivalent of a full trial.

   d. The interpretation of the key phrase in section 10(2) of the Act: "*caused the act or omission that forms the basis of the offence with which the defendant is charged*" has caused significant debate and required statutory interpretation beyond the plain textual meaning of the words.

   e. The parameters developed to date indicate the Court's acknowledgement of the need to go beyond the plain meaning of the text. However, the current parameters of objectively established defences, such as self-defence and mistake or accident are too narrow, especially in offending of a sexual nature and should include the defendant's belief in consent.

   f. The Judge may need to inquire into the subjective understanding or belief of a defendant who is unfit to stand trial, if this is not the product of his mental impairment and it is relevant to the offence alleged. This inquiry is no different to the Court's initial

examination in determining unfitness to stand trial and is consistent with both the purpose of the involvement hearing and the New Zealand Bill of Rights Act 1990.

g. Where the charge is one of sexual violation, the prosecution does have to prove the absence of reasonable belief in consent where there is evidence, objectively assessed, which is pertinent to this belief as a defence/element to prove by the prosecution.

4. Counsel respectfully submits the Court of Appeal erred in the following ways:

a. By failing to adequately engage in any rights-based discussion in determining the scope of the involvement hearing.

b. Misunderstanding the Appellant's argument that composite elements of mixed mens rea offences, such as sexual violation, should be considered as an argument that proof of all essential elements of the offence was required.

c. By conducting a narrow and inadequate examination into the purpose of the involvement hearing.

d. Erroneously determining that any inquiry into subjective elements was unrealistic and contradictory, without a factual basis to do so.

II Narrative of facts

5. Mr Repia was charged with sexual violation by rape and two charges of sexual violation by unlawful sexual connection arising from a single incident on 24 October 2019. Mr Repia was a patient at Te Whetu Tawera ("TWT"), the mental health ward at Auckland Hospital. The complainant was another patient in TWT. Mr Repia was held under the Mental Health Act.

6. On 7 August 2020, her Honour Judge Sinclair found the Appellant was unfit to stand trial, based on the reports of two psychiatrists (Dr Naidu and Dr Whiting).

7. On 17 March 2021, the s10 CPMIP Act involvement hearing proceeded before his Honour Judge Gibson.

8. On 28 April 2021 he found the Appellant "involved" in the three offences and the Appellant's reasonable belief in consent was held as irrelevant.

9. On 11 August 2021 Her Honour Judge Sinclair ordered that Mr Repia be made a special patient at the Mason Clinic, pursuant to s 24 of the CPMIP Act. He may be detained as a special patient for up to 10 years.

10. On 17 June 2022, the first appeal was dismissed by Justice Harvey in the High Court.

11. On 18 December 2024, the second appeal was dismissed by the Court of Appeal.

III Submissions

A The issue: two conflicting conceptions

1 Conflicting conceptions

12. Two conflicting conceptions of the purpose of the unfitness regime are present in academic literature and case law. These lie behind assessments of parliamentary intent, purpose, and scope of the involvement hearing. These conceptions have shaped how caselaw has developed, hence, a brief exploration is necessary.

13. The first conception of the hearing as a 'relaxed evidential enquiry'[1], centres on the suggestion that the outcome of the hearing is to treatment options, not to prison. It is further supported by the narrative of the fitness regime serving to protect the public from risk posed by unfit defendants.[2]

14. This approach informed the early interpretation of the key phase caused the act or omission that forms the basis of the offence with which the defendant is charged.[3] The Appellant respectfully submits that this conception still lingers within the Court of Appeal's decision in this case.

15. The other conception acknowledges that the accused may be detained, albeit for treatment, if found "involved." The hearing, therefore, is the only opportunity to challenge the allegations and avoid deprivation of liberty where the offence may not have been committed.[4] This approach therefore requires all possible procedural protections to be available to the accused.[5]

16. Decisions made by the Courts as to the appropriate scope of the involvement hearing have been guided by these conceptions to formulate the purpose of the hearing. Any resulting choice engages with several fundamental rights contained within the New Zealand Bill of Rights Act 1990 ("NZBORA), this necessitates a careful process of statutory interpretation.

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[1] Terminology adopted by Brookbanks in "Special Hearings Under CPMIPA" [2009] NZLJ 30.
[2] Warren Brookbanks "Evidential Sufficiency Hearings: Is Section 10 of the CP (MIP) Act Fit for Purpose?" (2020) 29 NZULR 31. Appellant's bundle of authorities, from 3.
[3] *R v McKay* [2009] NZCA 378, [2010] 1 NZLR 441; *Maangi v R* [2017] NZCA 534 and *Jones v R* [2015] NZCA 601.
[4] Brookbanks "Evidential Sufficiency", above n 2.
[5] *R v Tongia* [2020] NZHC 2382, [2021] 2 NZLR 743. Appellant's bundle of authorities, from 20.

17. Counsel respectfully submits the Court of Appeal failed to engage in an in-depth exploration of the ultimate purpose of the involvement hearing, in particular, the purpose the hearing serves as protecting unfit accused's rights in the same manner equivalent criminal procedure seeks to do. In avoiding this consideration, counsel submits the Court of Appeal's determination that a wider scope, beyond the already developed parameters (notably not themselves imminently found in the text of section 10 of the Act), "is inconsistent with the text and purpose of s 10(2)" is fundamentally compromised and incorrect.

18. In doing so, the court has ignored other remedies for the treatment of mentally ill/impaired people which also serve to protect the public, some of which include detention.

2 Context to the provision

19. The involvement hearing's origins in New Zealand are in the Criminal Justice Amendment Bill, which was later absorbed into the CPMIPA, in 2003. Prior to this, there was no safeguard to ensure a person found unfit to stand trial actually committed the offence alleged prior to disposition.

20. The intent of the legislation can be garnered from the following statement at the final reading of the bill:[6]

> This addresses the risk under the current law that a person can be found unfit to stand trial and placed into secure care, even though that person has not committed the alleged offence.

21. Counsel accepts there are references within the initial parliamentary documents of "physical responsibility" for the act or omission.[7] However, this is still in the context of the following statement "that forms the basis of the offence," or general reference to "an offence".[8]

22. Additionally, there is no consideration of what that would mean for more complex offending, such as sexual assault.

23. Counsel submits the legal position created within these documents is equally as unclear as the provision itself. The extent of the assistance it provides is that the intent of parliament

[6] (21 October 2003) 612 NZPD 9546. Appellant's bundle of authorities, from 71.
[7] Criminal Justice Amendment Bill (No 7) 1999 (328-1) (explanatory note) at iii; Criminal Justice Amendment Bill (No 7) 1999 (328-2) (select committee report) at 3, 5 and 7. Appellant's bundle of authorities, from 73; and (21 October 2003) 612 NZPD 9546.
[8] Criminal Justice Amendment Bill (No 7) 1999 (328-1), above n 7, at iii; Criminal Justice Amendment Bill (No 7) 1999 (328-2), above n 7, at 3, 5 and 7; and (21 October 2003) 612 NZPD 9546.

was *to prevent* detention of unfit people under this regime who did not commit the offence.[9]

24. While counsel accepts the provision is clearly not intended to require the Crown to establish all elements of the offence to the criminal standard, nor determine criminal liability, consequent restriction to "physical responsibility" is neither the required, nor logical, corollary.[10] This has steadily emerged in cases where an element of mens rea is inherent in the offence or, where self-defence, mistake or accident are raised (requiring consideration of elements of men rea).

25. With respect to the Parliament of the time, there appears to be an absence of consideration of how the provision was to operate in any circumstance beyond violence cases, particularly homicide cases. Courts have already recognised this inadequacy in what the Court of Appeal referred to as the "developed parameters".[11]

26. Sexual violation cases must either fit within one of these developed parameters or require one to be found within the interpretation of the provision in order to ensure the purpose of the hearing; to prevent unjust detention of those who may otherwise be acquitted.

3 Role of mens rea

27. Understandably general statements regarding the practicality of including mens rea in these inquiries when the accused is unfit have emerged. The Court of Appeal in *J v Attorney-General* summarises the origin of these concerns through reference to the House of Lords in *Antoine*:[12]

> Lord Hutton endorsed the view that, where a defendant has been found unfit to stand trial in the normal way because of their mental state, it would be "unrealistic and contradictory" for the involvement inquiry to include consideration of "what intention that person had in his mind at the time of the alleged offence".[13]

28. This, however, is a conflation between *unfitness* and *insanity*. Where requisite mens rea cannot be formed, or is impacted by a disease of the mind or natural imbecility <u>at the time</u>

[9] Criminal Justice Amendment Bill (No 7) 1999 (328-1), above n 7, at iii; Criminal Justice Amendment Bill (No 7) 1999 (328-2), above n 7, at 3, 5 and 7; and (21 October 2003) 612 NZPD 9546.
[10] Explanatory note: Crim Justice Amendment Bill (No 7) 328-1 at [2(c)], above n 7; and Select Committee Report p 5.
[11] *Repia v R* [2024] NZCA 677, at [52].
[12] *J v Attorney-General* [2023] NZCA 660, at [119]. Appellant's bundle of authorities, from 141.
[13] *Regina v Antoine* [2001] 1 AC 340 (HL) at [375]. Appellant's bundle of authorities, from 209.

of the offence, insanity provisions prevent the accused, who may be a demonstrable risk to the public, from being acquitted.

29. It is a misconception that, where someone is unfit to stand trial, they must also have lacked the requisite intent for the alleged offence. Fitness assessments are a 'contextual inquiry', investigating the effects of present mental impairment/s on necessary trial capabilities.[14] This is quite different to an assessment of the impact of an individual's impairment on their understanding of, or intent in relation to, the offence charged.

30. It is a similar misconception that where a defendant is found unfit, the difficulty the prosecution faces proving intent increases as a result.[15]

31. At equivalent "standard" criminal proceedings, the requisite mens rea is rarely proven directly by the prosecution. It is especially rare that it is derived from the accused person. Where a defendant is unfit, the only material difference to the prosecutor is that the defendant is unlikely to give evidence. Given fit defendants have a right to silence, a right which is frequently exercised, a finding of unfitness is unlikely to make a significant difference in the prosecution proving any required mental elements. The same inferences relied upon in standard proceedings can be relied upon in the involvement hearing.

32. Therefore, counsel submits Parliament's reference to physical responsibility was aimed at avoiding the situation where, due to an absence of fitness, unfit defendants would effectively have a defence by saying the prosecution could not prove intent.

33. Avoiding the risk of unfit defendants utilising this 'technicality', does not require exclusion of all considerations of intent, particularly where there is a required mental element within the act to be proven itself. Nor does it require the exclusion of defences which fit defendants could otherwise raise at a trial.

34. Counsel acknowledges it may, however, require a careful assessment of the reliability of evidence stemming from the accused. This is considered further from [104].

35. Rectifying these misconceptions behind findings of unfitness is vital in determining what the appropriate interpretation of section 10 of the CPMIP Act is. This remains consistent with Parliament's intent.

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[14] W Brookbanks "The Development of Unfitness to Stand Trial in New Zealand" in R Mackay and W Brookbanks (eds) *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press, Oxford, 2018) 127 at 127.
[15] England and Wales Law Commission, *Unfitness to Plead: Volume 1*: Report, Law Com No 364 (2016).

36. Unfortunately, the amendments to the procedure in 2018, did not encompass consideration of this vexed area.

37. Given the confused position and absence of legislative direction, counsel submits the *intent* behind the CPMIP Act regime should be used to guide interpretation of any ambiguous provisions. The Court of Appeal in *J v Attorney-General* accepted the following in relation to legislative intent:

> [140]..the intent of the CPMIP Act regime is to promote, rather than undermine, equality by providing *an alternative* procedure which accommodates the unique needs of ID unfit defendants.

38. This is readily aligned with the initial statements in Parliamentary debate discussed above at [23].

39. Counsel submits this legislative intent motivates a broad interpretation of section 10, as far as is possible to *promote equality* and that, in this instance, that requires consideration of an accused's reasonable belief in consent.

40. Counsel respectfully submits that the Court of Appeal, at [52] of their judgement, approached the question in the wrong way around. Although the full criminal trial is not possible, a rights-consistent approach, adherent with the overall purpose of the hearing, requires:

    a. a procedure as close as possible to the trial process, including the calling of evidence (albeit with a lower standard of proof);[16] and

    b. consideration of mens rea where it is not linked to the accused's mental impairment, particularly in cases where a mental element is a composite element of the actus reas (i.e. where, without a mental element, the act would not be criminal).[17]

4 Criminal culpability: treatment fallacy

41. An interpretation requiring examination into a reasonable belief in consent is further supported when the assessment of culpability and the functional reality of disposition under the CPMIP Act is clarified.

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[16] *R v Tongia*, above n 5, at [48]; and *Rafferty v R* [2024] NZCA 217, at [25]. Appellant's bundle of authorities, from 247.
[17] *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009, at [73]. Appellant's bundle of authorities, from 279.

42. Particularly in the early years of the CPMIP Act, there has been a suggestion that because disposition is to a treatment facility not a prison, the same degree of certainty in culpability is not required. This narrative was encapsulated by Jagose J in *Tongia* when his Honour said hospitals simply provide 'the help these people need'.[18]

43. Counsel respectfully submits this is a unhelpful misconception which has influenced the Court of Appeal's assessment of the nature of the involvement hearing.

44. While treatment is often involved in the disposition of people found unfit and involved, this can involve detention in a secure facility and has punitive features.[19] The outcome is not readily distinguishable from those convicted of a serious offence.[20] This form of detention *without trial* raises significant concern.

45. Counsel's submissions that criminal culpability, in all but name, is in issue at the hearing is further supported by the following points, which are elaborated on within the decision of Edwards J in *Tongia*:

    a. Section 10 proceedings arise in the criminal context and when a "trial" does not take place.

    b. The CPMIP Act applies only to proceedings which carry a term of imprisonment;[21]

    c. The phrase "forms the basis of the offence" implies criminality;[22]

    d. Where the Court is not satisfied as to involvement, the dismissal of the charge is deemed an acquittal.[23] In the alternative, where found involved, the finding is deemed a conviction for the purposes of appeal.[24]

    e. Disposition options under the CPMIP Act include provision for lengthy detention.[25] These periods are tied to the maximum sentence for the offence charged.[26]

[18] *R v Tongia* [2019] NZHC 3278 at [18].
[19] *Rafferty v R*, above n 16.
[20] DJ Power and others *Criminal Law and Forensic Psychiatry* (Barry Rose Law Publications, Chichester, 1996) at 8.
[21] Criminal Procedure (Mentally Impaired Persons) Act (CPMIPA), s 5(1) and *R v Tongia* [2020], above n 5, at [34].
[22] *R v Tongia* [2020], above n 5, at [35].
[23] CPMIP Act s 13(2) and *R v Tongia* [2020], above n 5, at [36].
[24] CPMIP Act s 16 and *R v Tongia* [2020], above n 5, at [36].
[25] CPMIP Act s 28 and *R v Tongia* [2020], above n 5, at [37].
[26] CPMIP Act s 30(1) and *R v Tongia* [2020], above n 5, at [37].

46. This suggestion has only recently, and far from routinely, been acknowledged by the Courts.[27]

47. This nature of the involvement hearing as being connected to criminal culpability **and** risk supports the adoption of a broad interpretation of section 10 in order to ensure consistency with the right not to be arbitrarily detained. In the criminal context, this refers to detention without trial. This is explored within the context of NZBORA and international conventions below from [113].

48. Were the motivation behind the regime solely related to treatment and risk, the **civil regime** of compulsory care orders under the Family Court, would appear more appropriate than a proceeding which carries a criminal origin and tone.[28]

49. For context, the Mental Health (Compulsory Care and Treatment) Act 1992 enables detention under an 'inpatient order' of those with an abnormal state of mind who "poses a serious danger to the health or safety of that person or others".[29] This is entirely separate from notions of criminality.

50. Mr Repia was under an inpatient order when these allegations arose.

51. The above concepts have manifest in various ways within the development of case law attempting to interpret section 10 of the Act. The Court of Appeal decision has not taken into account or acknowledged that notwithstanding an absence of conviction, there is a culpability determination and a potential lengthy detention as a special patient under section 24.

52. In adopting this fallacy, the Court of Appeal has failed to consider the ultimate purpose of the involvement hearing, and the effect is to undermine the fundamental rights of those engaged in the criminal justice system.

B Case law

53. The scope of the hearing has been the subject of consistent debate and differing judicial opinion. There is clear room for differing interpretation. This has resulted in inconsistent case law and an undefined scope.

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[27] See *R v Kolio* DC Auckland CRI-2021-004-007392, 15 November 2021 and *R v Tongia* [2020], above n 5. Compare *R v Tongia* [2019], above n 18.

[28] The more conservative dicta within *J v Attorney-General*, above n 12, can therefore be distinguished in this case as the concern relates to a special patient order.

[29] Mental Health (Compulsory Care and Treatment) Act 1992, s 2 and s 30.

54. The Court of Appeal's response to this question of interpretation was inequitable and unduly restrictive. In declining to adequately engage with the consequences of a finding of involvement on an accused's fundamental human rights, the Court has failed to eradicate the concern noted as early as 2009 in the same Court that the underlying act must be unlawful.[30]

1 General case law

55. The differing judicial opinions on what is required to be proved at the involvement hearing has been well explored in case law. The case law has been traversed at length in the Court of Appeal decision. A brief summary follows.

56. The House of Lords in *Antoine* initiated the debate as to the scope of the UK equivalent of the involvement hearing.[31] In the following years the Court of Appeal in the Australian Capital Territory expanded on these dicta in *R v Ardler.*[32] This presented three possible interpretations:

(a) proof is required of the commission of the physical act or acts only;

(b) proof is required of both the physical and mental elements of an offence; or

(c) proof is required of "something that is unlawful (in a broad sense) so as to be an offence or an element of an offence", but it is not necessary to prove "the full mental element necessary in law to establish the commission of the offence".

57. New Zealand Courts have continued to debate whether option (a) or option (c) are the required standard in a range of different contexts.[33]

58. Where option (c) is adopted, there is further discussion on what evidence needs to be present to engage in an inquiry into 'unlawfulness'. The prevailing suggestion appears to be that 'objective evidence' is required before such further inquiry is conducted. This approach has been adopted several times in New Zealand.[34]

59. Despite general consistency in the term 'objective evidence', what this includes is not settled. For the purposes of this appeal, counsel refers to the following segment of Edwards

[30] *R v Te Moni* [2009] NZCA 560.
[31] *Regina v Antoine,* above n 13.
[32] *R v Ardler* [2004] ACTCA 4, (2004) 144 A Crim R 552 at [55].
[33] Option (a) has been adopted in: *R v Lyttleton* (No 1) HC Auckland CRI-2008-044-9466, 4 November 2009 and received vague support from Court of Appeal in *Maangi v R* [2017] NZCA 534; and *Jones v R* [2015] NZCA 601. Option (b) has received support more recently in *R v Tongia*, above n 9.
[34] *R v Tongia* [2020], above n 5; *R v Te Moni*, above n 30; *R v Wira* [2016] NZHC 869; and *R v R* [2015] NZHC 783.

J's decision regarding whether the accused's statement could be considered 'objective evidence' in *Tongia*:[35]

> [67] The question is whether this evidence should be taken into account in determining involvement. In *R v Wells*, the England and Wales Court of Appeal said that this type of evidence fell outside the category of objective evidence that was otherwise admissible. The Court said that the following should be excluded:
>
> … assertions of the defendant who, at the time of speaking, is proved to be suffering from a mental disorder of the type that undermines his or her reliability and which itself has precipitated the finding of unfit to plead.
>
> [68] That is not the case here. Although Joshua's cognitive disabilities existed at the time, and may have affected his comprehension of his rights, there is no evidence that his disability rendered his statements to police unreliable. His statements are coherent and rational and provide the only direct evidence of how Joshua was behaving on the night in question. As explained further on in this judgment, the statements are not inconsistent with other evidence called at the hearing. The fact that the evidence was not given under oath and was not tested by way of cross-examination is relevant to weight. However, I consider the overall interests of justice require these statements to be taken into account when determining Joshua's involvement under s 10.
>
> [69] These statements form a sufficient evidential basis for self-defence and/or defence of another to be raised in the absence of Joshua giving evidence.
>
> [Footnotes omitted]

60. This reasoning is consistent with the above discussion at [32-33] on the intention of Parliament to avoid engaging with mens rea elements **only** where it is impacted by the accused's impairment.

61. The Court of Appeal decision of *J v Attorney-General* provides a thorough account of the differing judicial opinions of the scope of the hearing and what evidence is to be included which may assist further.[36]

62. Counsel notes in previous submissions the Crown accepted that the Court's focus should **not** be on the physical acts alone.[37]

[35] *R v Tongia* [2020], above n 5, at [67-69].
[36] *J v Attorney-General*, above n 12, at [117-132].
[37] Crown Submissions on first appeal at [3.27(d)].

63. The trajectory of case law, particularly in relation to sexual violation, tends to now support the suggestion that something more than simply the physical act is required.[38] What degree of 'something more' and what evidence must be present remains unclear.

2 Sexual violation case law

64. Section 128 of the Crimes Act 1961 provides the definition of sexual violation by rape:

> (1) …*omitted.*
> (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
> (a) without person B's consent to the connection; and
> (b) without believing on reasonable grounds that person B consents to the connection.

65. Given the above formulation, sexual violation falls into a complex category at the involvement hearing. To be a criminal act, there must be a particular *quality* to the act. Penetration must be *non-consensual,* it cannot be simply penetration. Proof of the actus reus alone, therefore, is insufficient.

66. This has caused particular difficulty, as was noted by the Court of Appeal in *R v Te Moni,* who, in reference to the combined approach taken in *Ardler* said this required "difficult distinctions to be made."[39] However, simultaneously acknowledged that focusing only on physical acts did not "appear to set a sufficiently high threshold to meet the objective of s 9."[40]

67. As Harvey J states in his decision, numerous decisions now support the requirement that the penetration be non-consensual.[41]

68. Whether this includes consideration of whether the accused had a reasonable belief in consent is less clear. Counsel acknowledges that the strength of the caselaw rests against the approach advocated for Mr Repia. However, counsel respectfully submits these interpretations, and Harvey J's ultimate interpretation, must be incorrect in light of the above discussion regarding the intent of the legislation.

[38] *R v Te Moni,* above n 30; *R v Wira,* above n 34; and *R v R,* above n 34.
[39] *R v Te Moni,* above n 30, at [78-79].
[40] At [79].
[41] *Repia v R* [2021] NZHC 1441, at [51].

(a) Exclusion of accused's reasonable belief in consent

R v Te Moni

69. While not determinative on the issue, the Court of Appeal in *R v Te Moni* said the following in relation to the elements to be proved at the involvement hearing in the context of sexual violation:

> [81] In the present case, there is no dispute that Mr Te Moni caused the physical act of penetration. There is, however, a dispute about consent. It cannot be the case that all that needs to be established for the purposes of s 9 is penetration, because that begs the issue as to whether the act was lawful or unlawful. Non-consensual penetration is qualitatively different from consensual penetration: they are different acts. For the purposes of the present case, we consider that the determination under s 9 must be whether non-consensual penetration took place.[42]

70. Here the court was concerned about the illegality of the act as a basis of a finding of involvement. The "act" in the charge of sexual violation requires an absence of the accused's reasonable belief in consent to be unlawful. The addition of the element of the complainant's lack of consent does not make the act unlawful.

71. Regrettably, whether a reasonable belief in consent was a relevant consideration was not considered in this case.

R v R

72. The scope of the involvement hearing in the context of sexual violation was also considered in *R v R*. The Court affirmed the suggestion in *R v Te Moni* stating "it will be necessary to show that non-consensual penile penetration took place."[43]

73. However, given that the facts of *R v R* involved an abduction, consent, nor a reasonable belief in consent was in issue.[44] Therefore, there was no material consideration of this issue.

74. This case is an example of where an absence of a reasonable belief in consent was clear on the facts and any inquiry into his state of mind would unlikely have compromised this finding of involvement. However, such an inquiry ought to have been made and assessed by the standard test of reasonableness as an absence of this belief is inherent in the illegality of the act.

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[42] *R v Te Moni,* above n 30, at [81].
[43] *R v R,* above n 34, at [9].
[44] At [9].

(b) Inclusion of accused's reasonable belief in consent

R v Cumming

75. French J in *R v Cumming* provided the following formular for the involvement hearing:[45]

> (a) so far as possible, the inquiry should focus on an accused's actions as opposed to his state of mind.
>
> (b) this distinction is dictated by the language of s 9 and its social purpose.
>
> (c) the distinction cannot be rigidly adhered to in every case because of the diverse nature of criminal offences and criminal activity. In particular, it cannot be adhered to when mens rea is a composite element of the actus reus. In those circumstances, the finding an accused caused the act or omission may of necessity include some element of mens rea. [emphasis added].
>
> (d) if there is objective evidence which raises the issues of mistake, self-defence and accident, then the Court should not find the accused caused the act or omission unless satisfied on the balance of probabilities that the prosecution has negatived that defence.
>
> (e) it is not open to an accused to argue absence of mens rea by reason of mental impairment - in so far as there are passages in *Ardler* which suggest otherwise, I consider they are contrary to *Antoine* and the underlying policy of the legislation and should not be followed.

76. In relation to a reasonable belief in consent, French J stated:[46]

> [93] The existence or absence of a reasonable but mistaken belief the complainant was consenting will only be relevant if there is some objective evidence which puts that in issue. Evidence Mr Cumming was labouring under such a belief because of mental impairment is not admissible for that purpose.

77. When considering Parliamentary intent as discussed above and the misconceptions of mens rea conflating insanity and unfitness regimes, this interpretation from French J is appealing. In particular, point (e) above emphasises that the only complete exclusion of consideration of mens rea should be restricted to cases of an absence of mens rea by reason of mental impairment.

78. French J also helpfully canvassed the case of *Antoine*, referencing the inherent complexity with the exclusion of mens rea but the inclusion of defences which "almost invariably

[45] *R v Cumming,* above n 17 at [89].
[46] At [93].

involve some consideration of the mental state of the defendant".[47] Her Honour further reasons:

> [77] The Antoine analysis has been criticised as contradictory and confusing. Commentators point out that on the one hand the ratio decidendi appears to be that the terms "act" or "omission" in the legislation mean the actus reus of the offence. Yet on the other hand, the decision allows the possibility of defences such as mistake and accident despite the fact these are usually simple denials of mens rea, not the actus reus: see Ashworth Principles of Criminal Law (5th ed, 2006) at 205; Omerod Smith & Hogan Criminal Law (12th ed, 2008) at 276; "Commentary on Antoine" [2000] Crim LR 621. The author of Smith & Hogan argues for example that if the dictum about the "objective" defences is correct, then it is difficult to see why any other evidence suggesting the absence of mens rea should not also be admissible.

79. The inherent confusion within this provision is clear. However, the Court's desire to develop parameters to ensure that an accused has available opportunities to challenge a potential culpability finding is equally clear.

(c) Mixed mens rea offences

80. A clear difficulty arises when the act or omission forming the basis of the offence is not sufficient in itself to attract a culpability finding.

81. The Court of Appeal in *Rafferty* refers to this difficulty in a literal interpretation of section 10 and notes the specific difficulty which has arisen in some cases.[48] The court then sets out the position French J came to in *R v Cumming.*[49]

> [28] …In *R v Cumming*, French J surveyed English and Australian authorities dealing with equivalent provisions, including *R v Antoine* and *R v Ardler* and concluded that the correct position is as follows:
>
> (a) so far as possible, the inquiry should focus on an accused's actions as opposed to his state of mind.
>
> (b) this distinction is dictated by the language of [s 9] and its social purpose.
>
> (c) the distinction cannot be rigidly adhered to in every case because of the diverse nature of criminal offences and criminal activity. In particular, it cannot be adhered to when mens

[47] *R v Cumming,* above n 17 at [76].
[48] *Rafferty v R,* above n 16, at [28].
[49] At [28].

rea is a composite element of the actus reus. In those circumstances, the finding an accused caused the act or omission may of necessity include some element of mens rea.

(d) if there is objective evidence which raises the issues of mistake, self-defence and accident, then the Court should not find the accused caused the act or omission unless satisfied on the balance of probabilities that the prosecution has negatived that defence.

(e) it is not open to an accused to argue absence of mens rea by reason of mental impairment …

[29] The Judge observed that the classic illustration of where mens rea is a composite element of the actus reus is the offence of possessing an offensive weapon. While the actus reus is possessing an offensive weapon, whether the weapon qualifies as offensive depends on the defendant's intention. Applying these principles to the charge of abduction, one of the charges faced by Mr Cumming, the Judge concluded that the prosecution was required to prove three elements:

(a) Mr Cumming unlawfully detained the complainant.

(b) The detention was without her consent.

(c) The accused detained her with intention to have sexual connection with her.

82. This difficulty in separating actus reus and mens rea is clear in a range of offences, including:

a. Possession of an offensive weapon: For the act of possessing an offensive weapon to be a culpable act for the purpose of the involvement hearing, it must be accompanied by an intention to use the weapon in an offensive manner. The involvement hearing must consider an element of mens rea. This is explored within *R v Cumming* at [73].

b. Abduction: For the act of abduction to be a culpable act for the purpose of the involvement hearing, it must be accompanied by an intention to have sexual connection with the victim. The involvement hearing must consider an element of mens rea. This is explored within *R v Cumming* at [94].

c. Arson: For the act of lighting a fire to be a culpable act for the purpose of the involvement hearing, it must be accompanied by an intention to endanger a life of another. The involvement hearing must consider an element of mens rea. This is explored within the Court of Appeal decision in this case at [33].

83. A wider formulation of section 10's scope, either within criminality fundamentally linked to the actus reus (mixed mens rea offences), or within an objectively available defence, has the following benefits:

a. The exclusion only of mens rea relating to an accused's impairment avoids the need to make difficult distinctions between elements of offences;

b. Allows a wider investigation into the 'unlawfulness' of the alleged act, increasing consistency with the phrase "forms the basis of the offence"; and

c. Better achieves Parliament's aim of ensuring unfit accused are only detained if they would have been found *criminally responsible* if fit.

d. Meets the legislative requirements for a rights-consistent interpretation under the New Zealand Bill of Rights 1990.

e. Recognises New Zealand's obligations under international law, in particular the United Nations Convention on the Rights of Persons with Disabilities, addressed further below at [118].

84. In the previous appeal, the Crown and the Court of Appeal sought to confine *Tongia* to its facts, engaging with the following comment to support the suggestion that mens rea elements of offences are not included within the scope of the involvement hearing:

> [61]…To take it into account would be to introduce a mens rea element back into the determination of involvement. That is a step too far in my view.

85. This reference came without the following surrounding context:

> [60] The defence sought to adduce a report from Dr Nuth as to Joshua's mental disabilities. Counsel for Joshua submits that my assessment of the circumstances for the purposes of self-defence should take Dr Nuth's report into account. The Crown objected to Dr Nuth's evidence on the grounds of relevance. By consent, I provisionally admitted the evidence with a final ruling to be made in this judgment.
>
> [61] I consider the report to be irrelevant. To take it into account would be to introduce a mens rea element back into the determination of involvement. That is a step too far in my view. If this report were adduced in evidence, then there would be nothing to stop a report being adduced in respect of a defendant who had a skewed perception of reality due to their mental disability at the time of the alleged acts. Taken to its logical conclusion, such evidence could lead to charges against defendants being dismissed because of their mental disability rather than in spite of it. That does not accord with the purpose of the Act.

86. Her Honour's concern directly links to counsel's submission above at [32], that Parliament sought to avoid the the situation where, due to an absence of fitness, unfit accused would effectively have a defence by saying the prosecution could not prove intent.

87. As explored above, this does not require exclusion of all considerations of intent, but only those which stem from the impairment itself. Counsel submits this is particularly true when considering acts which require an inherent criminal intent to be injurious acts.

88. This approach enables composite elements of the offence to be examined where they involve a degree of examination of intent. Precluding this would, in effect, prevent the concept of 'unlawfulness' of acts with composite mens rea requirements from being properly examined. This would be in direct conflict with Parliament's intent to only detain those who would, if fit, have been found *criminally responsible* for the offence.

89. In relation to the requirement for 'objective evidence', given that the absence of reasonable belief in consent is an *element* of the offence rather than a *defence*, it is possible that the so-called 'objective evidence rule' does not necessarily apply. [50]

90. Counsel appreciates that evidence must still meet certain thresholds, however, submits these thresholds are well covered within the provisions of the Evidence Act 2006 which continues to apply to the involvement hearing.[51]

91. Counsel submits when the entirety of the background to the provision and an holistic view of Parliament's intent is taken, the provision only excludes consideration of mens rea to the extent that such mens rea, or its absence *is connected to an accused's impairment.*

92. Ultimately, counsel submits that the act of non-consensual penetration cannot be adequately examined as an injurious act *without* some recourse to the accused's belief. While this will not always be accessible, in the instances it is, the purpose of the Act, and New Zealand Bill of Rights Act 1990, requires the Court to develop the existing parameters.

3 Application to Mr Repia

93. The contested issue for Mr Repia has always been whether he had a reasonable belief in consent. No other element is in contest. Counsel appreciates the Supreme Court is not the appropriate forum for questions of fact and provides the below in an effort to contextualise

[50] Simon France (ed) A*dams on Criminal Law – Offences and Defences* (looseleaf ed, Thomson Reuters) at [CA128.04].
[51] CPMIPA, s 10(3).

the question of law and what is at stake for an accused where the Court considers restricting this vital enquiry.

94. The consequence of a finding of involvement is that Mr Repia is currently detained as a special patient at Mason Clinic where he has now been for nearly 5 years. His liberty is restricted in a manner far beyond that of the equivalent civil regime.

95. Should the Court deem it unnecessary for the prosecution to prove Mr Repia did not have a reasonable belief in consent, Mr Repia will continue to be subject to a lesser standard with no opportunity to raise a critical factor which may have, in a standard criminal trial, resulted in his acquittal.

96. More generally, this would create a difficult environment where an act which would otherwise not be criminal, becomes criminal on the basis of a complainant's word alone. This is of particular concern in relation to sexual allegations as the offence requires proof by the prosecutor of the absence of the defendant's reasonable belief in consent.

97. On the more inclusive interpretation, however, the Court will be required to consider whether Mr Repia had a reasonable, albeit mistaken, belief in consent. Were Mr Repia fit, this would be an unavoidable question.

98. This embodies Parliament's intent that the accused would, if fit, have been *criminally responsible for the offence.*

99. Importantly, this interpretation does not conflate concepts of insanity and unfitness. Rather, it allows the criminality of the act to be examined through the requirement for the prosecution to establish all elements which make the act unlawful.

100. Returning to the concept of issues of lack of intent not stemming from the accused's impairment, discussed above from [26], in this case the Appellant is not seeking to rely on his delusions to establish a reasonable belief in consent. This would rightly be precluded. Rather, he is seeking to raise a reasonable belief in consent that existed *irrespective* of his impairment.[52]

[52] File note from Dr S Taylor (Psychiatric Registrar at Te Whetu Tawera) regarding incident on the ward (24 October 2019). Appellant's bundle of authorities, from 302.

5 Mental impairment and mens rea

101. The Court of Appeal here considered that both the inquiry into the subjective belief of the unfit accused and whether such belief was the product of their mental impairment were not feasible at a section 10 hearing.[53]

102. Counsel submits such an inquiry is not difficult and is one a judge could readily perform. The following key points support this proposition:

    a. Judges regularly rely upon the experts to determine fitness (as has already been done prior to a section 10 hearing (under section 8A of the Act).

    b. The defendant's mental state for the appropriate disposition (or sentence) is also a subject relevant to the judge's final decision.

    c. Judges (and juries) regularly rely upon experts to determine a question of the defendant's sanity or otherwise at a criminal trial (section 23 of the Crimes Act 1961).

    d. Mental illness and mental impairment are the province of the forensic psychiatrists. This is an assessment made regularly and provided to the court, usually in written form and occasionally in oral testimony.

    e. Pursuant to section 77 of the Mental Health (Compulsory Treatment and Assessment) Act 1992, special patients must be reviewed by a responsible clinician on a 6 monthly basis. This includes an examination of their state of mind and can lead to: a resumption of fitness or a change in detention status (transfer to civil regime).

103. The Court of Appeal's dismissal of these inquiries as being infeasible is incorrect. Courts can and do assess the state of mind for unfit defendants in all other stages of this procedure.

4 The objective evidence requirement

104. As explored above at [89], it is questionable whether the 'objective evidence' requirement even applies to an accused's reasonable belief in consent as this is a composite element of the offence, **not** a defence. Furthermore, given the Supreme Court has clearly indicated the focus of this appeal must be on the question of law, counsel addresses this portion very briefly.

[53] *Repia v R* (CA), above n 11, at [52].

105. In the Appellant's case, there is a range of available evidence which, but for Mr Repia's impairment, would be relied upon to challenge the Crown inference that there was no reasonable belief in consent.

106. This includes a statement from Mr Repia to a clinician immediately following the events[54], creating an analogous position to *Tongia,* and presenting what would in ordinary proceedings amount to a previous consistent statement.

107. While the weight to be given to Mr Repia's statement to the clinician may be impacted by his impairment, counsel submits the evidence is inherently able to provide a sufficient evidential basis for a reasonable belief in consent.

108. Additionally, there is also further evidence that a reasonable belief in consent was in issue, or, in less direct terms, is not inconsistent. This includes statements from within the complainant's ERI and portions of the other witness statements observing the behaviour of the complainant prior to the alleged assault.

109. An exclusion of Mr Repia's reasonable belief in consent, is an exclusion of a range of exculpatory evidence which, in a standard proceeding, may well have resulted in an acquittal.

110. In summary, should the Court agree that section 10 of the Act can and does require consideration of the accused's reasonable belief in consent, there will be a necessity to consider available evidence and assess reliability in the usual manner. As articulated above at [102], Courts routinely examine the state of mind of defendants where impairments are at play, including at the initial fitness hearing, there is no clear reason why the Court cannot assess reliability of evidence, with the assistance of qualified responsible clinicians, in the same manner at the involvement hearing.

111. Counsel submits, when considering the intention of Parliament to address the risk of arbitrary detention, section 10 of the CPMIP Act can, and does, require the prosecution to satisfy the Court that the accused did not have a reasonable belief in consent. Counsel accepts, as is the case in standard proceedings there must be an evidential basis. While this must be altered to ensure the evidential basis is not stemming from the accused's impairment, restricting this entirely is in fundamental conflict with the primary purpose of the provision.

[54] Dr Taylor "File Note", above n 52.

C Policy considerations

1 New Zealand Bill of Rights Infringements

112. It is a requirement that legislation complies with the New Zealand Bill of Rights 1990.

113. Several key rights, guaranteed within NZBORA are engaged when considering the required scope of the involvement hearing. This includes:

a. Rights to minimum standards of criminal procedure:[55]

1. Right to a fair hearing: The constraint of considerations and removal of standard trial procedure at the involvement hearing creates a position of unfairness.

2. Right to the presumption of innocence: The removal of key considerations from the involvement hearing infringes on accused's right to be presumed innocent.

3. Right to present a defence: The complete exclusion of considerations engaging with mens rea precludes a variety of defences being raised.

b. Right not to be arbitrarily detained:[56] An inability to raise the full extent of defences available subsequently risks arbitrary detention.

c. Right to be free from discrimination: [57] Any divergence from the standard trial procedure which may materially disadvantage the accused represents discrimination.[58]

114. Counsel acknowledges that infringements on rights are permissible where they can be justified.[59]

115. While exclusion of mens rea to the extent that it stems from the impairment for which someone is found unfit may be justifiable, complete exclusion is reductive and unjustifiable.

[55] New Zealand Bill of Rights Act 1990, s 25.
[56] s 22.
[57] s 19.
[58] Here, a contrast can be made to the Court of Appeal analysis *J v Attorney-General*, above n 12, as Mr Repia is subject to a special patient order. This has a connection to the criminal justice system in a way the compulsory care order considered in *J v Attorney-General* does not.
[59] New Zealand Bill of Rights Act 1990, s 5.

116. Additionally, in broader contexts, for example in relation to defendants found unfit on the basis of an intellectual disability, concerns regarding consistency with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[60] are also raised.

2 Obligations under Convention on the Rights of Persons with Disabilities

117. The New Zealand courts have an obligation to interpret legislation in a manner consistent with international obligations. This includes obligations under the UNCRPD.

118. In this case, the following subsections of Article Five: Equality and non-discrimination are particularly pertinent:[61]

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

119. As the Appellant has a long-term mental impairment (disability), the UNCRPD applies both directly to him, and to the section 10 hearing as a whole.

120. The preclusion of consideration of the Appellant's reasonable belief in consent removes an opportunity for a finding of non-involvement (acquittal), which he would otherwise have in criminal trial.

121. Where this exclusion of the accused's belief cannot be justified as arising from the Appellant's impairment, the exclusion is plainly a breach of equal protection and benefit under the law and amounts to discrimination under the UNCRPD.

3 International equivalents to s 10 procedure

122. The Court of Appeal in *J v Attorney General* has already noted that New Zealand is out of step with the developing jurisprudence in this area:[62]

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[60] 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008, ratified by New Zealand March 2011) (UNCRPD).
[61] At Article 5.
[62] *J v Attorney General,* above n 12, at [143].

> [143] As we have noted above, unfitness to plead laws have been the subject of comprehensive review by law reform bodies in comparable overseas jurisdictions in recent years. In our view a similar process is now well overdue in New Zealand, particularly given the evolving understanding of the rights of persons with disabilities, and the repeated concerns that have been raised regarding aspects of the CPMIP Act, almost since its inception.[63]

123. Several jurisdictions now require a hearing held as closely as possible to a standard trial with any necessary modifications to enhance participation and consistency with rights.[64]

124. The equivalent procedure in Victoria,[65] Tasmania[66] and New South Wales (NSW)[67] are prime examples of the reconciliation between the need for public protection where an unfit person has committed an offence and the need to ensure the process to determine this 'involvement' is fair and appropriately rigorous. The key hallmarks of these processes are as follows:

    a. The hearing must be held as closely as possible to standard proceedings;

    b. Modifications to hearing procedure can be made where they better enable defendant participation;

    c. Full proof of all elements of the offence/s is required;

    d. No formal conviction results.

125. Such procedures unequivocally establish that, while the involvement hearing is not a criminal trial, this does not mean that infringements of personal liberty can be readily justified.[68] This approach gives primacy to defendant protection, while still continuing to fulfil the intention of the Act, as it permits protection of the public to the same degree as standard proceedings and ultimately, where appropriate, provides for compulsory treatment.

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[63] In the New Zealand context, see for example Warren Brookbanks "Evidential Sufficiency", above n 2; and Warren Brookbanks "*R v Tongia* [2020] NZHC 2382" [2021] NZLJ 236. In the international context, see for example England and Wales Law Commission *Unfitness to Plead*, above n 188; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC R124, 2014); and Committee on the Rights of Persons with Disabilities *Views: Communication No* 7/2012 UN Doc CRPD/C/16/D/7/2012 (10 October 2016) [Noble v Australia].

[64] See Criminal Justice (Mental Impairment) Act 1999 (Tas), ss 15 and 16; Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), ss 54 and 56; and Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 17(2).

[65] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic).

[66] Criminal Justice (Mental Impairment) Act 1999 (Tas).

[67] Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW).

[68] England and Wales Law Commission, *Unfitness to Plead: Volume 1*: Report, Law Com No 364 (2016) at [5.64].

126. Importantly, these international procedures fundamentally challenge the Court of Appeal's finding in this case that it is "unrealistic and contradictory"[69] to look beyond the "developed parameters."[70] Counsel respectfully submits it is both inherently achievable and more consistent with the broader intent of the unfitness regime.

127. Counsel highlights that despite the Court of Appeal's deference to the English case law, the England and Wales provision has received similar criticism regarding unsuitability and infringement on accused's rights. This criticism has resulted in the England and Wales Law Commission proposing an entire overhaul of their system with the aim of establishing a trial which occurs as closely as possible to standard proceedings.[71]

128. While the New Zealand Parliament is yet to follow international developments and introduce substantial reform, this does not prevent the Court from adopting a more suitable interpretation of a provision which, due to its unhappy drafting, cannot be interpreted on a purely textual approach.

129. Within the bounds of the judicial role, the Court should allow evolving international knowledge, and clarification on the purpose of unfitness regimes to guide interpretive decisions. Where extending beyond the judicial role, a statement of inconsistency with the New Zealand Bill of Rights Act 1990 would be valuable.

D Resulting interpretation

130. Section 10 of the CPMIP Act is clearly ambiguous enough to require more than the plain reading of the provision.

131. Counsel submits when more expansive interpretive tools of parliamentary intent, purposive interpretation, and rights-consistent interpretation is applied, the hearing can and must encompass the consideration of Mr Repia's reasonable belief in consent.

132. The Court must go beyond the text of the provision to interpret the appropriate scope.

1 Purposive approach

133. Counsel submits the assessment of the purpose of the involvement hearing is vital to interpreting the scope of the hearing. This is complicated by the multitude of purposes of the procedure and, the potential conflict between the purposes.

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[69] *Repia v R* (CA), above n 11, at [50].
[70] At [52].
[71] England and Wales Law Commission, Unfitness to Plead: Volume 2: Report, Law Com No 364 (2016).

134. While the Court of Appeal concluded that inclusion of consideration of a reasonable belief in consent was in conflict with the purpose of the involvement hearing, this was absent significant reasoning beyond:

> [52] The main difficulty with Mr Hamlin's argument is that it is inconsistent with the text and purpose of s 10(2). As this Court explained in *Rafferty*, while an involvement hearing is the functional equivalent of a trial, it is not a trial in the usual sense. It serves an entirely different purpose and reflects the fact that a trial in the usual sense is not possible. Further, Parliament has expressly set the threshold for a finding of involvement lower than proof of the elements of an offence.

135. Counsel suspects the Court of Appeal was referencing the conceptualisation of purpose within *Antoine*, which was examined earlier in their decision. The excerpt reads:

> The purpose of s 4A, in my opinion is to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite mens rea. The need to protect the public is particularly important where the act done has been one which caused death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future. I consider that the section strikes this balance by distinguishing between a person who has not carried out the actus reus of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite mens rea.[72]

136. The above conceptualisation of purpose relies heavily on the classification of a finding of involvement not amounting to a determination of culpability and disposition being rehabilitative and not punitive. As explored further below at [143], the Court of Appeal has already accepted that a finding of involvement is a finding of culpability.[73] This reflects the nature of detention which can follow a finding of involvement.

137. The other, perhaps more broad purpose of the provision is encapsulated within the intent of parliament "to **promote**, rather than undermine, **equality** by providing an alternative procedure"[74], by ensuring where possible people found unfit are afforded all possible protections, rather than exposed to a less adequate process.

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[72] *Regina v Antoine*, above n 13, at 375–376, quoting Attorney-General's Reference (No 3 of 1998) [2000] QB 401 (CA), at 411.
[73] *Rafferty v R*, above n 16, at [22].
[74] *J v Attorney-General*, above n 12, at [140].

138. Fundamentally, it is consistent with the purpose of the provision to balance the accused's rights that their liberty is not restricted without sufficient certainty as to culpability through rigorous procedure, with the public's right to safety and protection from risk.

139. Sexual intercourse does not attract criminal liability and/or culpability unless it is done without a reasonable belief in consent. This feature of the offence is inherent within the criminality of the act. To not require proof of an absence of a reasonable belief in consent, is to open the door to a finding of involvement, a finding of culpability[75], where the act may not in fact be injurious at all (i.e. not the offence charged).

140. The lower Courts have had to develop parameters to ensure the broader purpose of this procedure (not to detain those who would otherwise be acquitted), is achieved through the interpretation given to the scope of the involvement hearing. It is unclear how those parameters could be explained were the Court to defer only to the original statement of "physical responsibility" discussed above. For the same underlying reasons as each of those 'extensions' had to be interpreted into the statute, a parameter for the consideration of an accused's reasonable belief in consent must be similarly acknowledged.

2 Rights consistent approach

141. Finally, an interpretation including an examination of subjective belief in consent as inherent in the actus reus is significantly more consistent with rights guaranteed in NZBORA.

142. The Court of Appeal in *Rafferty*[76] has helpfully summarised the necessity of deference to the New Zealand Bill of Rights Act 1990 within the involvement hearing:

> [23] The involvement hearing under s 10 of the Act is not a criminal trial and cannot lead to a criminal conviction — the section is engaged for the very reason that no criminal trial can be conducted due to the defendant's unfitness to stand trial. However, the involvement hearing may be viewed as the functional equivalent supplied by the criminal justice system for persons unfit to stand trial. It leads to outcomes ranging from the dismissal of the charge (a deemed acquittal) to a recorded finding by the court that the defendant was involved in the offence (a culpability finding) and consequent sanctions that can include an order for involuntary detention in a secure facility for a potentially lengthy period of up to 10 years.
>
> [24] We consider this context, where a person's liberty is at stake and the s 10 involvement hearing may be their only chance of securing an acquittal, suggests it is important that the legislative

[75] *Rafferty v R,* above n 16, at [22].
[76] *Rafferty v R*, above n 16.

provisions should be interpreted and applied where possible in a manner consistent with fundamental rights assured under the New Zealand Bill of Rights Act 1990 (BORA), including the right to minimum standards of criminal procedure guaranteed by s 25. While this Court acknowledged in *Ruka v R* that, strictly speaking, the court is not determining a charge when conducting an involvement hearing, the Court considered that the hearing is arguably a step taken "in relation to the determination of the [charge]" and therefore requires the observance of the minimum procedural standards in s 25 of BORA to the extent applicable and subject to any necessary modification.

[25] As Professor Warren Brookbanks persuasively argues, the purpose of the s 10 hearing, described by this Court in *R v Te Moni* as a form of trial, is to determine culpability and justifies "the full panoply of rights and duties that would attach to any criminal trial". This view was adopted by Edwards J in *R v Tongia*. The Judge concluded that "the full force of the protections enshrined in our criminal justice system, and most importantly those found in the New Zealand Bill of Rights Act 1990, should apply" to such hearings. We agree. [*footnotes omitted*]

143. With respect, the Court of Appeal in this case appears to have contradicted the above core portions of *Rafferty.* In particular, the Court of Appeal's suggestion that the more rights consistent approach in *Tongia* should be confined to its facts, and in the central reasoning for declining the appeal at [50-53] of the decision – that the involvement hearing "serves an entirely different purpose" to a criminal trial. There is a notable absence of deference to the New Zealand Bill of Rights Act 1990, and this, combined with a narrow and inaccurate assessment of the purpose of the hearing, has compromised their interpretation.

144. The interpretation of section 10, in the context of sexual violation, as requiring the Crown to prove the defendant did not have a reasonable belief in consent (where any proposed belief does not relate to the defendant's impairment) is tenable and should be adopted.

145. To exclude an examination into Mr Repia's subjective belief in consent, where there is an evidential basis to consider this, is to remove an opportunity he would, in a standard procedure, have access to as a means to achieve a full acquittal and avoid detention based on criminal culpability. This approach is plainly discriminatory and does not give effect to the minimum procedural standards contained in section 25 of the New Zealand Bill of Rights 1990.

146. Counsel acknowledges that there may be a concern as to Mr Repia's risk. However, any remaining concerns following a finding he was not involved in the offence can be properly

handled through the **civil regime** which does not impart the same connection to criminal culpability, as discussed from [44] and acknowledged by the Court of Appeal in *Rafferty*.[77]

IV Relief sought

147. The question of law should be answered in the positive – there was an error.

148. The Appellant's reasonable belief in the complainant's consent is relevant to the assessment of whether the Appellant was involved in the offences alleged. The appeal should be allowed and the finding that the Appellant was involved set aside.

149. In lieu of a judgement setting this finding aside, counsel submits consideration must be given to a declaration of inconsistency with the New Zealand Bill of Rights Act 1990, accompanied by a strong recommendation to Parliament that this procedure be reformed.

Signed 29 July 2025

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_____

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_____

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[77] *Rafferty v R*, above n 16, at [23].