IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC120/2024**

BETWEEN	**BARRY JOHN BAILEY**
	Appellant
AND	**THE KING**
	Respondent

RESPONDENT'S SUBMISSIONS

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

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1. Mr Bailey was facing eight charges of sexual offending against three girls when they were between the ages of five and nine. He was a caretaker at their primary school in the 1980s. Mr Bailey now has dementia. Judge Kellar found him unfit to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP**).[1] Although an involvement hearing,[2] which "must" be held following a finding of unfitness,[3] was directed by Judge Kellar,[4] Judge Savage dismissed the charges under s 147 of the Criminal Procedure Act 2011 (the **CPA**).[5] An involvement hearing has not been held.[6]

2. The Crown successfully appealed to set aside Judge Savage's ruling.[7] In allowing the appeal, the Court of Appeal held that a defendant found unfit to stand trial cannot rely on their mental impairment as a basis to seek a stay under s 147 CPA.[8]

3. Mr Bailey now brings a second appeal on a question of law and seeks to overturn the Court of Appeal's judgment. He contends the Court of Appeal's approach was "too narrow and prescriptive" and that it "removed a trial judge's discretionary power to dismiss charges under s 147 CPA in circumstances where no useful purpose would be achieved by following" the CPMIP procedure.[9]

4. The Court of Appeal's decision struck the correct balance between Parliament's clear intentions in enacting a mandatory alternative process for unfit defendants, and the need to preserve residual flexibility for courts to respond to the ways in which its processes may be abused (and more generally to deal with issues that are not covered by CPMIP). But applications for dismissal or stay in the context of fitness cannot be

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1 *R v Bailey* CRI-2020-009-007701 (**minute of Judge Kellar**) at [5]; Case on Appeal (**COA**) at 89.

2 CPMIP, s 10(2).

3 Section 8A(5).

4 Minute of Judge Kellar at [6]; COA at 90.

5 *R v Bailey* [2023] NZDC 18240 (**section 147 ruling**); COA at 91.

6 An involvement hearing has been set down for 26 January 2026. The prosecutor has maintained the date pending resolution of this appeal.

7 *R v Bailey* [2024] NZCA 552 (**Court of Appeal judgment**) at [44]; Supreme Court Case on Appeal (**SCCOA) at 9**.

8 At [32]; SCCOA at 21.

9 Appellant's submissions at [3].

grounded in the defendant's impairment or matters related to it. Otherwise, the process in CPMIP will be circumvented, along with the important purposes it serves. Involvement hearings provide information to a court about the most appropriate means of disposition for a defendant. They operate as an alternative to trial, meaning it is the closest unfit defendants will get to clearing their name or complainants will get to being vindicated. Further, involvement hearings need not be unduly burdensome; and any criticisms of their fairness must be weighed against the fact that Parliament has chosen to enact this particular regime. A dismissal or stay was not warranted in this case and the appeal should accordingly be dismissed.

Background

Alleged offending

5. The Crown case is that, on several occasions between 1982 and 1989, Mr Bailey offended against RN (aged between 6 and 9), KR (aged 6) and KC (aged 9). The offending took place while the girls were at school, where Mr Bailey was a caretaker. In a changing room, he rubbed his hands around RN's vagina (over her underwear) and kissed her neck. He got her to urinate on the floor while he watched, told her to hold his penis and put it in her mouth, put his fingers in her vagina twice and raped her. In respect of KR, Mr Bailey grabbed her groin over her clothing and rubbed her chest. When he found her in the school toilets on one occasion, he put his hand under her skirt and underwear and rubbed between her labia. On another occasion, Mr Bailey took KC into the changing rooms after asking her to help him with his work. Once inside, Mr Bailey pulled down her pants and penetrated her vagina with his fingers.

6. Mr Bailey was charged with five counts of indecency with a girl under 12, one count of inducing an indecent act, one count of rape, and one count of sexual violation by unlawful sexual connection.[10]

[10] The maximum penalties for these charges are 10 years, 10 years, 14 years and 20 years, respectively.

Procedural background

7. On 28 April 2023, after receiving an updated s 38 report, Judge Kellar found Mr Bailey was unfit to stand trial because he suffers from dementia, a mental impairment.[11] But before the matter could proceed to an involvement hearing, as the Judge had directed,[12] Mr Bailey filed an application to dismiss (under s 147) or stay the proceedings, which was heard by Judge Savage.[13]

8. The Crown submitted the Court did not have jurisdiction to dismiss the charges under s 147 of the CPA because "the matter must track along to an involvement hearing".[14] Judge Savage rejected the Crown's submission on jurisdiction. His Honour noted that Mr Bailey had not been found guilty, acquitted, or entered a plea of guilty.[15] It followed, in the Judge's view, that he had jurisdiction to dismiss the charges.

9. In determining whether the charges ought to be dismissed, the Judge was of the view that all that would be achieved by proceeding with an involvement hearing would be to "give the complainants their day in Court".[16] That was not enough to justify proceeding with an involvement hearing in light of the unfairness caused by the constraints on the defence's inability to test the Crown's evidence,[17] particularly given Mr Bailey had only generally denied the allegations.[18] Accordingly, the Judge determined the involvement hearing would be an improper use of the Court's processes and dismissed the charges.[19]

10. The Court of Appeal disagreed. In setting aside Judge Savage's ruling, the Court concluded that the Judge did not have jurisdiction to dismiss the charges, given Mr Bailey's mental impairment was relied on as one of the

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11 Minute of Judge Kellar at [4]-[5]; COA at 90. The finding was made pursuant to s 8A(2) of CPMIP.

12 At [6]; COA at 90.

13 Notice of Application – Section 147 Criminal Procedure Act; SCCOA at 29-30.

14 Section 147 ruling at [5]; COA at 92.

15 At [6]-[7]; COA at 92.

16 At [16]; COA at 93.

17 At [13]; COA at 93.

18 At [11] and [13]; COA at 92-93.

19 At [16]; SCCOA at 93.

bases for a dismissal or stay.[20] That the Judge did so "circumvent[ed] the process mandated by the CPMIP Act". Even if the Judge had jurisdiction (contrary to the Court's conclusion), the "reasons given by the Judge did not provide a sufficient basis for a dismissal of the charges".[21]

Suppression orders

11. The complainants' names and identifying details are suppressed.[22]

The CPMIP process

12. CPMIP stipulates the process to be followed once a finding of unfitness is made. Section 8A(5) provides that if the court finds a defendant is unfit to stand trial, the court "must" inquire into the defendant's involvement in the offence under ss 10, 11, or 12 (i.e. undertake an involvement hearing).

13. The mandatory terms of s 8A(5) with the use of the term "must":

    13.1 Reflect the purpose of the CPMIP as stated in s 3(b), which is to ensure that "a defendant found unfit to stand trial for an offence must be the subject of an inquiry to determine whether the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence."

    13.2 Are integral to a scheme which the Associate Minister for Courts described as comprising "two judicial inquiries" and as "prescribe[d]".[23]

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20 Court of Appeal judgment at [32]; SCCOA at 21.

21 At [35]; SCCOA at 22.

22 Criminal Procedure Act 2011, s 203.

23 (30 October 2018) 734 NZPD (Courts Matters Bill – Aupito William Sio): "Part 4 amends the Criminal Procedure (Mentally Impaired Persons) Act to reverse the order of the two judicial inquiries that the Act prescribes for assessing if a defendant is fit to stand trial in a criminal court. These two inquiries are called the involvement inquiry and the fitness inquiry. Part 4 will require a judge to first undertake the fitness inquiry, which assesses the defendant's fitness to stand trial. If the defendant is found to be fit to stand trial, the criminal trial continues. Most defendants are found to be fit to stand trial. The involvement inquiry will only be held if the person is found to be unfit to stand trial. The involvement inquiry assesses if the defendant was involved in the offending. If a judge is satisfied that the defendant probably participated in the offending, the judge will be able to impose the order specified in the Criminal Procedure (Mentally Impaired Persons) Act. Once the bill is enacted, victims and witnesses will only have to give evidence at either the involvement inquiry or the criminal trial. *At present, victims and witnesses can suffer unnecessary distress giving evidence at both the involvement inquiry and the criminal trial."* Emphasis added.

14. The language of CPMIP and the scheme described by the Associate Minister requires an involvement hearing after a finding of unfitness. As the Court of Appeal held in this case, CPMIP is "specialised legislation … that sets out specific and detailed processes to be followed in determining whether a defendant is unfit to stand trial and, if they are, the subsequent procedural steps that must be taken".[24]

15. Section 10(2) (which is engaged in this case) provides that 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. The court may consider any formal statements that have been filed under s 85 of the CPA, any oral evidence that has been taken in accordance with an order made under s 92 of the CPA and any other evidence that is submitted by the prosecutor or defendant.[25]

16. Section 13 provides that, if the court is not satisfied of the matter specified in s 10(2), it must dismiss the charge against the defendant under s 147. The finding that the defendant is unfit to stand trial is deemed to have been quashed and the court must not deal with the defendant under subpart 3.[26] But if the court is satisfied the defendant was involved, the court must deal with the defendant under subpart 3 of CPMIP.[27] The outcomes for the defendant at this point are within the health system, not criminal justice.

17. Accordingly, if the Court determined Mr Bailey was involved in the offending, he could be dealt with in the following ways (under subpart 3):

    17.1 He may be treated as a special patient (s 24(2)(a));

    17.2 He may be treated as a patient (s 25(1)(a)) under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or

    17.3 He may be released (s 25(1)(d)) and the proceedings stayed (s 27).

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24 Court of Appeal judgment at [29]; SCCOA at 19.

25 CPMIP, s 10(3).

26 Section 13(2).

27 Section 13(4).

18. Given the degenerative nature of dementia, any orders made by the court would not be for the purpose of treating or rehabilitating Mr Bailey. But protection of the public is also an important consideration, in addition to treatment of the defendant. It is still open to the court to make an order under s 24(2)(a) or 25(1)(a) if it is appropriate in the circumstances. Alternatively, the court can, if it considers it more appropriate, make an order for Mr Bailey's immediate release and stay the proceedings.

The nature of CPMIP and its predecessor as a prescribed judicial process

19. A number of cases make clear that CPMIP and its immediate predecessor (Part 7 of the Criminal Justice Act 1985) are mandatory statutory processes for unfit defendants. Once engaged, the process must be completed.

Pre-CPMIP

20. In *Police v L*, the District Court Judge had found the respondent was under a disability in terms of s 108 of the Criminal Justice Act 1985.[28] The Judge declined to make any order under s 115(1) and (2)(a) of the Criminal Justice Act 1985 because the respondent could not be subjected to the provisions for compulsory assessment and treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 as he did not suffer from a treatable mental illness. Instead, he discharged all charges against the respondent (under s 347).

21. Section 115 of the 1985 Act provided as follows:

> **115 Order to be made if person under disability or insane**
>
> (1) Subject to subsections (2) and (4) of this section, if a person—
>
> (a) is found to be under disability; or
>
> (b) is acquitted on account of his or her insanity,—
>
> the court shall make an order that the person be detained in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.
>
> (2) In any case to which subsection (1) of this section applies, the court, having regard to all the circumstances of the case, and being satisfied, after hearing medical evidence, that it would be safe in the interests

[28] Repealed on 1 July 2013 by s 411 of the CPA.

> of the public to make an order under this subsection, may, instead of making an order under subsection (1) of this section,—
>
> (a) make an order that the person be detained in a hospital as a patient; or
>
> (b) make an order for the person's immediate release; or
>
> (c) if the person is liable to be detained under any full-time custodial sentence, decide not to make any order under this section.
>
> (3) In the exercise of its powers under subsection (2) of this section, the court may take into account any undertaking given by or on behalf of the person that the person will undergo or continue to undergo a particular course of treatment.
>
> 4) Where a person is found to be under disability or is acquitted on account of his or her insanity, the court may, instead of exercising immediately any of its powers under subsections (1) and (2) of this section, remand the person to a hospital, for any period not exceeding 7 days, for the purpose of making enquiries to determine the most suitable method of dealing with the case pursuant to this section.

22. On appeal, Doogue J held that the provisions of the 1992 Act did not preclude the making of a compulsory treatment order under s 115(1) of the 1985 Act and the Judge was not entitled to take into account the irrelevant consideration the respondent did not suffer from a treatable mental illness as a basis for declining to make an order. His Honour noted this answer was "fully in conformity with earlier decisions of the District Court" and that the Judge had acted with "complete disregard for the provisions" of s 115 of the 1985 Act "which were binding upon him".[29] Doogue J considered the answer was "so clear that it hardly requires this Court to state it": the Judge had "no option but to make an order in terms of 115 of the [1985] Act".[30]

After the enactment of CPMIP

23. In *Cumming v R*, this Court allowed an appeal against conviction on the grounds that a miscarriage of justice had been caused by the appellant's mental condition. When considering CPMIP, the Court held the regime "*stipulates* a procedure for [unfitness to stand trial] to be ascertained"[31] and that "[s]ubpart 3 of the Act *stipulates* the process of inquiry and

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29 *Police v L* M21/2001, 11 December 2001 (HC) at [6], citing *R v T* (1993) 9 CRNZ 507; *Police v M (No 2)* [1994] DCR 388; and *Police v P* [1997] DCR 823.

30 *Police v L* M21/2001, 11 December 2001 (HC) at [7].

31 Sections 10-12 of CPMIP as enacted.

determination for dealing with a defendant who has been found unfit to stand trial."[32]

24. In *R v Dalley*, the Court of Appeal noted "[s]ubpart 1 of Part 2 of the 2003 Act sets out the procedure to be followed where a question of the defendant's fitness to stand trial arises."[33] It went on to confirm that "[o]nce the Subpart 1 procedure is triggered (as it was or should have been here), the procedure must be followed and must ultimately involve *judicial* findings on one or more matters" namely involvement, impairment and unfitness.[34]

25. The case on appeal in *R v Te Moni*, raised a number of issues about the process for determining whether an accused person is unfit to stand trial. The Court observed that its decision in *McKay v R* had clarified that "the [CPMIP] process, once it has been properly commenced, must be completed".[35]

26. In *Balemi v R*, the issue before the Court of Appeal was whether a finding of unfitness to stand trial, once made, could be revisited. The Court decided it could not and concluded that "the requirement identified in *McKay* that the CPMIP Act procedure, once triggered, must be completed, extends to the completion of the s 23 hearing and decisions as to what steps to take under ss 25 to 27 of the CPMIP Act."[36]

27. The High Court in *R v Soles* dealt with an issue where the defendant raised his fitness to stand trial but subsequently asserted he was fit. Applying *Te Moni*, the High Court held this "concession does not relieve the Court of having to complete the process that has been started".[37]

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32 *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [12]. Emphasis added.

33 *R v Dalley* [2009] NZCA 419 at [9].

34 At [14]. Emphasis in original.

35 *R v Te Moni* [2009] NZCA 560 at [39], citing *McKay v R* [2009] NZCA 378.

36 *Balemi v R* [2014] NZCA 176 at [47]-[48], citing *McKay v R* [2009] NZCA 378.

37 *R v Soles* [2014] NZHC 214 at [4].

Section 147 dismissals and stays

28. A court may dismiss a charge at any time before or during a trial until the defendant's guilt is determined or the defendant pleads guilty to the charge.[38] A dismissal under s 147 is a deemed acquittal.[39] Outside of the statutory grounds for dismissal,[40] case law under s 347 of the Crimes Act 1961, which remains applicable to a s 147 dismissal, indicates a charge may be dismissed when no useful purpose would be served by the continuation of the proceedings[41] or when the continuation of the proceedings would be an abuse of process. An abuse of process is likely to be claimed in cases that involve unconscionable conduct during the investigation[42] or the prosecution,[43] delay,[44] proceedings that create a risk of an unfair trial or an appearance of unfairness or where the conviction would otherwise be unsafe.[45] The court also has jurisdiction to consider a claim of abuse of process on the ground that the application of a statutory provision is inherently uncertain.[46]

29. The stay jurisdiction, like a s 147 dismissal, subsists throughout the proceeding. The approach to stay applications and applications to dismiss under s 147 on the grounds of delay is the same.[47] Unlike a dismissal, though, a stay is not a deemed acquittal.

30. *Attorney-General v District Court at Hamilton* involved an application by the prosecution for review of a discharge under s 347 of the Crimes Act 1961.

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38 Criminal Procedure Act 2011, s 147(1).

39 Section 147(6).

40 Section 147(4).

41 This may include: where the circumstances of the alleged offending do not justify a trial, including where only a nominal punishment would follow (*R v Harrington* [1976] 2 NZLR 763 (SC); *R v Harlick* HC Auckland T177/86, 27 February 1987; *Thompson v District Court at Christchurch* (2002) 9 NZCLC 262 (HC)); a trial would be unreasonably burdensome on the defendant (*Long v R* [1995] 2 NZLR 691 (HC)); or the defendant has pleaded guilty to associated charges and the expense of a trial on other charges is unwarranted (*R v ETE* (1990) 6 CRNZ 176 (HC)).

42 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

43 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

44 *CT (SC88/13) v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [32].

45 See for example *R v Flyger* [2001] 2 NZLR 721 (CA) at [15].

46 *R v Chase* [2013] NZHC 1963.

47 *H (SC97/18) v R* [2019] NZSC 69 at [39], [2019] 1 NZLR 675 at [39].

The context identified by Randerson J as applying to any consideration of an application for a stay *or* dismissal is useful:[48]

> These authorities confirm that ordinarily, it is the duty of the court to try the person charged. It is not for the court to interfere with the decision to prosecute. The jurisdiction to stay or dismiss must be exercised sparingly and only in the clearest of cases. Abuse of process is a flexible remedy designed to be adapted to different situations as they arise. But there are at least two categories where the court may act. First, where the prosecutor's conduct would preclude a fair trial. Secondly, where the prosecutor's conduct is so inconsistent with the purposes of criminal justice that to proceed with the prosecution would tarnish the integrity of the court or offend its sense of justice and propriety.

31. In *R v London County Quarter Sessions,* Lord Goddard CJ observed that a power to refuse to try an indictment would in effect enable a court, which disapproved of a statute, simply to decline to enforce it:[49] "it would enable a court, the members of which disapproved of or disliked a statute, the breach of which formed the subject of the indictment, simply to quash it and decline to try it."

32. Mr Bailey contends "[d]ismissal or stay is available in cases where elderly defendants become unfit to stand trial due to a permanent condition, preventing a fair trial from taking place".[50] He cites three cases in support of this claim: *R v B,*[51] *R v Codd*[52] and *R v Corkran.*[53] All three of those cases involve stays rather than s 147 dismissals. And, in the Crown's submission, they are wrongly decided, although explicable in their individual contexts.

33. In *R v B*, where all the evidence indicated guilt, Wild J held that a s 347 discharge would be inappropriate as it operated as an acquittal.[54] However, the Judge's reliance on the defendant's mental incapability[55] when staying the proceeding was in contravention of the mandatory process at the time (set out in Part 7 of the Criminal Justice Act 1985); and would have also

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48 *Attorney-General v District Court at Hamilton* [2004] 3 NZLR 777 (HC) at [34].

49 *R v London County Quarter Sessions* [1954] 1 QB 1 at 6.

50 Appellant's submissions at [31.3].

51 *R v B* HC Wellington CRI-2003-091-2902, 17 November 2003.

52 *R v Codd* [2006] 3 NZLR 562 (HC).

53 *R v Corkran* [2023] NZHC 1602.

54 *R v B* HC Wellington CRI-2003-091-2902, 17 November 2003 at [2].

55 At [8].

circumvented the CPMIP process (which introduced involvement hearings for the first time), had it been in force at the time. Notably Wild J's judgment was oral and he does not appear to have been referred to Doogue J's decision in *Police v L*, or even the text of the controlling legislation in the Criminal Justice Act 1985. Neither are mentioned in the judgment.

34. *Codd* concerned a defendant charged with historic sexual offending in relation to two boys. The case involved applications under CPMIP, s 347 and the inherent jurisdiction of the High Court, prior to the resequencing of CPMIP in 2018 (discussed below). All three applications put in issue Mr Codd's fitness to stand trial, with the latter two applications focusing on the historical nature of the complaints. Simon France J ultimately stayed the charges under the exercise of the Court's inherent jurisdiction. His Honour's decision was grounded in the defendant's incapacity to conduct a defence. But, importantly the decision was made prior to the Court of Appeal's decisions in *McKay* and *Dalley* and was influenced by a possible procedural obstacle to determining involvement after committal for trial pre-Criminal Procedure Act 2011.[56] This obstacle was eliminated in subsequent amendments and s 10 now makes it clear that involvement may be determined at any time before trial. The CPMIP process was mandatorily engaged here and a stay could only be granted for reasons unrelated to Mr Codd's fitness.

35. In *Corkran,* Isac J opted to stay proceedings (despite there also being a s 147 application before the Court) against the 91-year-old defendant because of his physical and mental impairments and "very serious delay".[57] His Honour had not determined whether Mr Corkran was unfit to stand trial and given the stay, it was unnecessary to do so.[58] Notably, there was a mixture of grounds relied on for the stay application, including delay, terminal cancer and a range of other physical and mental impairments. As the Court of Appeal held in this case, it is not clear from the decision which was

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56 At [28]-[33].

57 *R v Corkran* [2023] NZHC 1602 at [42]. The charges stemmed from alleged offending at Lake Alice Hospital.

58 At [67].

the sole or primary factor justifying a stay. But as the Court went on to say, "the appropriate course would have been for issues relating to Mr Corkran's fitness … to be addressed within the context of the CPMIP Act framework."[59] Given that reports had been prepared in relation to Mr Corkran under s 38,[60] involvement had to be determined on Court of Appeal authority binding on the Judge at the time: "the [CPMIP] process, once it has been properly commenced, must be completed".[61] Again, the Judge does not appear to have been referred to the applicable authorities.

Involvement hearings serve an important purpose

Alternative to trial

36. When introduced in CPMIP, the involvement hearing (held prior to any finding of unfitness) was said to address "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."[62]

37. Since the amendment of CPMIP in 2018,[63] which reversed the unfitness and involvement hearing steps and brought New Zealand in line with comparable jurisdictions, the s 10 procedure may now be conceptualised "as being an *alternative* to trial rather than a possible *addition* to trial".[64] This conclusion is supported by Professor Warren Brookbanks's comments on the legislative change.[65] He considers the s 10(2) hearing an alternative to trial and the only place where a defendant who has been declared unfit can contest the charge. That view is shared by the High Court of Australia and the minority of the Victorian Court of Appeal.[66]

38. Section 10 thus provides an important protection: it is the closest a defendant can get to an acquittal after the Court has actually heard the

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59 Court of Appeal judgment at [34]; SCCOA at 22.

60 *R v Corkran* [2023] NZHC 1602 at [32].

61 *R v Te Moni* [2009] NZCA 560 at [39], citing *McKay v R* [2009] NZCA 378.

62 (23 October 2003) 612 NZPD 9545.

63 By the Courts Matters Act 2018.

64 *R v Tongia* [2020] NZHC 2382 at [42]. Emphasis in original.

65 Warren Brookbanks "Evidential Sufficiency Hearings: Is Section 10 CP(MIP) Act Fit for Purpose" (2020) 29(1) NZULR 31.

66 At 32 and 42; *Subramaniam v The Queen* [2004] HCA 51 at [28]; *McDonald v The Queen* [2016] VSCA 304 at [60].

evidence against him or her. It protects a factually innocent defendant from compulsory disposition under CPMIP. A s 147 order like in the present case is, of course, a deemed acquittal. But in the context of a defendant who has been declared unfit, making such an order prior to involvement not only circumvents the mandatory statutory process but also acquits the defendant without any factual determination. The order becomes detached from its basis in evidential sufficiency and may become misleading and something of a "fiction". Such a course of action is unlikely to quell controversy or free a defendant from the taint of serious criminal allegations, as Ferguson JA put it in *McDonald v The Queen*.[67]

39. It follows that there is also significant value for complainants in proceeding to an involvement hearing: should involvement be proved, it is the closest they will get to a *conviction*.[68] The possibility of a positive finding of involvement offers complainants vindication in the form of "public acknowledgement and acceptance that what they alleged happened to them did happen."[69]

40. Although Mr Bailey contends that at "no stage … did Parliament intend to … introduce a vindicatory purpose whereby complainants would get 'their day in court'",[70] that is a natural consequence of a substitute trial in which a court determines a defendant's involvement; and it is, practically speaking, what happens. It is significant that involvement hearings allow for "any oral evidence that has been taken in accordance with an order made under section 92 of the [CPA]".[71] Accordingly, complainants give oral evidence in involvement hearings (see for example *R v Cumming*[72] and *R v Tongia*).[73] Moreover, s 24(1) requires the court, after finding that that the defendant was involved, to: consider "all the circumstances of the case", which logically

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67 *McDonald v The Queen* [2016] VSCA 304 at [51].

68 *R v Tongia* [2020] NZHC 2382 at [36].

69 *McDonald v The Queen* [2016] VSCA 304 at [51], per Ferguson JA.

70 Appellant's submissions at [54] and [54.2].

71 CPMIP, s 10(3)(b).

72 *R v Cumming* HC Christchurch CRI-2001-009-835552, 17 July 2009 at [106]-[107].

73 *R v Tongia* [2020] NZHC 2382 at [52].

include the facts of the offending and impact on complainants;[74] and be satisfied that an order under s 24(2) of CPMIP "is necessary in the interests of the public or any person or class of person who may be affected by the court's decision" (which plainly includes any victim(s) of the offending whose views may inform the appropriateness of certain disposal options).[75]

Flow of information

41. Involvement hearings allow Judges to obtain information which "informs the eventual s 147 or other dispositive orders" pursuant to ss 24 and 25 of the CPMIP.[76] So unless there is no involvement and s 13 applies so that a s 147 dismissal is ordered, prior to an order for disposition, the court is required to "consider all the circumstances of the case".[77] That includes "[a]n understanding of the facts of the charged offending, including its context, frequency and any relevant triggers", which may ultimately assist the Judge in their assessment of the defendant's ongoing risk to public safety.[78] It may be that Mr Bailey will be assessed as not posing any ongoing risk to the community.[79] But without "reference to all relevant information", it is difficult to understand how a court could properly be "satisfied that the defendant's condition renders [the CPMIP process] unnecessary as no compulsory disposition would be ordered", as Mr Bailey claims.[80]

42. *R v Mulholland*[81] also involved an unfit defendant with "likely irreversible" dementia.[82] Medical professionals recommended an order for Mr Mulholland's immediate release.[83] But Gendall J reached a different conclusion:[84]

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74 See *R v Mulholland* [2015] NZHC 881 at [440], discussed below.

75 CPMIP, s 24(1)(c).

76 Court of Appeal judgment at [40]; SCCOA at 23.

77 CPMIP, s 24(1)(a).

78 Court of Appeal judgment at [40]; SCCOA at 24. See *R v MT* [2020] NZHC 1490 at [117] (considering "that the particularly callous and serious nature of MT's offending needs to factor into the assessment of risk").

79 Court of Appeal judgment at [41]; SCCOA at 24.

80 Appellant submissions at [22].

81 *R v Mulholland* [2015] NZHC 881.

82 At [430](b); [433](a), and [435].

83 At [439].

84 At [440].

> While it is plain that his condition has deteriorated substantially, I think that the best balance is struck by an order under s 25(1)(a) [of CPMIP]. Such an order recognises the seriousness of the offending, the harm caused, and the views of the victims. Pursuant to s 26 [of CPMIP], that order will take effect as a community treatment order.

43. In *R v Garibovic*, the defendant suffered from an advanced form of dementia.[85] Lang J held the "only appropriate order" was that Mr Garibovic be detained as a special patient in terms of s 24 of CPMIP.[86] His Honour listed three factors supporting that conclusion:[87] first, Mr Garibovic was responsible for a "brutal killing … for no apparent reason" and the Court could not take the risk a similar event would happen again; secondly (and apparently relatedly), Mr Garibovic "clearly remain[ed] at risk of committing acts of violence in the future" – he had assaulted a staff member while in custody and had no recollection of the events that gave rise to the murder charge; and thirdly, there was "no prospect whatsoever that Mr Garibovic will recover with or without treatment. Rather, his condition will inevitably become more and more grave." In such circumstances it was, Lang J held, "manifestly inappropriate" to make an order under s 25 of CPMIP.

44. *Mulholland* and *Garibovic* demonstrate that, even for unfit defendants who have no prospects of recovering from their mental impairment, an order for immediate release may not be inevitable. This accords with the aims of the unfitness process, which is to strike a balance between:[88]

> the public interest both in ascertaining whether acts have been committed and in identifying and treating, *or otherwise dealing with*, persons who have committed the acts, and the interests of those persons.

45. Moreover, in some cases involving defendants with dementia, an immediate release has only been arrived at with reluctance after being informed by an involvement hearing. In *R v I*, Moore J granted a s 25(1)(d) release and noted there were "obvious shortcomings to that somewhat unsatisfactory consequence", as there were "obvious health and safety issues given Mr I's

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85 *R v Garibovic* [2014] NZHC 2199.

86 At [10].

87 At [9].

88 Court of Appeal judgment at [23]; SCCOA at 17, citing *Regina v M* [2001] EWCA Crim 2024. Emphasis added.

criminal offending" (sexual abuse of his daughter and stepdaughter).[89] His Honour noted Lang J was confronted with a very similar situation in *R v Kalolo*. In that case the Judge observed the difficulty with s 25(1)(d) is that it does not permit a court to order a defendant to be released subject to conditions. Lang J considered this was a "serious shortcoming in the statutory regime because it effectively prevents the Court from having any oversight in respect of a defendant's future activities notwithstanding the fact that criminal charges remain in existence."[90]

46. The upshot is that, even if an order for a discharge may be the most likely outcome, there is a need to adopt "a cautious and principled approach" – and a factually well-informed one – to disposition where the offending is serious.[91] For that category of unfit defendants, "any orders must take into account, to the extent it is possible, the need to protect the community".[92] That assessment can only be informed by matters arising out of the involvement hearing, and the extensive inquiries conducted thereafter under s 23 via a health assessor.

Involvement hearings need not be an imposition and can be conducted fairly

47. Section 15 of CPMIP provides that the jurisdiction under any of sections 8A and 10 to 13 may be exercised in the absence of the defendant if the court is satisfied that the defendant is too mentally impaired to come to court. As the Australian Capital Territory (**ACT**) Supreme Court observed in *R v Chute (No 4)*, "excusing the accused from attendance … would significantly ameliorate the burden of the continuation of the special hearing upon him". And because involvement hearings are conducted by judge alone, "the risk that a jury might draw some adverse inference from his non-attendance has been removed."[93]

48. Moreover, recent cases involving defendants with dementia suggest courts are capable of discharging their CPMIP duties expeditiously, by determining

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89 *R v I* [2017] NZHC 1021 at [35].

90 *R v Kalolo* [2017] NZHC 518 at [17].

91 *R v I* [2017] NZHC 1021 at [15].

92 At [16].

93 *R v Chute (No 4)* [2018] ASTSC 259 at [114].

fitness and involvement at the same hearing. In *R v Tofilau,* the defendant was remanded in custody, but Crown and defence were agreed the evidence was sufficient to positively determine his involvement on an attempted murder charge. As soon as the Judge had determined fitness and involvement (in one hearing), he remanded the defendant to a clinic for the purpose of determining disposition (at which hearing Mr Tofilau would need to be present).[94] The Judge in *R v S*, determined fitness and involvement together, and the defendant was remanded on bail pending a disposition hearing.[95] The same approach was taken in *R v Jenkins* – fitness and involvement were determined together – and the defendant was ultimately detained in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[96] These cases demonstrate that courts can quickly dispatch the mandatory steps and dispose of the matter, or bail the defendant pending disposition, such that minimal procedural burden is imposed. That is particularly the case if s 15 is engaged and, if appropriate, the matter is heard in the defendant's absence.

49. There is of course some awkwardness in subjecting any unfit person to a mandatory court process. But taking any such unfairness into account when assessing abuse of process "would involve the subversion of the legislative scheme."[97] As the High Court of Justice in England and Wales put it, "the fact that the defendant does not or cannot take any part in the proceedings does not render them unfair or in any way improper."[98]

Specific provision to be preferred over general one

50. Mr Bailey says the interpretive principle of generalia specialibus non derogant does not assist to interpret the scope of s 147. He says the Court of Appeal was wrong to describe s 147 as later legislation and that the "relevant question is whether the s 147 CPA discretion is to be interpreted

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94 *R v Tofilau* [2019] NZHC 2145.

95 *R v S* [2023] NZHC 273.

96 *R v Jenkins* [2019] NZHC 1231.

97 *R v Chute (No 4)* [2018] ASTSC 259 at [64].

98 *Crown Prosecution Service v P* [2007] EWHC 946 (Admin) at [61](v).

as constrained in law by the CPMIP Act process, not whether their ordering in time affects their interpretation."[99]

51. If a specific provision comes after a general one, the specific provision normally prevails too.[100] The "practical effect is usually the same whether the special provision is later or earlier: it creates an exception to the general one".[101]

52. The Crown's interpretation of CPMIP can be reached without need to resort to this canon, but it "propels analysis in the same direction".[102] New Zealand does not have a criminal code. Instead, prosecutions are underpinned by many statutes that together make up the framework of criminal law. CPMIP provides for a specific criminal process for unfit defendants. They are on a diverted medico-legal path which must be followed. While some CPA powers may supplement the CPMIP process,[103] recourse to a general CPA provision is not necessary or appropriate in this case given the specific process provided. That is particularly so given s 147 is already included in that process under s 13(2)(a) of CPMIP.

53. The two cases Mr Bailey cites in support of the proposition that relevant CPA provisions may continue to apply even if a CPMIP process is underway[104] do not assist him. In *Teika v Te Whatu Ora*, the defendant had been found unfit and an involvement hearing had taken place. The question before the Court was the lawfulness of Mr Teika's detention while inquiries (about the most suitable method of disposition) were being made under s 23 of CPMIP. It was, the Court held, "necessary to consider the broader legislative framework, particularly the provisions of the [CPA] and the Bail Act 2000."[105]

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99 Appellant's submissions at [57].

100 Although "for some reason this is not usually described as generalia specialibus; it is more commonly described as 'implied repeal pro tanto'": R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 625.

101 Ibid.

102 *Make It 16 Inc v Attorney-General* [2022] NZSC 134 at [94], per Kós J.

103 For example, ss 168 (dealing with defendant on adjournment) and 169 (order for detention of defendant in hospital or secure facility) continue to apply to a person who is also subject to CPMIP; and judges may use their powers under the CPA to order name suppression or issue summons.

104 Appellant's submissions at [38], citing *Teika v Te Whatu Ora* [2024] NZCA 390 (leave to appeal granted in *Teika v Te Whatu Ora* [2024] NZSC 125) and *Maangi v R* [2017] NZCA 534.

105 *Teika v Te Whatu Ora* [2024] NZCA 390 at [17].

That is because s 23 is "not the provision under which the detention is authorised."[106] But the mandatory process to be followed after a finding of unfitness was not in question in *Teika*. A judgment is pending from this Court.

54. In *Maangi v R*, the Court of Appeal agreed with the Crown's position that, prior to an involvement hearing under s 10 of CPMIP, a Judge has the power to grant a prosecutor leave to withdraw charges under s 146 of the CPA. Significantly, the Court held that:[107]

> The withdrawal of a charge by the prosecutor is not in any way dependent on a defendant's fitness to stand trial. We consider that the power to grant leave to withdraw under s 146 subsists independently of the Act until the Judge makes a determination about the defendant's involvement in terms of s 13(1). At that point, however, the Judge is obliged to either dismiss the charge or proceed to the unfitness enquiry in s 14.

A dismissal or stay was not warranted in this case

55. The circumstances of Mr Bailey's case did not warrant a s 147 dismissal. The likelihood that he would be unconditionally released "does not weigh heavily in the balance".[108] Indeed, it is problematic for a court to conceive of a "likely outcome" without an involvement hearing in which information bearing on that outcome can be gathered. As discussed, *Mulholland* and *Garibovic* make clear that, even in the case of a defendant with dementia – and indeed one whose condition has "deteriorated substantially"[109] – immediate release under s 25(1)(d) is by no means a given. The seriousness of the offending, the harm caused and the views of the complainants, should involvement be proved, are important considerations to weigh before disposition.[110]

56. There has been considerable delay between offending and prosecution in this case, primarily because the complainants did not all give statements until recently. At first instance, Mr Bailey contended in support of his s 147

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106 At [22].

107 *Maangi v R* [2017] NZCA 534 at [34]. Emphasis added.

108 *McDonald v The Queen* [2016] VSCA 304 at [54], per Ferguson JA.

109 *R v Mulholland* [2015] NZHC 881 at [440].

110 At [440].

application that: the delay carries "presumptive prejudice", including a large number of witnesses who are no longer available; important documents, including the police video interview of RN (closer to the time of the alleged offending) cannot be found; Mr Bailey's age and mental frailty affect his ability to mount a defence; and Mr Bailey would be required to give evidence and provide counsel with specific instructions for the purpose of cross examination but he is no longer able to do that, so he is unable to receive a fair hearing.[111]

57. There is accordingly an amalgam of concerns and the inclusion of mental impairment among them precludes a dismissal or stay. It bears emphasis that, given s 15 of CPMIP, Mr Bailey need not even be present at the involvement hearing (indeed, his attendance was excused from the fitness hearing)[112] and it can proceed on the basis of the complainants' evidence. Although the standard of proof is lower, the onus is at all times on the Crown. Mr Bailey, who says the more recent allegations were only put to him in general terms, clearly denies them. It is not unusual for a defendant to advance a general defence (such as denial) rather than address each charge, particularly in a trial of multiple charges of sexual offending.[113] He can put the Crown to proof through rigorous cross-examination. The Judge who presides will be alive to potential reliability issues given the passage of time. The risk of impermissible jury reasoning is not present. If the judge is not satisfied to the requisite standard of proof, he or she must discharge Mr Bailey under s 147.

58. Moreover involvement hearings always involve incapable defendants. As the Court of Appeal in *J v Attorney-General* observed, the CPMIP regime provides "a non-criminal alternative to a criminal process the defendant has no capacity to participate [in]".[114]

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111 Submissions in support of s 147 application, dated 14 August 2023.

112 Minute of Judge Kellar at [1]; COA at 89.

113 *Bullock v R* [2024] NZCA 3 at [44].

114 *J v Attorney-General* [2023] NZCA 660 at [140], citing *J v Attorney-General* [2018] NZHC 1209 at [531]. This Court has granted leave to appeal: *J v Attorney-General* [2024] NZSC 34 (judgment pending).

59. It is true that an involvement hearing, where the Crown and complainants are heard, may be followed by the Judge deciding simply to order a s 147 discharge or stay. That was the outcome in *R v I* where Moore J ordered a stay of proceedings and ordered the immediate release of the defendant under s 25(1)(d).[115] But only after an involvement hearing.[116]

The approach to unfit defendants in cognate jurisdictions

60. Ultimately the legal questions raised by this case are statutory interpretation issues in relation to the specific scheme presented by CPMIP. As such the case law of cognate jurisdictions is of limited assistance. The England and Wales material supports the Court of Appeal approach, but Australian case law is more ambiguous. The Canadian regime is too different to provide a useful comparison.

England and Wales

61. The relevant procedure in England and Wales is stipulated by the Criminal Procedure (Insanity) Act 1964.[117] After a finding of unfitness under s 4, a jury (rather than a judge)[118] must, under s 4A(2) examine evidence already given or newly adduced and decide whether the unfit accused "did the act or made the omission charged against him as the offence". The jury may make a positive finding or return a verdict of acquittal.[119]

62. If a jury finds the accused did the act or omission, there is no determination of a criminal charge and no question of conviction or punishment.[120] The measures available to the court are therefore restricted to treatment, rehabilitation and support and, in very serious cases, providing protection for the public.[121] The England and Wales Court of Appeal (the **EWCA**) has held the legislation seeks to strike a balance between protecting "the rights and interests of those accused of crime" and, on the other hand, "the public

115 *R v I* [2017] NZHC 1021 at [42].

116 At [6].

117 As modified by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004

118 Even though the issue of fitness to plead is no longer decided by a jury (Criminal Procedure (Insanity) Act 1964, s 4(5); Domestic Violence, Crime and Victims Act 2004, s 2.)

119 Section 4A(3) and (4).

120 *Wells and Others v The Queen* [2015] EWCA Crim 2 at [3], citing *Regina v M* [2001] EWCA Crim 2024.

121 *Wells and Others v The Queen* [2015] EWCA Crim 2 at [3].

interest … from those who are proved to have committed the most serious acts but who cannot be tried" because of unfitness.[122]

63. In *Regina v M,* which was considered in detail by the Court of Appeal in this case, the EWCA heard three cases involving fitness to plead. All three cases raised similar issues about the statutory procedure for unfit defendants and the exercise of the relevant judicial discretion.[123] One of the applicants in that case (K) contended the words "shall be determined by a jury" in s 4A are procedural, not mandatory, and that it was wrong to refuse a stay when the facts involved the complex trial of an elderly man with many witnesses and documents.[124] The Court concluded that an application to stay could be made between the s 4 (fitness finding) and s 4A (equivalent to involvement hearing) stages; it was not persuaded the "apparently mandatory" terms of s 4A(2) precluded that course.[125]

64. But the Court held the defendant's disability or matters related to it could not be the basis of a successful abuse application. The application must instead be grounded in matters unrelated to the defendant's disability, such as oppressive behaviour of the Crown or circumstances or conduct which would deprive the defendant of a fair trial. To rely on matters related to disability would "avoid the whole point of ss 4 and 4A".[126]

65. The EWCA concluded that K's personal circumstances and conditions, the likelihood of an absolute discharge and the lack of risk were irrelevant to the question of a stay. It was not appropriate for the first instance Judge to conduct a balancing exercise, taking into account the public interest in having serious allegations investigated and hearing the complainant's allegations investigated in a public forum. Such matters were for the prosecution to consider when deciding whether to prosecute in the first place. Rather, the public interest in having serious allegations investigated is, the Court held, a factor behind the general principle that the power to

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122 At [5].

123 *Regina v M* [2001] EWCA Crim 2024.

124 At [12].

125 At [36].

126 At [37].

order a stay should be exercised sparingly, even when there are proper (i.e. non-disability related) grounds.[127]

66. The principle (against premature dismissal) stands from England and Wales irrespective of the fact that *Regina v M* turned on the inherent power to stay rather than a statutory power to dismiss. The jurisdiction to stay or dismiss overlaps to a considerable extent; in either case it "must be exercised sparingly"[128] and not to circumvent a mandatory statutory process of which a judge may disapprove.[129]

67. The unavailability in New Zealand of an England and Wales-style supervision order amounts to a lacuna in the legislation. As Mr Bailey notes, powers under the Personal and Property Rights Act 1998 are only available to the Family Court.[130] But that is not a licence for not following the procedure stipulated by CPMIP – particularly given that, as noted, involvement hearings, provide further information to the court about the most appropriate disposition in any given case. And as *Mulholland* and *Garibovic* demonstrate, "supervision" can appropriately be provided by an order that the defendant be detained as a special patient under s 24(2)(a) or a patient under s 25(1)(a) of CPMIP.[131]

***Australia*[132]**

68. In *Subramaniam v The Queen*, the High Court of Australia considered whether a stay should have been granted under the Mental Health (Criminal Procedure) Act 1990 (NSW), the successor to which is discussed in the appendix. The Court observed that an important purpose of the Act is an ameliorative one: it gives an unfit defendant an opportunity to be acquitted. Another important purpose of the Act, the Court observed, is that victims

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127 At [38].

128 *Attorney-General v District Court at Hamilton* [2004] 3 NZLR 777 (HC) at [34].

129 Above n 49: *R v London County Quarter Sessions* [1954] 1 QB 1 at 6: "it would enable a court, the members of which disapproved of or disliked a statute, the breach of which formed the subject of the indictment, simply to quash it and decline to try it."

130 Appellant's submissions at [60].

131 *R v Mulholland* [2015] NZHC 881; *R v Garibovic* [2014] NZHC 2199.

132 Counsel have focussed on the relevant provisions and caselaw in Victoria, New South Wales and the Australian Capital Territory. There are very similar provisions contained in legislation in the Northern Territory, South Australia and Tasmania. See Criminal Code (NT), pt IIA, div 4; Criminal Law Consolidation Act 1935 (SA), ss 269M–269N; and Criminal Justice (Mental Impairment) Act 1999 (TAS), ss 15 and 16.

are afforded an "opportunity to see that a form of justice, as necessarily imperfect at it may be in the circumstances, has been done." The Court went on to say it is "self-evident" a special hearing in which a defendant is "disabled from instructing his or her lawyers or in other ways from full participation … will have its deficiencies." But such deficiencies do not provide reason to "construe and apply the Act otherwise than according to its tenor."[133]

69. The Court found a permanent stay was not warranted on the facts before it but noted "there may … still be cases of mental infirmity calling for the grant of a stay even of the special hearing for which it provides although instances of them are likely to be rare. This is so for two reasons: the Act does not, expressly or by implication, forbid their application; and, common humanity would argue in favour of a stay if the risk were a real one, and the likely exacerbation grave."[134]

70. It is notable that the High Court of Australia in *Subramaniam* did not give examples where the "common humanity" test may be met.[135] As the

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133 *Subramaniam v The Queen* [2004] HCA 51 at [28]. Footnotes omitted.

134 At [35]. Footnotes omitted.

135 In cases in which the District Court of New South Wales has considered the test was met and accordingly stayed the special hearing, the defendants' mental and/or physical conditions are "extreme or exceptional" given that a permanent stay should only be granted in an extreme or exceptional case: *Barton v R* (1980) 147 CLR 75. In *R v Murray* [2011] NSWDC 258, the defendant was 81 years old and suffered from numerous medical conditions. His prognosis was a 30 to 40 per cent chance of dying within one year and a 60 to 70 per cent chance of dying within five years. The evidence also established his risk of cardiac arrest would be increased by the stress induced by a special hearing that was expected to run over several weeks, regardless of whether he was present. In *Arrivoli v R* [2017] NSWDC 112, the defendant was 94 years old and living in a nursing home and "staring into space". He had a number of medical conditions. There was a significant risk if the special hearing proceeded, given his frailty, and regardless of any ameliorative measures made by the Court, of his suffering a life-threatening cardiac event. In *R v Crawford* (Unreported) Flannery DCJ 1 November 2018, the defendant was 86 years old, was suffering from "severe dementia" and was described as being in a "vegetative state". He was completely dependent on nursing care for mobility, feeding and bodily functions. If he was required to attend court a full body lifting machine and three staff members would be needed to move him from his nursing home and bring him to court. While in court he would need to have regular health checks. In *R v O'Neill (No 2)* [2023] NSWDC 572, the defendant was 89 years old, resided interstate, was largely wheelchair bound and relied on the assistance of his son for most of his day-to-day living activities. He suffered from various mobility issues as well as mental health issues and had attempted suicide "multiple times in the past 12 to 18 months". Psychiatric opinion established the defendant was likely to become more depressed and anxious as the trial approached, raising the risk of suicide levels to "much higher" than those experienced on average by a man of his age. But in *R v RC* [2024] NSWDC 239, the test was not met: the applicant had a number of health conditions, including incurable cancer. But he was able to care for himself, walk and drive. His life expectancy, while reduced, primarily because of his cancer (20 per cent chance of a five-year life expectancy), it was not as reduced as in other cases. His mental condition was going into increasingly rapid cognitive decline and he was diagnosed as being depressed with ongoing suicidal ideation, but his dementia was still mild. As well, his health conditions could be moderated and ameliorated if the defendant was excused from the special hearing.

NSWCCA said of the test recently, it "requires an evaluative judgment with no precise criteria to guide it".[136]

Canada

71. Mr Bailey cites *R v Demers* in support of the argument that the Court of Appeal's interpretation of s 147 in this case is "inconsistent with the presumption in favour of liberty".[137] But the Canadian regime for unfit defendants, at the time that judgment was issued, is fundamentally different from that established in New Zealand, Australia and the United Kingdom.[138] Given that the regime in Canada fails to provide an end to the prosecution, mechanisms akin to s 147 are more important in Canada.

Conclusion

72. Mr Bailey's argument, if accepted, will mean defendants found unfit to stand trial by dint of their dementia will always be released immediately and have the charges stayed. That outcome conflicts with Parliament's intention to establish a mandatory specialist regime so the courts may make an informed assessment as to the unfit defendant's ongoing risk to the public. The Court of Appeal's judgment is consistent with that legislative intent. Once a question as to the defendant's fitness has been raised the statutory process must be followed.

73. Ultimately, the Court of Appeal was correct to conclude that the court's general power under s 147 CPA was available, despite the mandatory language of the CPMIP, but that power ought to be exercised only for reasons unrelated to a defendant's mental impairment. In doing so, the Court struck the correct balance between Parliament's clear intentions in enacting a mandatory alternative process for unfit defendants, and the need to preserve a residual flexibility for courts to respond to the ways in which

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136 *RC v Director of Public Prosecutions* [2024] NSWCCA 95 at [25].

137 Appellant's submissions at [56], citing *R v Demers* [2004] 2 SCR 489.

138 See at [8]-[13] of *Demers* for an overview of the equivalent Canadian regime. A key difference is that "an accused found unfit to stand trial remains in the 'system' … until either (a) he or she becomes fit to stand trial or (b) the Crown fails to establish a prima facie case against him or her" (at [13]). Contrary to the position in Canada, where "[t]he regime fails to provide an end to the prosecution" (at [55], an unfit defendant with a permanent mental impairment can be released pursuant to ss 25(1)(d) of CPMIP.

its processes may be abused. Moreover, the equivalent stay and discharge orders made after the benefit of an involvement hearing remain available.[139]

74. The appeal should accordingly be dismissed.

9 June 2025

M J Lillico | W J Harvey
Counsel for the respondent

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

AND TO: The appellant.

139 CPMIP, ss 25(1)(d) and 27(1).

Appendix – Additional Australian Case Law

Victoria

1. In Victoria, the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 provides the relevant procedures. If the jury finds an accused is unfit and the judge determines he or she is not likely to become fit within 12 months, the court must proceed to hold a special hearing within three months.[140] The following findings are available to the jury at a special hearing: not guilty; not guilty because of mental impairment; or the accused committed the offence (or an offence available as an alternative).[141] The jury must be satisfied beyond reasonable doubt before it can find the accused committed the offence.[142] A special hearing is to be conducted as nearly as possible as if it were a criminal trial.[143]

2. In *McDonald v The Queen*, the Victorian Court of Appeal (the **VSCA**) considered the case of an 85-year-old applicant with dementia who had been charged with historic sexual offences.[144] The applicant contended the approach of the first instance Judge to the question of a stay was too narrow. He submitted the Judge had erred in putting aside the applicant's mental infirmity, his inability to follow the proceedings or provide any instructions and the likely order that would be made at the end of the special hearing. Those were, he said, relevant factors which had to be considered in conjunction with the prejudices arising from the delay.[145]

3. The majority of the Court (Redlich and Beale JJA) allowed the appeal. Their Honours observed there is "always a public interest in having a formal determination of the guilt or innocence of a person in a special hearing" and that such a hearing provides an "opportunity for the complainants to be vindicated".[146] But they agreed the Judge had erred and was required to take into account the "constellation of features" upon which the

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140 Section 12(5).

141 Section 17(1).

142 Section 17(2).

143 Section 16(1).

144 *McDonald v The Queen* [2016] VSCA 304 at [43].

145 At [43].

146 At [44].

applicant relied:[147] his mental infirmities; whether disadvantages arising from the delay caused unacceptable unfairness; and whether, having regard to the likely outcome of the special hearing, there remained public interest in the proceedings continuing.[148]

4. Ferguson JA dissented. Her Honour observed the High Court's finding in *Subramaniam* that the special hearing procedure has deficiencies but offers a method for "quelling controversy as to whether an offence has been committed". The procedure therefore "serves an accused, complainants and the broader community. The accused has the opportunity of being acquitted and freed from the taint of serious criminal allegations. The possibility of a guilty verdict offers complainants the prospect of a public acknowledgement and acceptance that what they alleged happened to them did happen." And it also serves the "the very important public purpose of ensuring that charges for serious offences are prosecuted and determined."[149] That public interest was not lessened by the likelihood the applicant would be unconditionally released – it was "simply one of the possible outcomes" and a relevant consideration.[150] Ultimately, Ferguson JA considered the legislative procedures and outcomes which address what is to happen when an accused is unfit have the effect of "reducing the influence" mental impairment might otherwise have had in determining whether there has been fundamental unfairness.[151]

New South Wales

5. In New South Wales, the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 mandates the holding of a special hearing if the court or Tribunal determines a defendant will not become fit in the next 12 months.[152] A judge is to try the proceedings, unless there is a jury

147 At [47].

148 At [46].

149 At [51].

150 At [54].

151 At [58].

152 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), s 55.

election.[153] The verdicts available are: not guilty; special verdict of act proven but not criminally responsible; that on the limited evidence available, the defendant committed the offence charged (or an offence available as an alternative).[154] A special hearing is to be conducted as nearly as possible as if it were a criminal trial[155] and the criminal standard of proof is engaged.[156] The fact that the defendant has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation.[157]

6. In *Koschier v The King*, the 88-year-old applicant, who suffered from dementia or a "permanent and significant decline" in cognitive functioning was charged with 12 counts of historic sexual offending.[158] He unsuccessfully sought leave to appeal the first instance Judge's dismissal of his application for a permanent stay of the proceedings. The NSWCCA was referred to the VSCA's decision in *McDonald* (above) and took exception to some of the reasoning by the majority. The Court considered the VSCA's "formulation which referred to the 'likely outcome of the special hearing'" was "problematic": "[p]rognostications as to the likely outcome of any hearing, let alone a special hearing, are inappropriate on a stay application which should not involve a 'mini-trial' or assessment of the strength of a case."[159] The Court went on to observe that "whether the continuation of proceedings is in the public interest has never been … an established test or criterion for the grant of a permanent stay" and that "[s]uch a formulation is apt to undermine the exceptional nature" of the remedy.[160] As for the applicant's contention of prejudice arising from loss of evidence or the unavailability of a witness, the Court considered many of the

153 Section 56(9).

154 Section 59(1).

155 Section 56(1).

156 Section 54.

157 Section 56(4).

158 *Koschier v The King* [2024] NSWCCA 24 at [13].

159 "unless, exceptionally, it is contended that a case is so hopeless that it is liable to be summarily dismissed or struck out and constitutes an abuse of process for that reason." At [62]. Footnotes omitted.

160 At [62].

examples on which he relied were speculative and stressed that, in any event, a fair trial does not equate to a perfect trial.[161]

ACT

7. The provisions in the Australian Capital Territory (**ACT**) are materially similar to Victoria and New South Wales. In the Crimes Act 1900, s 315C provides that a court must hold a special hearing if a defendant is unfit and unlikely to become fit within 12 months. A special hearing will usually be trial by jury unless the defendant elects – or it is in the defendant's best interests – the hearing is trial by judge alone.[162] The jury can find the defendant not guilty or, if satisfied to the criminal standard, find the defendant engaged in the conduct required for the offence (or an alternative). Such a finding is not a basis in law for recording a conviction and bars further prosecution.[163] As in New South Wales, a decision that the accused is unfit is not to be taken to be an impediment to his or her being represented at a special hearing.[164]

8. In *R v Chute (No 4)*, the Supreme Court of ACT considered an application for a permanent stay of a special hearing.[165] The defendant, who had mild to moderate dementia and had been found unfit, faced 16 charges of historic sexual offending. He placed "significant reliance" on the VSCA's decision in *McDonald.*[166] The Court noted the majority's language in *McDonald* was "more suggestive" of a balancing exercise "between the Court's perception of where the public interest lies having regard to the desirability that trials occur on the one hand, and the unfairness to the accused on the other." Such an approach, on the Court's assessment in *Chute*, meant the majority judgment in *McDonald* "should be treated with caution" as "it is for the Crown to determine what charges are brought … and it is not part of the function of the Court, save in the extreme

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161 At [73].

162 Section 316(2).

163 Section 317.

164 Section 316(7).

165 *R v Chute (No 4)* [2018] ACTSC 259.

166 At [57].

circumstances where an abuse of process is established, to determine whether it is appropriate that any particular charge … proceeds".[167]

9. The Court considered Ferguson JA's emphasis, in her dissent, on the statutory process was "significant". While a special hearing might have "very significant limitations", it was a process the legislature had established. That process involved determining whether an unfit defendant committed certain acts. If there were unfairness in that process, it was "irrelevant to whether or not there is an abuse of the Court's process". That is because the legislature had provided for that process. The Court concluded that to "assess the question of whether unfairness is such as to amount to an abuse of process without recognition of the inherent features of that process would involve the subversion of the legislative scheme."[168]

10. The Court ultimately dismissed the application for a stay and relied on the following factors:[169] as the applicant had been found unfit, his participation or giving of instructions was not significant; his dementia remained in the mild to moderate category; any special hearing would need to be conducted in a way that accommodated his health conditions but he could be excused from attending; there was no significant delay by the prosecution; and while the low probability of a custodial order may reduce the public interest in proceeding, that was not the only aspect of public interest: it did not bear on the public interest in either acquitting the accused or vindicating the rights of the community and victims.

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167 At [63].

168 At [64].

169 At [108]-[116].