**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA** **SC12/2025**

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| **BETWEEN** | **TYSON WADE FRANCIS REPIA** |
| | **Appellant** |
| **AND** | **THE KING** |
| | **Respondent** |

# RESPONDENT'S SUBMISSIONS

**8 August 2025**


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

**CONTENTS**

1. Mr Repia was charged with sexual offending and found unfit to stand trial. Pursuant to s 10 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP**), an involvement hearing followed. Mr Repia did not contest that penetration occurred nor that the complainant did not consent. Instead, he asserted that the Crown also had to prove that he did not reasonably believe the complainant was consenting. The District Court, High Court and Court of Appeal have all determined that the Crown did not.

2. Proof of involvement pursuant to s 10(2) CPMIP does not encompass consideration of a defendant's state of mind at the time non-consensual penetration took place. Mr Repia's interpretation would mean that the prosecution is required to prove all elements (including the mens rea element) of the offence charged. By its drafting of s 10(2), Parliament has clearly articulated that something less than proof of commission of the offence is required.

3. Mr Repia's reasonable belief in consent was correctly excluded from the inquiry into his involvement in the District Court. The appeal should be dismissed.

## Background

### *Suppression orders*

4. The complainant's name and identifying details are suppressed.[1]

### *Alleged offending*

5. Mr Repia was charged with the rape and unlawful sexual connection (x2) of a fellow patient at a psychiatric ward in Auckland Hospital on 24 October 2019. The incident took place in his room and ended when a passing nurse observed the complainant lying on Mr Repia's bed with Mr Repia on top of her in "a missionary position".[2]

### *Procedural background*

6. Mr Repia was found unfit to stand trial in August 2020 by Judge Sinclair.[3] Mr Repia has a diagnosis of schizophrenia that is continuous and treatment

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1 Criminal Procedure Act 2011, s 203.

2 *New Zealand Police v Tyson Repia* [2021] NZDC 7278 at [5] (**involvement ruling**); Supreme Court Case on Appeal (SCCOA) at 62.

3 *R v Tyson Repia* [2020] NZDC 16001 (**fitness ruling**); SCCOA at 117-123.

resistant.[4] His "main symptom" is disorganised thought form, but his schizophrenic illness is also characterized by auditory hallucinations and persecutory grandiose delusions.[5]

7. An involvement hearing pursuant to s 10 of the CPMIP followed.[6] This required the court to determine, on the balance of probabilities, whether the evidence against Mr Repia was "sufficient to establish that he caused the act or omission that forms the basis of the offence with which he is charged".[7] Proof was required of the acts forming the basis of the offences of sexual violation by rape and sexual violation by unlawful sexual connection (digital and anal penetration).

8. Significantly in Mr Repia's case:[8]

> It was not contested that, for the purpose of the sexual violation by rape charge, that the defendant penetrated the complainant's genitalia with his penis, and for the other two charges that he penetrated her anus with his penis and/or her genitalia with his finger.
>
> Neither does [the defence] take issue with the complainant's statement in her evidence-in-chief that she did not consent to these acts. The complainant was not challenged in cross-examination on this.

9. The only issue at the involvement hearing was whether the prosecution also had to prove that Mr Repia did not reasonably believe the complainant was consenting. Judge Gibson held it did not: "reasonable belief in consent is irrelevant to the inquiry for the involvement hearing".[9] The Judge accordingly determined that:[10]

> The evidence of penetration, not disputed by the defendant and seen in any event by Ms Meldrum with the complainant's evidence in the form of her evidence-in-chief that the acts were nonconsensual are sufficient to satisfy me on the balance of probabilities that the defendant caused the act forming the basis of the offences with which he is charged.

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4 At [5].

5 At [5]-[6].

6 Witnesses gave viva voce evidence: Notes of Evidence, SCCOA at 67-95.

7 CPMIP, s 10(2).

8 Involvement ruling at [8]-[9], SCCOA at 63.

9 Involvement ruling at [18], SCCOA at 66.

10 Involvement ruling at [18], SCCOA at 66.

10. Mr Repia's involvement was proved to the requisite standard, and his case proceeded to a disposition hearing where Judge Sinclair ordered that he be detained as a special patient pursuant to s 24(2)(a) of the CPMIP.[11]

11. Practically, this means that Mr Repia can be detained as a special patient for a maximum period of 10 years.[12] This detention can be shorter if it is no longer necessary to safeguard Mr Repia's own interests and the safety of the public or the safety of a person or class of person.[13] A responsible clinician would have conducted a formal review of the condition of Mr Repia not later than three months after the disposition ruling, and thereafter at intervals of not longer than six months.[14] That review involves an examination of Mr Repia, and consultation with other health professionals involved in the treatment and care of Mr Repia.[15] The responsible clinician is required to provide full particulars for their opinion of Mr Repia's condition,[16] and to send a statement of the legal consequences of their finding to numerous parties, including a district inspector who must then ascertain from Mr Repia whether or not he wishes for an application to be made to the Review Tribunal for review.[17]

12. Mr Repia subsequently appealed Judge Gibson's involvement determination to the High Court and was unsuccessful.[18] Specifically, Harvey J said (footnotes omitted):[19]

> [T]here have been repeated findings by courts that a reasonable belief in consent is not relevant to the inquiry. Despite the initial contrary finding in *R v Cumming*, following the later decision of the Court of Appeal in *R v Te Moni*, and following decisions of *R v R* and *R v Wira*, the position appears to be settled as to the scope of the inquiry regarding sexual offending. The determination under s 10 when the offences are sexual offending, as set out in the passages from those decisions cited above, the question is only whether non-consensual penetration took place.

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11 *New Zealand Police v Tyson Repia* [2021] NZDC 16528 at [31] (**disposition ruling**); SCCOA at 60.

12 CPMIP, s 30(1)(b).

13 CPMIP, s 31(3).

14 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 77(1).

15 Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 77(2) and 76(2).

16 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 76(4).

17 Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 76(8) and (9).

18 *Repia v R* [2021] NZHC 1441 (**High Court judgment**), SCCOA at 29-47.

19 At [51], SCCOA at 45.

13. Mr Repia successfully sought leave to bring a second appeal against this finding in the Court of Appeal, but his appeal was dismissed.[20] The Court determined that Mr Repia's reasonable belief in consent was properly excluded from the involvement hearing inquiry (footnotes omitted):[21]

> The authorities are clear that the actus reus of sexual violation is non-consensual penetration. Lack of reasonable belief in consent is not inherent in the actus reus of sexual violation. Requiring the prosecution to prove lack of reasonable belief in consent would mean requiring it to prove the charge, which is not required in the context of an involvement hearing.

**What the section says**

14. Section 10(2) of the CPMIP reads:

> **Inquiry before trial into defendant's involvement in the offence**
>
> …
>
> (2) The court must decide whether the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.

15. This section has a convoluted history. Albeit expressed in identical terms, it was formerly s 9, the key difference being one of sequencing. Prior to its 2018 amendment, the Court had to be satisfied of a defendant's involvement before fitness to stand trial was determined. When s 9 became s 10, it reversed the order so that the question of a defendant's involvement arose for determination only after he or she was found unfit to stand trial.[22] The wording otherwise remained unchanged.[23]

***How it has been interpreted***

16. The correct interpretation of this section (and its broadly similar overseas equivalents) has been the subject of much judicial and academic discussion.

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20 *Repia v R* [2024] NZCA 677 (**Court of Appeal judgment**), SCCOA at 7-28.

21 At [53], SCCOA at 27.

22 Court Matters Act 2018, s 127. This amendment was directed at Parliament's concern to "reduce the burden on victims and other witnesses, who sometimes have to attend and give evidence at both the "involvement" inquiry and the criminal trial (if the defendant is found fit to stand trial.)" Court Matters Bill 2017 (285-1) (explanatory note).

23 Despite many concerns having been raised about the wording of the provision (see discussion in *Walker v Police* [2021] NZHC 2606 at [44], respondent bundle of authorities at 3).

Before addressing the correct interpretation in Mr Repia's case, it is first necessary to canvass the differing approaches taken over the years.

*England*

17. In the oft-quoted House of Lords decision *R v Antoine,* the purpose of the comparable UK provision "did the act or made the omission charged against him as the offence",[24] was described as being to:[25]

> ... 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.

18. Their Lordships interpreted the statutory wording as effectively synonymous with the actus reus of an offence.[26]

19. Lord Hutton specifically endorsed the reasoning from *Attorney-General's Reference (No. 3 of 1998*):[27]

> Where on an indictment for rape it is proved that sexual intercourse has taken place without the consent of the woman, and the defendant has established insanity, he should not be entitled to an acquittal on the basis that he mistakenly, but insanely, understood or believed that she was consenting.

20. One qualification was proposed: if there was objective evidence of accident, mistake, or self-defence, the prosecution was required to negative it.[28]

21. In 2015 the Court of Appeal (England and Wales) in *R v Wells* discussed the provision in the context of a charge of rape: "when directing the jury in relation

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24 Of note, a recent proposal to amend the legislation to require the prosecution to establish all elements of the offence charged was rejected in October 2023: Ministry of Justice (UK) *Government response to the Law Commission report on 'Unfitness to Plead'* (25 October 2023) at [Recommendation 10.39]: discussed in *J v Attorney-General* [2023] NZCA 660 at [122], appellant bundle of authorities at Tab E.

25 *R v Antoine* [2000] 2 All ER 208, [2001] 1 AC 340 (HL) at 375-6, appellant bundle of authorities at Tab F.

26 *R v Antoine* at 376. See Lord Hutton's discussion: "where a person is unfit to be tried in the normal way because of his mental state, it would be unrealistic and contradictory that in carrying out the determination under s 4A(2) the jury should have to consider what intention that person had in his mind at the time of the alleged offence. I consider that this criticism is well founded and that by using the word 'act' and not the word 'offence' in sub-s (2) Parliament made it clear that the jury was not to consider the mental ingredients of the offence."

27 At 376.

28 The defences the Court considered could be raised in respect of the actus reus of the offence (of murder): see clarification in *R v Grant* [2001] EWCA Crim 2611, [2002] QB 1030 at [44]-[45] respondent bundle of authorities at 23, rejecting the argument that provocation should be considered in respect of a murder charge: "it would be unrealistic and contradictory, in relation to a person unfit to be tried, that a jury should have to consider what effect the conduct of the deceased had on the mind of that person."

to making a finding for the purposes of s 4A of the Act, an inquiry into the state of mind or level of knowledge of the person concerned at the time when they did the acts or omissions comprising the offence is not required."[29] Indeed, the Court was decisive about this. The Court discussed the decision of *Antoine* and the conceptual difficulty of distinguishing between the actus reus and mens rea of some offences, before clearly stating:[30]

> Although we recognise that there are instances where it is difficult to distinguish between the actus reus of an offence and its mens rea, the question of a reasonable belief in the consent of the complainant to sexual touching clearly falls into the realm of the latter and does not require a finding in the context of s. 4(A) of the Act.

22. The Court of Appeal (England and Wales) recently considered the provision in the context of the charge of possession with intent to supply a controlled drug.[31] After analysing earlier authorities, the Court set out the following principles:[32]

> a. A hearing pursuant to section 4A of the 1964 Act is limited to ensuring that the interference with the liberty of the defendant consequent upon whatever order might be made following an adverse finding can be justified by reference to what can be proved about that which he or she did (or omitted to do), even if intention might have been clouded by delusion or other incapacity: *Wells*.
>
> b. In such a hearing, the jury will be concerned only with the 'injurious act' (or omission) which would constitute a crime if done (or made) with the requisite mens rea: *Antoine.*
>
> c. In demonstrating the actus reus, the Crown must show that the defendant 'has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law …': *Attorney-General's Reference (No. 3 of 1998),* approved in *Antoine.*
>
> d. There is no 'bright line' between the actus reus and the mens rea; depending upon the nature of the offence charged, the former may involve mental elements. A proper consideration of the 'acts' required to prove an offence requires an offence-specific consideration of its ingredients: *Wells* and *Grant*.
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> e. In some cases, there are practical difficulties in distinguishing between the act of the crime (the 'actus reus') and the mental element (the 'mens rea'), it being the case that, in some instances, the act of

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29 *R v Wells* [2015] EWCA Crim 2, [2015] 1 WLR 2797 at [61], respondent bundle of authorities at 45.
30 At [68].
31 *R v Goldsmith* [2024] EWCA Crim 780, [2024] 4 WLR 79, respondent bundle of authorities at 66.
32 At [28].

> the crime might include a mental element: *Antoine*, as explained in *MB*.
>
> f. In each case, it will be necessary to analyse, with care, the gravamen (that is, the essence) of the allegation which constitutes the act or omission for the purposes of section 4A. Where the offence charged is statutory, that will require interpretation of the language used and of the pleaded particulars of the offence. That exercise may result in a conclusion that the 'act' of which the jury must be sure, goes beyond physical acts and encompasses some aspect of the defendant's intention or purpose at the relevant time. In such circumstances, it is that intention or purpose which results in the act in question being, in the language of Lord Hutton, 'an injurious act', in which the two components are indissoluble and only a consideration of all matters provides real meaning to the jury's verdicts: *Young* and *MB*.
>
> g. A state of mind which is not directly linked to the outward component of the act — that is, which is not the reason for it — does not form part of the act charged as the offence and, accordingly, will not be a matter for the jury to determine: *MB*.
>
> h. In a case in which there is objective evidence which raises a prospective defence to the actus reus of the offence charged, albeit one entailing some consideration of the mental state of the defendant, the jury should not find that the defendant did the 'act' unless it is satisfied beyond reasonable doubt, on all the evidence, that the prosecution has negatived that defence: *Antoine*.
>
> i. Where a prospective defence does not relate to the actus reus of the offence charged, it is not open to the jury to consider issues of mens rea; hence, on a charge of murder, it is not open to the jury to consider lack of specific intent diminished responsibility; and provocation (the last of which relevant only when the jury was satisfied that the defendant had the requisite mens rea for murder): *Antoine* and *Grant*.

23. The Court held that the appellant wrongly conflated the gravamen of the offence (intent to supply) with the gravamen of the injurious act, being possession. It is the latter which is the focus of attention.[33] No enquiry into the defendant's intent was permitted.[34]

*Australia*

24. In *R v Ardler,*[35] the Australian Capital Territory Court of Appeal considered that the words of their equivalent provision ("committed the acts that constitute the offence charged")[36]q1` 2 required proof of "something that is unlawful

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33 At [32].

34 At [35].

35 *R v Ardler* [2004] ACTCA 4, (2004) 144 A Crim R 552, respondent bundle of authorities at 79.

36 Crimes Act 1900 (ACT), s 317. The Act was amended in 2004 such that the test is now whether "the accused engaged in the conduct required for the offence charged".

(in a broad sense) so as to be an offence or an element of an offence but not to require proof of the full mental element necessary in law to establish the commission of the offence."[37] However, the Court rejected the proposition that there should never be an inquiry into mens rea, holding instead that the Crown must prove that "any specific intent or knowledge necessary to constitute the particular offence alleged was present." The Court also held that if there is objective evidence of, for example, self-defence or accident, the prosecution must negative that defence.

25. Comparison should not be drawn between the scope of s 10 and the scope of the equivalent procedure (special hearings) in Victoria, Tasmania and New South Wales. Their legislation bears no similarity to ours.

26. Special hearings in Victoria are concerned with whether an accused *committed the offence charged*.[38] In Tasmania, the purpose of special hearings is to determine whether the defendant is not guilty of the offence.[39] In New South Wales, the purpose of a special hearing is to ensure that despite the unfitness of the defendant, that the defendant is acquitted unless it can be proved to the required criminal standard of proof that the defendant *committed the offence charged*.[40] These are entirely different enquiries than whether there is sufficient evidence to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.

*New Zealand*

27. In a July 2009 decision, *R v Cumming,* French J considered the requirements of the (then s 9) involvement hearing in the case of a man charged with a number of offences, including rape. The Judge held, after canvassing overseas authorities (and particularly both *Antoine* and *Ardler*) that "so far as possible,

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37 *R v Ardler*, above n 35 at [55].

38 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), s 15.

39 Criminal Justice (Mental Impairment) Act 1999 (Tas), s 15(2).

40 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), s 54.

the inquiry should focus on an accused's actions as opposed to his state of mind", but:[41]

> 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.

28. Specifically referring to the rape charge, the Judge held that proof was required that non-consensual sexual intercourse took place. However, the Judge also considered that the existence or absence of a reasonable but mistaken belief in consent would be relevant where objective evidence put that in issue, but "evidence Mr Cumming was labouring under such a belief because of mental impairment is not admissible for that purpose."[42]

29. In *R v Lyttleton*[43] Wylie J expressed reservations about French J's approach in *Cumming,* and specifically her view that the delineation between physical acts and mens rea "cannot be rigidly adhered to in every case."[44] His expressed preference was to consider that the statutory wording required proof only of the commission of the physical act or acts.[45] Wylie J held that the wording of the test militated against a broader enquiry, "giving direct attention not to the specifics of the offence charged, but rather to the underlying factual foundation which forms the basis for the offence charged". He considered mens rea an essential element of all offences (except those of strict or absolute liability) and said it would be incorrect to distinguish between offences in which the mens rea is a composite part of the actus reus and offences where it is not.

30. In its November 2009 decision of *R v Te Moni*, the Court of Appeal was not required to determine the requirements of s 9, but considered it nevertheless appropriate to "comment on them."[46] Neither *Cumming* nor *Lyttleton* were

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41 *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009 at [89], appellant bundle of authorities at Tab H.
42 At [93].
43 *R v Lyttleton* HC Auckland CRI-2008-044-9466, 4 November 2009, respondent bundle of authorities at 95.
44 *Walker v Police*, above n 23 at [37]-[38].
45 *Walker* at [40].
46 *R v Te Moni* [2009] NZCA 560 at [67], respondent bundle of authorities at 117.

referenced in this decision. The Court of Appeal identified the different possible approaches to determining involvement:

30.1 Proof is required of the commission of the physical act or acts only;

30.2 Proof is required of both the physical and mental elements of an offence; or

30.3 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 not to require proof of the full mental element necessary in law to establish the commission of the offence'.

31. Whilst not deciding the point, the Court commented that the process would be more easily understood and applied:[47]

> if the s 9 inquiry were limited to proof that the defendant committed the *physical* acts that form the basis of the offence, as opposed to the actus reus. There is some indication in the Hansard debate relating to the Bill which became the CP Act that that may have been what was envisaged by Parliament as the test applying under s 9. However, that approach does not appear to set a sufficiently high threshold to meet the objective of s 9, which is to ensure that a court has made a finding of criminal culpability before the sanctions which can apply to a person who is unfit to stand trial can be imposed on that person.

32. This judgment has consequently been interpreted as suggesting that something more than purely physical acts are required.[48] As the Court of Appeal expressed it in *Maangi v R,* citing *Te Moni*, "in a s 9 inquiry, the Court's task is to ascertain whether the actus reus is established, albeit to the civil and not the criminal standard of proof."[49]

33. Significantly, in *Te Moni*, notwithstanding the differing approaches that were discussed, the Court had no difficulty concluding that, for s 9 purposes, the charge of rape required proof of non-consensual penetration,[50] because "non-

47 At [79].

48 Although it is noted that, despite the Court's reasoning, s 9 does not constitute a finding of criminal culpability and nor does it invoke the application of sanctions.

49 *Maangi v R* [2017] NZCA 534 at [36].

50 *Te Moni,* above n 46 at [81].

consensual penetration is qualitatively different from consensual penetration: they are different acts."[51]

34. This approach was followed in subsequent cases involving sexual violation: by Winkelmann J (as she then was) in *R v R,*[52] and Keane J in *R v Wira.*[53]

35. In *R v RTPH* Kós J noted the unhappy drafting of s 9 and its frustratingly obscure purpose.[54] He addressed the conflicting authorities and expressed his own view that s 9 is "more likely to be intended simply to exclude a likely non-participant than anything more sophisticated than that."[55]

36. In an Auckland prosecution for murder, two High Court judges approached the requirements of s 10(2) differently. In a December 2019 judgment (*Tongia (1)*), Jagose J preferred the more restrictive approach, holding that the test does not require a finding of criminal culpability nor encompass consideration of exculpatory matters of justification.[56] However, in a subsequent ruling in the same case (*Tongia (2)*), in September 2020 (postdating the CPMIP amendment of s 9 to s 10(2)), Edwards J reached the opposite view:[57]

> [T]he s 10(2) hearing involves more than just establishing that the defendant caused the acts or omissions. The unlawfulness of those acts or omissions must also be weighed in the balance.

37. Interestingly, while Edwards J considered that the question of involvement could encompass consideration of defences (that were objectively in issue), mens rea considerations were nevertheless precluded from inquiry:[58]

> [T]o introduce a mens rea element back into the determination of involvement…is a step too far in my view…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.

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51 At [81].
52 *R v R* [2015] NZHC 783, respondent bundle of authorities at 150.
53 *R v Wira* [2016] NZHC 869, respondent bundle of authorities at 162.
54 *R v RTPH* [2014] NZHC 1423 at [4], respondent bundle of authorities at 168.
55 *RTPH* at [7].
56 *R v Tongia* [2019] NZHC 3278 at [17]-[18].
57 *R v Tongia* [2020] NZHC 2382 at [51], appellant bundle of authorities at Tab B.
58 *Tongia* [2020] NZHC 2382 at [61].

38. More recently, Cull J said in *Walker v Police:*[59]

> On the basis of *Ardler*, the involvement hearing should identify the unlawfulness of the offending without proof of the full mental element of the offence. If the approach in *Ardler* is adopted, objective evidence of accident, mistake or self-defence, which may have been available to the defendant, must be negatived by the prosecution. The hearing thus provides a judicial assessment of the facts; an accurate description of the defendant's role in the alleged offending; and is a check on whether the alleged charge is appropriate in the circumstances. Such findings then form the basis of forensic risk assessments or treatment options under the MHCAT or IDCCR Acts.

39. In *Rafferty v R,* a Permanent Court of the Court of Appeal noted that the correct interpretation of the words "caused the act or omission that forms the basis of the offence" was not always straightforward, and had given rise to difficulty in some cases.[60] The Court confirmed that at an involvement hearing, the Judge must be satisfied as to the actus reus of an offence, including any mental element that is integral to the actus reus.[61] As the Court of Appeal stated in this case, that is the settled position.[62]

40. The Law Commission announced on 28 April 2025 that it had been asked by the Minister of Justice to undertake a comprehensive review of the CPMIP.[63] The Commission was expected to begin this project in the second half of 2025.

**Submissions**

***The scope of s 10(2)***

41. Mr Repia argues that a s 10(2) involvement hearing for rape requires proof of:

    41.1 Non-consensual penetration; and

    41.2 A lack of reasonable belief in consent.

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59 *Walker v Police,* above n 23 at [60].

60 *Rafferty v R* [2024] NZCA 217 at [28], appellant bundle of authorities at Tab G.

61 At [30].

62 Court of Appeal judgment at [13], SCCOA at 11.

63 Te Aka Matua o te Ture | Law Commission "Law Commission to undertake review of the Criminal Procedure (Mentally Impaired Persons) Act 2003" (press release, 28 April 2025).

***Sexual violation- settled law***

42. Sexual violation is defined in s 128 of the Crimes Act 1961. It requires proof of:

    42.1 Penetration of the complainant's genitalia,[64] or sexual connection[65] with the complainant;[66]

    42.2 Without the complainant's consent; and

    42.3 Without a reasonable belief in the complainant's consent.[67]

43. The first two elements relate to the defendant's physical act and the circumstances of that act and the third relates to the defendant's state of mind as per *KSB v Accident Compensation Corporation*.[68]

44. When assessing what s 10(2) requires, arguably it assists to first consider what it does not. Section 10(2) does not require proof of all elements of, or constituting, the offence charged. It does not require proof that the defendant committed the offence, or proof that he/she did the conduct charged. Rather, Parliament has used far more careful wording: "caused"; "act or omission"; and "forms the basis of". By its drafting, Parliament has articulated that something less than proof of commission of the offence is required. It follows that what s 10(2) does not require is proof of all elements of the offence charged.[69]

45. The Court's inquiry is directed at what act or omission underlies the offence with which s/he is charged. For sexual violation, as the Courts have held, that is

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64 If the charge is sexual violation by rape: s 128(1)(a).

65 If the charge is sexual violation by unlawful sexual connection: s 128(1)(b). "Sexual connection" is itself defined in s 2 of the Crimes Act 1961.

66 Depending upon whether the charge is sexual violation by rape, or sexual violation by unlawful sexual connection.

67 The exemplar question trial for sexual violation by rape provides that the third element of sexual violation can be satisfied in two ways: at the time X penetrated the genitalia of Y with his penis, X did not believe that Y was consenting; or at the time X penetrated the genitalia of Y with his penis, there were not reasonable grounds for X to believe that Y was consenting. A jury do not need to agree with which of these they are sure of, provided all 12 are sure that either option applies. Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* (updated March 2025) at [5.10.10.7].

68 *KSB v Accident Compensation Corporation* [2012] NZAR 578 citing with approval *R v Cook* [1986] 2 NZLR 93 (CA) at 97.

69 Note the appellant's submission at [70] that the "act" in the charge of sexual violation requires an absence of the accused's reasonable belief in consent to be *unlawful*. This can be contrasted with the wording of the section which requires proof that the defendant *caused the act or omission that forms the basis* of the offence with which the defendant is charged (emphasis added.) The Court is not undertaking a determination of whether an accused's conduct was "unlawful".

a relatively straight forward exercise: the underlying act is non-consensual penetration.[70]

46. Mr Repia expresses uncertainty about whether the Courts' references to non-consensual penetration extend to include the defendant's belief.[71] But the Courts plainly do not intend the description that way.[72] The reference is to the absence of consent on the part of the complainant and does not incorporate any mens rea element on the part of the defendant.

47. As the Court of Appeal explained in *Te Moni*, in a case of rape, the physical act is penetration. However, the Court considered that more was required than the purely physical act, because "non-consensual penetration is qualitatively different from consensual penetration."[73] What makes it qualitatively different is the absence of consent on the complainant's part. A defendant's belief in consent does not alter the nature of the act itself: it does not make a non-consensual encounter consensual. The complainant's lack of consent is what makes penetration an "injurious act".

***The correct approach***

48. The correct approach is proof of the actus reus: namely, the Crown must prove both penetration/sexual connection and that the complainant did not consent.[74] This is the approach that was taken by Judge Gibson, Harvey J and the Court of Appeal in Mr Repia's case. And, it is, in the Crown's submission, without error. A number of reasons can be deployed in support.

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70 *Te Moni* above n 46 respondent bundle of authorities at 117*, Wira* above n 53 respondent bundle of authorities at 162*, R v R* above n 52 respondent bundle of authorities at 150. Interestingly, even *Cumming*, above n 41 appellant bundle of authorities at Tab H, limited the proof requirements for charges of sexual violation to proof that the sexual intercourse took place, and that the complainant did not consent: [91]. The Judge then went on to say "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." [93]. In this way this element was treated as akin to one of the defences discussed in *Antoine,* above n 25, appellant bundle of authorities at Tab F.

71 Appellant submissions at [68].

72 See for example in *R v Wira* above n 53 respondent bundle of authorities at 162 at [17]: "should Mr Wira go to trial, the Crown would also have to prove that he did not honestly believe that the complainants did consent…".

73 *Te Moni* above n 46 respondent bundle of authorities at 117 at [81].

74 Incidentally, where the appellant records that the Crown previously accepted in submissions "that the Court's focus should not be on the physical acts alone" (appellant submissions at [62]) the Crown was accepting that proof of penetration/sexual connection alone would not suffice for s 10(2) purposes. Plainly, the complainant's lack of consent is also required.

*Statutory wording*

49. First, it is consistent with the deliberately chosen statutory wording which stops short of requiring proof of the offence charged.[75] As the House of Lords accepted of their broadly analogous provision: "by using the word 'act' and not the word 'offence'… Parliament made it clear that the [fact finder[76]] was not to consider the mental ingredients of the offence."[77]

50. Worthy of emphasis, over and above the precise wording of s 10(2), is the title of the section itself. It is described as an "inquiry into the defendant's involvement in an offence." Involvement in an offence very clearly describes something short of the commission of that offence. The two phrases are not synonymous.

*Statutory purpose*

51. Second, it is consistent with the purpose and scope of the CPMIP which is not designed to prove an unfit defendant's criminal guilt. It is directed at a person's "physical responsibility" for the act underlying the offence.[78]

> … the finding under the proposed new section [9] that the defendant caused that act or omission is not a determination of criminal liability: it is merely a determination that the prosecution has produced sufficient evidence to make out a *prima facie* case in relation to the physical elements of the offence.

52. It constitutes a different pathway, with a different purpose, leading to a different outcome. "The CPMIP Act regime provides 'a non-criminal alternative to a criminal process the defendant has no ability to participate in'."[79] It does not expose a defendant to the risk of conviction and sentence.[80] When those differences are properly appreciated, the argument that the CPMIP process should entirely mirror criminal proceedings and require proof of the same criminal elements falls away.

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75 And, of course, there was no substantive change to the wording of the provision when the sequencing was altered by the Court Matters Act 2018.

76 There, a jury.

77 *Antoine,* above n 25 at 376, appellant bundle of authorities at Tab F. Arguably this distinction is made even clearer by the New Zealand provision which additionally characterises the act as one "forming the basis of" the offence charged, rather than being "the act or … the omission charged against him as the offence."

78 Criminal Justice Amendment Bill (No 7) 1999 (328-1) (explanatory note) at [2(c)] (appellant bundle of authorities at Tab D) and Criminal Justice Amendment Bill (No 7) 1999 (328-2) (select committee report).

79 *J v Attorney-General* [2023] NZCA 660 at [140], appellant bundle of authorities at Tab E.

80 At [139], as endorsed at [140].

53. It is also consistent with the conscious decision made at the time not to have the words 'Criminal Justice' in the bill title, "because the thrust of this bill was that a person who was found not to be competent to stand trial, or who was found to be insane, was, therefore, not criminally culpable."[81]

54. The appellant's submission that s 10 was enacted in the absence of consideration of offences beyond violence cases is untenable.[82] Parliament clearly considered the class of offences that should be subject to the CPMIP regime in enacting s 5(1), which provides that the Act applies only to criminal proceedings in which a defendant is charged with an imprisonable offence.

55. The basis for the appellant's submission that Parliament's intent was to detain "only those who would, if fit, have been found criminally responsible for the offence" is not clear.[83] Those words do not appear in the explanatory note for the Criminal Justice Amendment Bill (No. 7) nor in the Select Committee Report.

*Rights consistent approach*

56. As discussed further below from [71], some of rights referred to by Mr Repia do not apply in a s 10 hearing.

57. Further, while courts are required to give an enactment a meaning that is consistent with NZBORA if the interpretation is "tenable", that meaning must still be arrived at through the process of interpretation.[84] "The Courts may interpret but must not legislate".[85] Parliament's intention in s 10 is clear. The statutory language makes it plain that consideration of mens rea is excluded, and the prosecution does not need to prove all elements of the offence charged. To read s 10 with the "rights consistent approach" Mr Repia promotes would be to read the legislation in a way which is so inconsistent with the statutory purpose as to do violence to its scheme.[86]

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81 (21 October 2003) 612 NZPD 9545, appellant bundle of authorities at Tab C.

82 Appellant submissions at [25].

83 Appellant submissions at [88]. No citation is provided for this proposition.

84 *Fitzgerald v R* [2021] NZSC 131 at [58] and [73].

85 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [156].

86 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [36].

*Consistent with authority*

58. The approach taken in Mr Repia's case is also entirely consistent with the balance of authorities in New Zealand dealing with the application of s 10(2) (and its s 9 predecessor) in cases of sexual violence.[87]

59. Even those more recent authorities in New Zealand which permit consideration of matters extending beyond the actus reus in the context of an involvement hearing, do so in a specific and focussed way which do not support Mr Repia's argument:

    59.1 In *Tongia (2),* Edwards J approved and followed the House of Lords' approach in *Antoine,* requiring the prosecution to negate self-defence where it arose on the available objective evidence.[88] However, her Honour also made it clear that her decision was not intended to introduce a mens rea element back into the determination of involvement, which would be "a step too far." As such, this judgment supports the Crown argument, and not the defence position, in Mr Repia's case.[89] The defendant's belief at the time of the sexual activity is undeniably a mens rea element, and, in reliance on *Tongia (2),* continues to have no place in an involvement hearing.

    59.2 Following *Tongia (2),* in *Walker v Police,* Cull J also followed this line of authority, requiring the prosecution to disprove accident where it arose in a case of assault with a weapon and there was objective evidence that the force applied had been accidental.[90] Again, however, this decision does not support the appellant's argument. As with *Tongia (2),* the Court addressed a mens rea aspect only in the context of one of the three specified defences described in *Antoine* (accident, mistake, or self-defence) and only where it was put in issue by objective evidence. The

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87 *Te Moni* above n 46 respondent bundle of authorities at 117*, R v R* above n 52 respondent bundle of authorities at 150*, Wira* above n 53 respondent bundle of authorities at 162.

88 Described as a "more rights consistent" interpretation of s 10(2): *J v Attorney-General* at [135], appellant bundle of authorities at Tab E.

89 For completeness the Crown does not accept the appellant's suggestion (Appellant's submissions at [85]-[88]) that Edwards J's comment was qualified by its surrounding context or can be read down to suggest the Judge considered mens rea could be considered sometimes but not other times, depending on the nature of the defendant's impairment.

90 *Walker v Police,* above n 23 respondent bundle of authorities at 3.

Judge treated this as an exception to the rule: "The inquiry should focus on Mr Walker's actions, not his state of mind."[91]

60. The only decision seemingly supporting Mr Repia's argument is the 2009 High Court decision of *R v Cumming*. Interestingly, French J first stated her view that the actus reus should be the focus of an involvement hearing and not mens rea.[92] However, after describing the approach taken in *Antoine* and *Ardler* (permitting consideration of those three defences only where they arise on objective evidence), French J proceeded to treat the issue of "mistaken belief in consent" as the effective equivalent of the defence of mistake, and not as an element of the offence, thus requiring it to be disproved if arising on objective evidence.[93] In the Crown's submission, this approach is in error.

61. Accident, mistake and self-defence go partly or wholly to mens rea, but they are defences that must be raised on objective evidence. This can be contrasted to reasonable belief in consent, which is the mens rea element of the offence and not a defence. There is no evidential burden on the defence for an element– the burden is always on the Crown. So whether a defendant had a reasonable belief in consent is a very different question to whether an act was accidental, mistaken, or committed in defence of oneself or another. For this reason, the Crown submits that this aspect of the judgment in *Cumming* should not be followed and emphasises that it has been superseded by subsequent decisions in any event. [94]

*Consistent with authority abroad*

62. The lower Courts' approach is also consistent with overseas authority. The clearest example is *R v Wells* which put it beyond doubt in England and Wales that broadly consistent statutory wording does not permit consideration of the question of a reasonable belief in consent.[95]

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91 At [65].

92 *R v Cumming,* above n 41 at [89]a, appellant bundle of authorities at Tab H.

93 At [93].

94 For example, *Te Moni* above n 46 respondent bundle of authorities at 117; *R v R* above n 52 respondent bundle of authorities at 150*; Wira* above n 53 respondent bundle of authorities at 162.

95 *R v Wells,* above n 29 respondent bundle of authorities at 45.

63. The decision of the England and Wales Court of Appeal in *Grant* is also informative.[96] Ms Grant's boyfriend died of stab wounds in her home. She was found unfit, and the involvement hearing was confined to proof that she had stabbed him. Her counsel unsuccessfully requested that lack of intent and provocation also be considered. This decision was appealed. The Court had no hesitation concluding that lack of the requisite intent for murder could not be advanced as it fell "squarely within the territory of *mens rea"* which was outside the scope of the equivalent of an involvement hearing. As for provocation, it is "intimately bound up with the defendant's state of mind" and "inevitably requires examination of the defendant's state of mind." The Court stated:

> It would be unrealistic and contradictory, in relation to a person unfit to be tried, that a jury should have to consider what effect the conduct of the deceased had on the mind of that person. Parliament cannot have intended that question to be included within the determination of whether the person "did the act charged."

64. The same reasoning can be applied to a case of sexual violation. Reasonable belief in consent necessarily also involves consideration of the effect of the complainant's conduct on the mind of an unfit defendant. It would be equally problematic for this to be in focus at an involvement hearing.

*Appropriate in principle*

65. Excluding an unfit defendant's thought processes from consideration is also entirely appropriate as a matter of principle.

66. There may be situations where an unfit defendant could give a narrative of their alleged offending sufficient to raise a reasonable belief in consent. But the possibility that some otherwise unfit defendants may be able to give instructions as to this element does not define the parameters of s 10. Often where a person is unfit to be tried in the normal way because of his or her mental state, it would be "unrealistic and contradictory" for the involvement hearing to consider their intention at the time of the alleged offence.[97] So Parliament has explicitly drawn the line at acts or omissions that form the basis

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96 *R v Grant,* above n 28 respondent bundle of authorities at 23.

97 *R v Antoine,* above n 25 at 376, appellant bundle of authorities at Tab F.

of the offence. The fact that there can be a spectrum of unfitness or that unfitness is conceptually different to insanity does not change the wording of the statute or the policy setting.

67. Mr Repia seeks to draw a difficult distinction – arguing that Parliament's intention was "to avoid engaging with mens rea elements only where it is impacted by the accused's impairment."[98] The appellant appears to suggest that like a Judge relying on expert reports to determine fitness, a Judge could rely on reports from an expert as to a defendant's state of mind at the time of alleged offending and in the case of sexual violation, determine whether any reasonable belief in consent was a product of mental impairment or not.

68. This suggestion, that the Courts can enquire into mens rea so long as it is not connected to an unfit defendant's impairment, is impractical. Mr Repia's case demonstrates the difficulty. Mr Repia was subject to an inpatient order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 at the time of his alleged offending. His mental disorder was such that it was necessary for him to be subject to this compulsory treatment order.[99] When finding Mr Repia unfit, the Court referenced his chronic and treatment resistant schizophrenia, his psychosis, his disorganised thought form and its severity, his auditory hallucinations and persecutory grandiose delusions, the difficulties understanding him, his own difficulties communicating and expressing himself, his concrete thinking, his limited attention span, his limited insight, his limited understanding of aspects of the Court process, and his difficulty engaging in and conceptualising ideas.[100] Indeed, the Judge considered Mr Repia's understanding of court processes minimal if not non-existent.[101]

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98 Appellant submissions at [60].

99 Mental disorder is defined as meaning an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it poses a serious danger to the health or safety of that person or of others; or seriously diminishes that capacity of that person to take care of himself or herself: Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2(1). By virtue of s 30(2), Mr Repia's responsible clinician did not consider that he could be treated adequately as an outpatient.

100 Fitness ruling, SCCOA at 117-123.

101 At [24].

69. These symptoms affect both Mr Repia's perception of the complainant's response to him at the time of offending and his ability to communicate that to counsel later. And yet, notwithstanding all these factors underpinning the Court's determination of unfitness, on Mr Repia's behalf it is suggested that the Court can somehow exclude his impairment from consideration in order to determine whether he reasonably believed the complainant was consenting at the time of their sexual encounter. The Court is being asked to conclude that irrespective of his mental impairment and its manifestations, including his inability to understand the Court procedures, Mr Repia's thought processes at the time of the sexual activity should be evaluated and determined by the Court because they "existed irrespective of his impairment."[102]

70. If what is intended is that the Court consider whether Mr Repia believed the complainant was consenting without in fact considering his own beliefs or thoughts or expressions (because such are excluded as connected with his impairment), then the Crown submits this would be a short inquiry. The Court would need to determine what Mr Repia thought at the time, albeit without actually considering any evidence of what he thought. The Court would be left with the complainant's account of a sexual encounter which began when she was dragged into his room and onto his bed,[103] Mr Repia pulled up her dress and removed her underwear,[104] and then continued to penetrate her notwithstanding she said "no" many times[105] and tried to push him away.[106] The fact the complainant had previously been in Mr Repia's room and was at times passive during the encounter,[107] would not assist his position in any material way.

***Not a determination of the criminal charge***

71. Much of the appellant's argument in the present case appears to be founded upon concern that Mr Repia is being disadvantaged by the CPMIP proceedings.

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102 Appellant submissions at [100].
103 EVI, SCCOA at 97, 100, 106, 107, 113.
104 NOE, SCCOA at 74-75; EVI, SCCOA at 101.
105 NOE, SCCOA at 75; EVI, SCCOA at 97.
106 NOE, SCCOA at 79; EVI, SCCOA at 103, 112, 113, 114.
107 See Crimes Act 1961, s 128A(1) and *Christian v R* [2018] 1 NZLR 315 (SC) at [45]: "consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent…this is equally applicable to the issue of reasonable belief in consent."

In support of this position, the appellant equates a finding of involvement with a conviction, treatment under the CPMIP as the equivalent of a sentence of imprisonment, and available outcomes as "not readily distinguishable" from those for a defendant convicted of a serious offence.[108]

72. These arguments have been made and rejected in the Court of Appeal numerous times.

73. In *M v Attorney-General* the Court found that the CPMIP Act provided significant advantages for a defendant including that:[109]

73.1 They were not exposed to the risk of a conviction and sentence.

73.2 They would not be detained unless detention was necessary in the public interest.

73.3 If they were detained, that detention would be frequently reviewed and would continue only for so long as it remained necessary in the public interest.

74. In *J v Attorney-General* the Court of Appeal was clear that, "unlike sentences of imprisonment imposed upon conviction, health-related orders are made when a person is unable to be held morally responsible for their offending and are therefore non-punitive." [110] Leave to appeal was granted by this Court, and a judgment is pending.[111]

75. Similarly, in *Ruka v R*,[112] the Court of Appeal said "even though a finding of unfitness can result in a curtailment of a person's liberty and compulsory treatment, it does not constitute a conviction, and imprisonment is not an available order for a person found unfit to stand trial. Section 9 is a safeguard for a defendant; it is a screening mechanism designed to protect a person from being subjected to the consequences of a finding of unfitness to face trial in the

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108 Appellant submissions at [44].

109 *M v Attorney-General* [2020] NZCA 311, (2020) 32 FRNZ 685 at [135] respondent bundle of authorities at 177. Appeal allowed by this Court in *M v Attorney-General* [2020] NZSC 145, although not on this point.

110 *J v Attorney-General* at [63], appellant bundle of authorities at Tab E.

111 *J v Attorney-General* [2024] NZSC 34.

112 *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768 respondent bundle of authorities at 224.

absence of proof to a defined standard of involvement in the alleged offending."[113]

76. The New Zealand approach also accords with the Court of Appeal of England and Wales' pronouncements in *R v Wells*:[114]

> [3] In the event that a defendant is found to have done the act or made the omission, there is no determination of a criminal charge and no question of conviction or punishment... Only the act or omission has been proved and there has been no investigation or attempt (even less, a successful attempt) to prove all the constituent ingredients of the offence charged. The powers of the court are therefore not those which follow a conviction but are restricted to measures designed to treat, rehabilitate and support while, in the most serious cases, providing protection for the public.
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> ....
>
> [9]…[I]t is worth emphasising that a hearing pursuant to s. 4A of the Act is not a criminal trial to determine the guilt or otherwise of an accused person. It is the consequence of an inability to conduct a trial with that aim in mind because of the mental incapacity of the defendant; it recognises that the part which can be played by the defendant is necessarily limited because, for whatever reason connected with that incapacity, by definition, he or she cannot participate in the trial.

77. Further, an involvement hearing is not necessarily the "only opportunity to challenge allegations".[115] If a defendant responds positively to treatment to the effect that they are no longer unfit to stand trial within half the maximum sentence for the offence they were charged with, the Attorney-General can direct that the defendant be brought before the appropriate court for the criminal process to resume.[116]

78. Because the respondent's submission is that s 10 does not involve a determination of the charge (unless the Court is not satisfied of involvement and the charge is dismissed pursuant to s 147 of the Criminal Procedure Act), the necessary implication of that is that s 25 of the New Zealand Bill of Rights Act 1990 (NZBORA) is not applicable. That section provides minimum standards of criminal procedure for "everyone who is charged with an offence" "in

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113 *Ruka v R* at [62].

114 *R v Wells,* above n 29 at [3] respondent bundle of authorities at 45.

115 Appellant submissions at [15].

116 CPMIP, s 31(2)(a).

relation to the determination of the charge". An involvement hearing is not a determination of the charge, for the reasons articulated above.

79. In *R v H*, the House of Lords rejected an argument that their s 10 equivalent involved the determination of a criminal charge when considering the applicability of article 6 of the European Convention on Human Rights (the right to a fair trial).[117] The respondent endorses that position.

80. Alternatively, if s 25 is engaged at an involvement hearing, observance of those procedural standards is only to the extent possible and subject to any necessary modification.[118] It is not possible for unfit defendants to have an unfettered right to present a defence at their involvement hearing. The right is subject to a necessary modification: unless it is a defence based on mens rea that is not integral to the actus reus.

***Discrimination***

81. The argument that the CPMIP regime is discriminatory (either in terms of s 19 of NZBORA or in terms of article five of the United Nations Convention on the Rights of Persons with Disabilities) has been made before and rejected by lower Courts.[119]

82. Claims of discrimination are assessed against the following framework:[120]

    82.1 Is there differential treatment or effects as between groups in analogous or comparable situations (the comparator group) based on a prohibited ground of discrimination?

    82.2 If there is, has it resulted in a material disadvantage for the person or group differentiated against?

    82.3 If it has resulted in material disadvantage, can the discrimination be justified under s 5 of NZBORA?

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117 *R v H* [2003] UKHL 1, [2003] 1 WLR 411 respondent bundle of authorities at 246.

118 *Rafferty v R* at [24], appellant bundle of authorities at Tab G.

119 *Ruka,* above n 112 respondent bundle of authorities at 224*, M v Attorney-General* [2020] NZCA 311, (2020) 32 FRNZ 685, above n 109 respondent bundle of authorities at 177, *J v Attorney-General* [2023] NZCA 660, appellant bundle of authorities at Tab E.

120 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55], [60], [109], [117], [136] and [143].

83. As the Court of Appeal said in *J v Attorney-General,* identifying an appropriate comparator group for the purposes of assessing a CPMIP Act discrimination argument is not straightforward.[121] The factor that determines whether a person will proceed to an ordinary trial or to an involvement hearing is not disability,[122] but unfitness to stand trial. These concepts are not synonymous. The Court in *J v Attorney-General* treated defendants who are fit to stand trial as the relevant comparator group. As noted above, a judgment from this Court in respect of *J v Attorney-General* has been reserved.[123]

84. Mr Repia appears to suggest that defendants participating in the "standard trial procedure" are the comparator group.[124] There are difficulties with that, for the reasons discussed in *J v AG*. While some persons suffering from psychiatric illness may meet the criteria of being unfit to stand trial, others may not. If a comparator group can be identified, given the nature of the appeal (whether reasonable belief in consent is excluded from consideration at an involvement hearing), it would seem more appropriate for it to be fit defendants charged with sexual violation. What is considered at an involvement hearing is offence specific.

85. There is no question that unfit defendants are treated differently from this comparator group, but there is no material disadvantage. A s 10 hearing has significant advantages:

    85.1 By excluding this non-integral mens rea from consideration at a s 10 hearing, the unique needs of unfit defendants are better accommodated.

    85.2 Both an involvement hearing and a trial can result in an acquittal, but only a trial can result in conviction and punishment.

    85.3 The outcomes following a finding of involvement are more advantageous than those following a finding of guilt:

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121 *J v Attorney-General* [2023] NZCA 660 at [116], appellant bundle of authorities at Tab E.

122 Under s 19(1) of the Bill of Rights"[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". The prohibited grounds of discrimination in s 21(1) of the Human Rights Act include disability. The definition of 'disability' in s 21(1)(h) includes "(iii) psychiatric illness".

123 *J v Attorney-General* [2024] NZSC 34.

124 Appellant submissions at 113(c).

(a) Defendants found involved are not exposed to the risk of imprisonment. Defendants who are convicted of sexual violation not only face the risk of imprisonment, but a presumption of imprisonment.[125]

(b) Defendants found involved will only be detained if that is necessary in the public interest.

(c) Detention as a special patient is not imposed for a punitive purpose. Imprisonment can be imposed for a punitive purpose (among other purposes of sentencing).

(d) When a person is detained as a special patient, their detention is regularly reviewed. Detention can cease if it is no longer necessary to safeguard that person's interests and the safety of the public. There is no minimum period of detention before release can occur. A defendant sentenced to a term of imprisonment over two years (which is frequently the case for sexual violation offending) is entitled to review in the form of parole only after serving a third of their sentence.

(e) Detention as a special patient is a health outcome. There is appropriate resourcing and treatment available, which is unlikely to be available to the same standard in a prison environment.

86. If there is any material disadvantage, that is justified under s 5 of NZBORA. The objective of s 10 of the CPMIP (to provide a non-criminal alternative to a criminal process the defendant has no ability to participate in) is sufficiently important to warrant overriding any guaranteed right.

***Mr Repia's involvement was appropriately proven***

87. In accordance with the statutory wording, the statutory purpose, overarching principle, and previous authority, the Courts correctly approached the question of whether Mr Repia's involvement was properly proved. Proof was required of

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125 Crimes Act 1961, s 128B(2).

sexual connection (penetration of the complainant's vagina by his penis; penetration of her vagina by his finger, and penetration of her anus by his penis), and that these acts occurred without the complainant's consent.

88. It was accepted on Mr Repia's behalf that these acts of sexual connection occurred, and that the complainant was not consenting. This being so, his involvement was appropriately proved for the purposes of s 10(2) of the CPMIP.

89. There was no need for the Court to consider whether Mr Repia reasonably believed the complainant was consenting as this is not within the scope of a s 10(2) inquiry.

90. For completeness, the Crown notes that even if the Court disagreed and held that a reasonable belief in consent could be within scope in an involvement hearing, this issue would need to be raised by objective evidence.[126] There is no objective evidence capable of putting a reasonable belief in consent in issue in this case. As above, the complainant's account was that she was dragged into Mr Repia's room and penetrated notwithstanding that she said "no" many times and tried to push Mr Repia away. Mr Repia's statement to a clinician following his alleged offending is plainly not objective evidence. There is no possibility that the Crown would have failed to prove Mr Repia's involvement to the requisite standard in the circumstances of this case.

**Conclusion**

91. The interpretation of s 10(2) that the appellant promotes signifies a substantial change to a settled and principled position of law. It would require the prosecution to prove all elements of the offence. Such a substantial change should originate from Parliament, and the review the Law Commission is presently undertaking of the CPMIP will provide a platform for consideration of any change.[127]

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126 In *R v Wells* above n 29 at [15] respondent bundle of authorities at 45, the England and Wales Court of Appeal considered independent eyewitness evidence, CCTV, cell site, scene of crime or expert forensic evidence, and evidence of a fight would fall into the objective evidence category.

127 In *Tamiefuna v R* [2025] NZSC 40 at [109]-[110], this Court declined to recalibrate the test contained in s 30(2)(b) of the Evidence Act 2006 for several reasons but including because the Law Commission in its final review of the Evidence Act considered s 30 in detail and made recommendations for change. The Court said "at this stage it is preferable to wait and see what emerges from that process".

92. In the meantime, the Court of Appeal's judgment in this case was consistent with present legislative intent. The appeal should accordingly be dismissed.

8 August 2025

M J Lillico | I L M Archibald
Counsel for the respondent

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

**AND TO**: The appellant.

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6. Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), s 54.
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11. *R v Antoine* [2000] 2 All ER 208, [2001] 1 AC 340 (HL).
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14. *R v Goldsmith* [2024] EWCA Crim 780, [2024] 4 WLR 79.
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16. *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009.
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31. *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315.

32. *M v Attorney-General* [2020] NZCA 311, (2020) 32 FRNZ 685.

33. *J v Attorney-General* [2024] NZSC 34.

34. *Ruka v R* [2011] NZCA 404, (2011) 25 CRNZ 768.

35. *R v H* [2003] UKHL 1, [2003] 1 WLR 411.

36. *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

37. *Tamiefuna v R* [2025] NZSC 40.

**Other**

38. Ministry of Justice (UK) *Government response to the Law Commission report on 'Unfitness to Plead'* (25 October 2023).

39. Te Aka Matua o te Ture | Law Commission "Law Commission to undertake review of the Criminal Procedure (Mentally Impaired Persons) Act 2003" (press release, 28 April 2025).

40. Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* (updated March 2025) at [5.10.10.7].

41. Criminal Justice Amendment Bill (No 7) 1999 (328-2) (select committee report).

42. Court Matters Bill 2017 (285-1) (explanatory note).

43. (21 October 2003) 612 NZPD 9545.