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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 67/2020
[2021] NZSC Trans 1

DANIEL CLINTON FITZGERALD
Appellant

v

THE QUEEN
Respondent

HUMAN RIGHTS COMMISSIONER
Intervener

Hearing: 23 February 2021

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Arnold J

Appearances: K F Preston and D A Ewen for the Appellant

M Laracy and Z R Hamill for the Respondent
A S Butler and R A Kirkness for the Intervener

CRIMINAL APPEAL

MR PRESTON:
May it please the Court, Preston, together with my learned friend, Mr Ewen, for the appellant, Mr Fitzgerald.

WINKELMANN CJ:
Tēnā kōrua.

MS LARACY:
Tēnā koutou e ngā Kaiwhakawā, ko Ms Laracy māua ko Ms Hamill e tū nei mō te Karauna.

WINKELMANN CJ:
Tēnā kōrua.

MR BUTLER:
Tēnā koe e ngā Kaiwhakawā, ko Andrew Butler ahau, me Robert Kirkness, me Scott Fletcher mō Te Kāhui Tika Tangata.

WINKELMANN CJ:
Tēnā koutou. And those are your juniors sitting behind you, are they?

MR PRESTON:
They are.

WINKELMANN CJ:
Thank you.

MR PRESTON:

Your Honours, it is intended I would deal primarily within the appellant's submissions 1 to 4. Mr Ewen will address the Court in relation to the –

WILLIAM YOUNG J:

I'm finding it a little difficult to hear you, I'm sorry.

WINKELMANN CJ:

So am I. We can't hear you.

MR PRESTON:

We're both struggling.

WINKELMANN CJ:

I think you might need to lift the microphone perhaps a little bit and speak more directly into it.

MR PRESTON:

Can you hear me now?

WINKELMANN CJ:

Yes. You might just have to keep your voice up when you're speaking.

MR PRESTON:

Certainly. I was indicating within the appellant's submissions there are effectively 10 sections and it's intended that I would address the Court on 1 to 4 and Mr Ewen address the Court in relation to the Bill of Rights issues.

So if it pleases the Court, "if" is the operative word. If on any occasion an offender is convicted of one or more three-stage offences, section 86D states "if convicted", and those words would be otiose if the interpretation of the High Court and the Court of Appeal is correct, the majority of the Court of Appeal is correct.

Parliament, in drafting the Sentencing and Parole Reform Act, in its earlier stages, an early version, refer to para 4.19 of the appellant's submissions, 4.18 and 4.19, said: "An offender who has a record of final warning commits a serious violent offence."

As observed by Court of Appeal in *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49 the structure of the Sentencing Act 2002 is such as to instruct the Courts as to how to approach sentencing. Para 49 *Barnes*: "It is clear from the structure of the Sentencing Act and the detail of the directions given by Parliament that the courts are required to consider in each case a wide spectrum of matters designed to ensure that the sentence imposed is appropriate." Within section 8 of the Sentencing Act it specifically provides a court must consider any particular circumstances of the offender that means a sentence or other means of dealing with an offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe, and in Mr Fitzgerald's case, if convicted, the maximum sentence of seven years must be imposed, and indeed was, and that was despite Mr Fitzgerald's significant mental health issues and mental health history and despite that section then having the consequent impact of precluding dispositions under the Criminal Procedure (Mentally Impaired Persons) Act 2003.

WINKELMANN CJ:
Can you explain how exactly it precluded it?

MR PRESTON:
The dispositions under the Criminal Procedure (Mentally Impaired Persons) Act are premised on a conviction being entered. Section 86D says: "If convicted the court must impose a sentence of imprisonment." The recommendation of one of the psychiatrists who prepared a report for the benefit of the High Court was that Mr Fitzgerald would be better served in effectively a care facility under section 44(1)(b) instead of passing sentence, but the impact of section 86D, if a conviction is entered, the court must impose a sentence of imprisonment. Section 34(1)(b) cannot be considered because

that's premised on a conviction being entered in the first place and that was a finding, something in the High Court. It was with the agreement of counsel that if a conviction was entered, section 34 would essentially be ousted.

Now, the Sentencing Act is split into various sections and part 1 is the purposes and principles and that provides directions for the Courts to consider firstly the hierarchy of sentences. Section 8(g) provides: "The Court must impose the least restrictive outcome that is appropriate in the circumstances in accordance with that hierarchy of sentences and orders." But of course discharge without conviction under section 10A is the lowest, but the entry point therefore is discharge without conviction and the Sentencing Act goes on to say in section 11, it reinforces that point and indicates: "A court is not precluded from discharging an offender even when a provision applicable to the offence provides a presumption in favour of imposing, on conviction, a sentence of imprisonment if appropriate in the circumstances.

WINKELMANN CJ:
But this isn't a presumption, is it?

MR PRESTON:
Well –

WINKELMANN CJ:
It's mandatory, not a presumption.

MR PRESTON:
It's mandatory if convicted and it's why the words "if convicted" were inserted into the Act.

WILLIAM YOUNG J:
But isn't any punishment, leaving aside section 106(3), isn't a conviction a precondition to any sentence of the Court? We don't sentence someone because we think they done it.

MR PRESTON:

No, but what the Sentencing Act provides is if somebody pleads guilty or is found guilty, the starting point for the Court is should I discharge without conviction.

WILLIAM YOUNG J:

I agree.

MR PRESTON:

Or if sentenced to come up if called upon, or convicted and discharged sorry and then we go down the hierarchy or up the hierarchy.

WILLIAM YOUNG J:

What do you say, what would be an example of a presumption of imprisonment? Would it be presumptive disqualification subject to special reasons, or would it be the presumption that was in relation to I think sexual violation or perhaps drug dealing offences?

MR PRESTON:

Well, in relation to sentences or in relation generally?

WILLIAM YOUNG J:

Presumptive, I mean the reference to a presumed sentence, a presumption in favour of imprisonment, what do you say that refers to? Would it refer to disqualification which can be avoided if special reasons are established?

MR PRESTON:

Well, disqualification can be avoided if special reasons are established, but also if an individual is before the Court, for example, driving with excess alcohol, the Court is not precluded from discharging them without conviction for the offence, but has the power to order that they be disqualified.

WILLIAM YOUNG J:

I know that. What I'm saying, is it a – I'm trying to get my head around the legislative history what is a presumption in favour of imprisonment? Now, one is, sorry, the only ones I can actually think of are what was I think for sexual violation.

MR PRESTON:

Yes, there's a presumption that if convicted that imprisonment would be something first and foremost in the Court's mind. I think of section 6 from memory. So, the impediment in this case which precluded the majority of the of the Court of Appeal and the High Court from discharging Mr Fitzgerald without conviction, was, of course, the wording within section 106 itself which says "unless by any enactment applicable to the offence the Court is required to impose a minimum sentence". The question is is a maximum sentence a minimum sentence, because there is nothing within section 135 of the Crimes Act 1961 in relation to indecent assault that says if convicted of a third offence you will receive the maximum. It simply says there is a maximum of seven years. There is other legislation which provides higher penalties if they are third convictions or subsequent. Again, an example of that is driving with excess alcohol. But in this instance it is by virtue of previous warnings that an offender is liable for 86D to actually have effect. So the legislation is directed towards the offender, not towards the offence itself. It is my submission had Parliament intended to eliminate the ability of an offender charged with an offence that would attract a warning to apply for a discharge without conviction, it would have done so in very clear language.

WILLIAM YOUNG J:

In section 65 of the Land Transport Act 1998 there are mandatory penalties for repeat offences involving the use of alcohol and drugs.

MR PRESTON:

Yes.

WILLIAM YOUNG J:

As I understand it, they can't be dispensed with on the grounds of special reasons.

MR PRESTON:

I'm unsure on that point, Sir.

WILLIAM YOUNG J:

Well, there section 80, I think, or section 81, talks about minimum periods but these are indefinite periods.

MR PRESTON:

Does it in relation to disqualifications, yes.

WILLIAMS J:

Yes.

MR PRESTON:

I'm grateful that my learned friend reminds me the select committee, when section 106 was amended from minimum sentence to minimum penalty, sorry, minimum penalty to minimum sentence, yes, it's that's way round, when that was amended that was specifically done to avoid that type of circumstance.

WILLIAM YOUNG J:

Well, I'm sort of interested in that. So would you say that the section 65 mandatory penalty is not a minimum sentence which prevents discharge?

MR PRESTON:

Yes.

WILLIAM YOUNG J:

Why?

MR PRESTON:

Because again in relation to the offence it's of – by the amendment of section 106 to change the terminology from "penalty" to "sentence", Parliament was effectively trying to address a situation whereby there may well be a case, an offender before the Courts, who ought properly to be granted a discharge without conviction but not escape the consequences nevertheless of disqualification. So no criminal record but nevertheless an order that they be disqualified for a certain period of time determined by the offence itself and indeed by their history, if any.

WILLIAM YOUNG J:

But it must follow from that that you say the minimum penalty imposed by section 65 is not just for a minute sentence for the purposes of section 106?

MR PRESTON:

No. I mean that's the interpretation of the, certainly the interpretation of the Court of Appeal, but it's looking behind the – when that was enacted –

WINKELMANN CJ:

What is the interpretation of the Court of Appeal?

MR PRESTON:

The Court of Appeal indicated, Justice Collins referred to the fact that when 106 was amended back in 2002, at the time there were only on the statute books a limited number of offences, treason and piracy, that attracted a minimum sentence. It was enacted with the purpose, there was nothing within. Section 86 came into force 10 years, well eight.

WILLIAM YOUNG J:

Sorry, just going back to section 2002, but it was at least arguable that section 65 was a minimum sentence.

MR PRESTON:

It was argument, well, that was my understanding is prior to it being amended in 2002, that was the difficulty presented, that a minimum sentence was interpreted by the Court of Appeal in *R v Eteveneaux* (1999) 16 CRNZ 601 (CA) as being if it carries a consequence because of the number of convictions, that that then was tantamount to a minimum.

WILLIAM YOUNG J:

I thought the word "penalty" was substituted for "sentence" to avoid – sorry, "sentence" was substituted for "penalty" to avoid automatic consequences not imposed by the Court.

MR PRESTON:

My understanding is it was amended to give effect to the ability to still discharge without conviction but still impose orders nonetheless.

WINKELMANN CJ:

So it had drink-driving in mind? It had drink-driving in mind?

MR PRESTON:

Yes, among the mix, yes.

WINKELMANN CJ:

So, ie, you could discharge and still disqualify, is that the submission?

MR PRESTON:

Yes.

WILLIAM YOUNG J:

But, you would say discharge but not disqualify because the imposition of a penalty under, of a sanction under s 106(3) is discretionary?

MR PRESTON:

Yes. Well, the Court always maintains a discretion.

WILLIAM YOUNG J:

Only if it's not excluded:

MR PRESTON:

Yes.

WILLIAM YOUNG J:

So we go round in circles.

WINKELMANN CJ:

Can I ask you this, has the Court used the power under section 107 to discharge without conviction in those kind of cases?

MR PRESTON:

Yes, it certainly has discharged without conviction in relation to drink-driving cases.

WILLIAM YOUNG J:

In a case under section 65?

MR PRESTON:

Driving with excess alcohol, yes.

WINKELMANN CJ:

What did you say then?

WILLIAM YOUNG J:

A repeat conviction for alcohol?

MR PRESTON:

Sorry? In the case of indefinite disqualification, there are ways around indefinite disqualifications.

WILLIAM YOUNG J:

All right, what are they?

MR PRESTON:

Well, disqualifications can be backdated, they can be subject to section 94 applications whereby rather than disqualify you can impose community work. I'm no expert when it comes to the Land Transport Act. It's a very niche area, but certainly the Court has on my experience from what I've observed regularly discharged, not regularly, but has discharged offences of drinking with excess breath alcohol and also –

WILLIAM YOUNG J:

Well, there are certainly cases where people have been discharged for standard breath alcohol offences. What I would be interested to know if there are cases where people have been discharged so as to avoid the consequences of section 65.

WINKELMANN CJ:

I think you are looking at that, your juniors are looking at that at the moment.

WILLIAM YOUNG J:

Okay, perhaps Mr Ewen might be able to deal with that later.

WINKELMANN CJ:

He's delegating the task.

ARNOLD J:

Can I just ask a question? If you look at section (11), subsection (1) imposes an obligation on the Court to consider whether an offender should be dealt with under 106, 108 or 110 and then as you indicated earlier, subsection (2) says well if the offence provides a presumption in favour of opposing a particular sentence, then that obligation does not arise but the Court may, if it wishes, nevertheless do it.

MR PRESTON:

Yes.

ARNOLD J:

Now, when you think about that in terms of sort of design, it makes sense because if there is only a presumption of a particular sentence of a particular type, it means the Court does have a discretion not to accept the presumption in a particular case and to do something different and there's no reason to exclude discharging without conviction, so that's logical and then when you come to 106, you can look at it as being the third leg of the stool if you like which says on the other hand, when on conviction a sentence is mandatory, particular sentence, then that's it, you can't discharge without conviction. Now, there's a logic to that scheme, isn't there because it progresses down. The thing about section 11(2) is it requires the Court to look at the position after conviction. A presumption arises and so the question I have is why wouldn't the same be true of 106 which requires the Court to look at the position after conviction?

MR PRESTON:

My answer would be section 11 came into force in 2002. What has happened is Parliament has then grafted on an amending statute. The part 1 of the Act remains the sense and guidance and principles as to how to approach and, as noted by Collins J, there was no consideration of any particular impact on 106. It was never envisaged that a case such as Mr Fitzgerald would fall within the category of a serious violent offence that would therefore –

ARNOLD J:

When you say: "It was never envisaged," what exactly do you mean by that?

MR PRESTON:

The legislation was very much directed towards the worst type of offenders and worse type of repeat offenders and the Court, in dealing with the worst type of offenders and worst type of offence, is never realistically going to entertain a discharge without conviction, so it was never effectively in Parliament's mind that this could potentially occur.

ARNOLD J:

But there was no doubt that Parliament was aware that by changing the qualifying offence from one which would attract where there would have been a sentence of five years otherwise and having the list of qualifying offences, that that was going to expand and there was a risk that relatively minor behaviour would be caught. I mean, that possibility was explicitly identified, wasn't it?

MR PRESTON:

It was, but it's in identifying that Parliament inserted "if convicted" as opposed to "commits". So, why was "if convicted" inserted if not to put the brakes on for a Court to consider, as instructed by section 11, a discharge without conviction first and foremost.

WINKELMANN CJ:

Can –

MR PRESTON:

Sorry?

WINKELMANN CJ:

Carry on.

MR PRESTON:

It's interesting, if the Court looks at the earlier provisions in section 86, 86B and C because what they say is: "When a court, on any occasion, convicts an offender of 1 or more stage-1 offences," and then 86C: "When, on any occasion, a court convicts." So, the optimum word there is "when". It's almost anticipated that a conviction will be entered, but there's nothing that would prevent, within the legislation, would prevent an individual charge with a stage-1 offence or a stage-2 offence, other than murder, from making an application for discharge without conviction because that is not ousted by the terminology of 106 as a minimum sentence.

WINKELMANN CJ:

So, it's not ousted by your – do you have to make the argument that a judge is required by section 11(1) must always look at section 106, or could you allow that the Amendment Act does get read into subsection (2) so that the Court is not obliged to but may consider it?

MR PRESTON:

Well, the starting point is consider discharge without conviction, but reading it in the round, in certain circumstances, the Court need not. So, if you have a heinous offence before the Court, the Court may say well: "Technically I have to consider a discharge without conviction, but in these circumstances."

WINKELMANN CJ:

Yes, no I don't think you're understanding my question. It may be that there is something wrong-headed about it, on my question that is, because can you treat the sentencing amendment as a provision applicable to a particular offence and you'd say no because – are you reading the particular offence in the same way as you read it in section 106? Are you saying section 11(2) does not apply to the Sentencing Act Amendment Act because it's still talking about "particular offence" as opposed to the offending?

MR PRESTON:

Yes. My submission is that when we're dealing with section 86 that 106 is not engaged because we're not dealing with a minimum sentence applicable to the offence. We're dealing with a sentence applicable to the offender. It's only by virtue of your previous warnings that the individual would be in that position.

WINKELMANN CJ:

So you're saying section 11(2) doesn't apply?

MR PRESTON:

I'm saying section 11(2) would not apply, would not necessarily apply in these circumstances because…

WINKELMANN CJ:

Well, “necessarily” or “doesn’t apply”, because I understood your submission to be it doesn’t apply because it’s dealing with a particular offence, not the offending. It’s your same argument.

MR PRESTON:

What I say in relation to section 11 is for any offence before the Court that is the instruction which is consider first and foremost whether more appropriately dealt with by discharge without conviction if there is a presumption in favour of imposing on conviction a sense of imprisonment. Again, it’s on conviction. Well, then the Court need not necessarily consider a discharge. But again it’s on conviction. It’s not ousting 106 at that point.

WINKELMANN CJ:

Yes, but section 11(2) says if there is – do you accept section 11(2) applies to the three strikes regime because that’s what Justice Arnold was asking you, I think?

MR PRESTON:

Yes, would do.

WINKELMANN CJ:

And I asked you, well, does it apply because don’t you make the same argument in relation to the expression “particular offence” in subsection (2)?

MR PRESTON:

Yes. “Any provision applicable to the particular offence in this or any other enactment.” I’m not quite sure I’m understanding the question but…

ARNOLD J:

I wasn’t suggesting that section 11(2) captured the third strike regime. What I was looking at subsection (2) for was to – it’s a plain statement of when the obligation under 11(1) does not arise.

MR PRESTON:

Yes.

ARNOLD J:

But it preserves the freedom of the Court, the discretion of the Court, to do it in appropriate cases.

MR PRESTON:

Yes.

ARNOLD J:

My point was that then when you look at 106 you see, as you go down the possibilities, you see what arguably is an exclusion. In other words, just as you look at the position after conviction to see whether there's a presumption under section 106, you look at the position after conviction and see whether there is effectively a mandatory sentence and, if there is, the discretion that would otherwise be there does not arise. So my argument, or, sorry, my reason for presenting that, is if you look at it as a matter of statutory interpretation or structure, that looks to be the scheme and what I wanted to find out is where the error in that analysis is, and I think you were responding.

MR PRESTON:

My submission in response to that is that section 11 falls within Part 1 of the Sentencing Act and those are the overall guiding principles. The Act then goes on in separate parts to provide sentences and other provisions which – so the point is Part 1 is the governing section of it all and reading section 106, as I understand your point, 106 is on, prima facie, provides a bar to that. It puts the brakes on at that later point. My response would be that had that been intended, well, then Parliament could have amended section 11, for example, to say these are still the guiding principles and directions that we are giving to the Court in dealing with sentencing and we now amend to indicate if section 86 is in force, well, then it's obviously –

ARNOLD J:

Yes. No, I understand, thank you.

MR PRESTON:

No doubt Mr Ewen will address you on this but essentially it's my submission that the reasoning or the reading of the statute contended for the appellant is, and this was accepted by the Court of Appeal, it is available on the text. No words needs to be added, no words need to be omitted, and against the background then of section 6 of the New Zealand Bill of Rights Act 1990, if that meaning is consistent with rights and freedoms in the Bill of Rights Act and particularly, in Mr Fitzgerald's case, section 9, well, then that is the reading that ought properly to be forwarded to it.

So unless you have any more questions of me, I'll defer to my learned friend.

WINKELMANN CJ:

And Mr Ewen is going to address the relationship between section 106 and section 9.

MR EWEN:

Before I commence my submissions, just a point in relation to the matters raised by Justice Young in relation to section 65 of the Land Transport Act and the enactment of the Sentencing Act back in 2002. I can speak to that because I was intimately involved in the select committee process. One of the government members of the committee, Mr Kevin Campbell MP, was the driver behind the insertion of 106(3)(c) which is the ability to make, the Court to make consequential orders on a discharge without conviction in frankly what was one of the most oblique legislative provisions ever enacted. It simply said any other orders the Court was required to make on conviction.

WILLIAM YOUNG J:

Did that include imprisonment?

MR EWEN:

No, because imprisonment isn't a consequential order. This is where –

WILLIAM YOUNG J:

It's required to make. Sorry, it's required to make, yes.

MR EWEN:

Yes, and also, for example, in the current context it doesn't include protection orders that the Court can as a matter of discretion make on conviction because the 106(3)(c) didn't cover discretionary orders, only mandatory orders. I've asked to see if I can put before the Court both the select committee report from the Justice and Electoral Committee and also the committee of the whole speeches where Mr Campbell makes it quite clear that one of the reasons he had in mind to insert 106(3)(c) was to avoid the mandatory indefinite disqualification that could follow and preserve the position and impose a finite conviction. I am –

WILLIAM YOUNG J:

All right, the cases, I'm looking at the law of transportation, the pre-Sentencing Act cases are to the effect that section 65 precluded a discharge without conviction.

MR EWEN:

Yes.

WILLIAM YOUNG J:

It was a case called *Wakefield*. The drift of the commentary is that that still applies.

MR EWEN:

Well, in which case the learned authors of the text haven't looked at the select committee materials.

WILLIAM YOUNG J:

Well, no. You're saying what prevents this being – it was held to be a maximum penalty, a minimum penalty. What prevents it being a minimum sentence?

MR EWEN:

Because the Sentencing Act made a distinguishing feature what the sentences were. It specified sentences. Practically anything else was just a consequential order. Disqualifications became categorised under the heading of "consequential order." It's not a discrete sentence.

WILLIAM YOUNG J:

Is that in the definition of "sentence"?

MR EWEN:

Well, no. There isn't actually a definition of sentence per se, but there is the hierarchy of sentences I think you find in section 10A. It's hierarchy of sentences and orders and it starts at the top with discharge, conviction, and works its way down to imprisonment. It was the hierarchy that was created by the structure of this.

WINKELMANN CJ:

Is this covered in your submissions?

GLAZEBROOK J:

Just so I'm clear, so you say the disqualification was a consequential order not part of the hierarchy of sentences?

MR EWEN:

Under the Sentencing Act, that was the change between the two. It was the dropping of the word "penalty" which was of greater compass than sentence and that was accepted in, I think the first reported cases of judgment of his Honour Justice Nicholson in the High Court in *Police v Stewart* [2004] 22 CRNZ 35 which was a Crown appeal against a District Court discharge and

disqualification. I am unaware of any case where it's been used to avoid section 65. Clearly, consequences to get round a mandatory disqualification would need to be quite significant but certainly the select committee material and the committee of the whole House, the government speeches do support that completely cutting across what I'm about to say of let's stop me doing Hansard.

WINKELMANN CJ:
Yes.

YOUNG J:
Sorry, what's the hierarchy of sentences, is that section 10?

MR EWEN:
10A, your Honour. I think –

WINKELMANN CJ:
Yes, it is 10A.

MR EWEN:
I think 10A.

WINKELMANN CJ:
This is covered in your written submissions, isn't it?

MR EWEN:
At paragraph 4.11 of the written submissions. It's 4.11 in the written submissions. It sets out the hierarchy, or it references the hierarchy of sentences. As I say, the hierarchy of sentences and orders from the least restrictive to the most restrictive is as follows and it starts with discharge or to become up if called upon and ends with sentence of imprisonment at paragraph (f). If I may, turning to my submissions, which address the interpretation-relationship of the Bill of Rights Act and the proper interpretative framework that in my submission leads to the answer can it ever truly be said

that interpreting a statute in a manner that avoids a manifest injustice is contrary to parliamentary purpose or that it does violence to the statutory scheme. Interpreting legislation in a manner that requires a manifest injustice does however do violence both to our constitutional order and many other things beside. The Crown refers to the breaches in this case in section 9 and section 23 breaches, but really we need to use the language of what they actually are instead of their technical description. They represent an intrusion into judicial sphere leading not only to a result that even the majority in the Court of Appeal described as something that outrages the public consciousness, but it also brings the law into disrepute in the eyes of the public. Even under a parliamentary supremacy model in my submission, that is a conclusion that is only available when truly no other result is available. Fortunately, the appellant's case is not one of those because deciding the appeal in the appellant's favour does not require an intrusion into parliamentary sovereignty. This appeal is not about the supremacy of parliament, but rather about the contended supremacy of section 5 of the Interpretation Act 1999. The real contest here is what is the proper relationship between section 5 of the Interpretation Act more generally and with the New Zealand Bill of Rights Act. The Crown indicate in their submissions that the Crown's view *Hansen* is not up for reconsideration in this appeal on the basis that both the majority and the minority in the Court of Appeal applied a *Hansen* analysis to the facts of the case but came to different conclusions so this Court's function is largely picking which one was the right one, but under the prevailing *Hansen* methodology.

Several points arise from that. First of all, as with mathematics homework, the result is often less important than the way you get to it. The methodology that arises from this case, or the proper approach, the Bill of Rights Act, is of the far more general application than simply the answer to the question in this case, and it does, in my submission, by reference to a key statutory provision that seems much overlooked and whose ball tickets seem to have been much misplaced, namely section 4 of the Interpretation Act.

It is my submission that when section 4 of the Interpretation Act is given its proper role, the relationship between section 5 of the Interpretation Act and the New Zealand Bill of Rights Act becomes clearer.

At paragraph 8.2 in my submissions I set out an analysis of *Hansen* and the judgments of the Court. I'm going to speak to them rather than go into detail. But it's my submission it was really only Justice McGrath in that Court who unambiguously nailed his colours to the mast and said that section 5 of the Interpretation Act had primacy in a Bill of Rights analysis. Also it is clear, of course, that both Justices Blanchard and Tipping said that section 5 had a clear role to play, and I think in fairness all members of the Court, the Chief Justice in dissent, indicated that again text and purpose is part of the inquiry.

But with the greatest of respect, there is very little elucidation in Justice McGrath's judgment about why section 5 has the dominant role and it may be that it is through resort to tradition and the historic role played by the Acts, Interpretation Act, in New Zealand law. But there was nothing per se in the Interpretation Act itself that gives it that status.

WILLIAM YOUNG J:
Well, it says "must be ascertained from text and in light of purpose".

MR EWEN:
And it says it applies to all Acts exception section 4 of that Act, and I was going to sort of quote…

WILLIAM YOUNG J:
Yes, that's in the submissions. So do you say section 6 of the New Zealand Bill of Rights Act can compel an interpretation that is inconsistent with a text construed in light of its purpose of a statute? Or do you say that's a false framing?

MR EWEN:

I was just about to get onto what Justice Glazebrook raised the other week in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2 and the interrelationship with two of them. It is not my case, as is indicated in Professor Geiringer's article that Justice Glazebrook referred to, that it can enable the Court to go beyond text and purpose or conflict with text and purpose. That is simply not my case. The real question is where does it fit in and at what stage.

WINKELMANN CJ:

Isn't it your case, which isn't a complicated thing, that the Bill of Rights Act tells us that it's always Parliament's purpose unless it tells us otherwise to promote and uphold the values in the Bill of Rights Act?

MR EWEN:

Exactly, Ma'am, and I say the net effect of the long title of the Bill of Rights Act, section 3 and section 6 of that Act, is to build into parliamentary purpose in every piece of legislation that engages BORA the principle that rights consistency and rights enlargement is a purpose of that legislation. The problem in my submission with *Hansen* is if you start out in Justice Tipping's methodology with trying to work out what Parliament intended this particular provision to mean, and then come to the conclusion that it conflicts with the Bill of Rights Act, it's all but impossible as a mental exercise to come up with a rights consistent meaning notwithstanding – given the findings that you just made about what Parliament intended. It is a straightjacket on the interpreting exercise. In fact, it's a whalebone corset and as appropriate in the 21st century as corsets and whalebone. It really is a matter from a different age which the Bill of Rights mandates take a different view to.

And so unlike *D*, in my submission this is a case where this question has to be squarely grappled with because if you do end up, and I was going to say it at the end of my submissions but I'm going to say it now since this is the point raised in Justice Glazebrook's judgment, if the approach suggested by

Professor Rishworth means you put the section 5 text and purpose enquiry at the end of the analysis rather than at the beginning, that opens up wider meanings. If that opens up wider meanings, in my submission, the game is simply over because that is what section 6 of the Bill of Rights Act has to require. If greater meaning is available –

YOUNG J:

But it must be meaning that it is consistent with the purpose, purpose reflecting of course section 6 of the New Zealand Bill of Rights Act.

MR EWEN:

Well, again, it all gets a little bit circular when you get to purpose, but as I say, my submission is that the effect of the Bill of Rights Act is greater than the *R v Secretary of State for the Home Department ex parte Simms* [2000] AC 115 (HL) principle of legality. It's to build into parliamentary purpose, spoken or not, the intention to rights consistent.

WINKELMANN CJ:

Isn't possibly the whole issue of staging a bit of a red herring and in fact, if you just read it into the purpose you don't have to do the staged thing because it's part, it's already synthesised into the purpose? So assume when you're reading that one of the purposes of the legislation or the provision is section 6 and section 6 says –

MR EWEN:

Yes and it does make the enquiry a good deal less hierarchical and step by step than Justice Tipping mandated and frankly, easier to apply.

WINKELMANN CJ:

Can I suggest, and I think it is a point that you make or maybe the Human Rights Commissioner, I can't immediately recall, that *Hansen* was dealing with a provision where there was a real question of there being justification in a free and democratic society?

MR EWEN:
Exactly.

WINKELMANN CJ:
And so that methodology did make sense there because if you'd already read in some rights consistent interpretation you might be over-riding a parliamentary purpose that actually was consistent with a free and democratic society even if rights limiting.

MR EWEN:
Absolutely, Ma'am. Yes, because here the one additional complicating factor that the Court simply does not face is section 5 of the Bill of Rights Act because nobody here maintains that these rights can be subject to reasonable limitations.

WINKELMANN CJ:
circularof Lords generally speaking and now the Supreme Court starts out with a description of the right and that takes into account usually because in fact the European Convention takes into account what are, and also the case law that flows from it, what are and are not reasonable limitations on that right.

MR EWEN:
Indeed.

WINKELMANN CJ:
So, that might be in fact a logical starting point that when you identify the rights engaged and you scope out its natural limits.

MR EWEN:
Well, and that, certainly in the context of a section 9 right would be an important starting point because the magnitude of the right –

WINKELMANN CJ:
It doesn't allow a qualification, just like torture doesn't.

MR EWEN:

Indeed.

WINKELMANN CJ:

But some does, for instance, freedom of speech.

MR EWEN:

And there are all sorts of situations where –

WINKELMANN CJ:

Which is *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA) isn't it?

MR EWEN:

Yes, when there are competing rights to consider, but this simply not one such case. The Court has before it in the starkest of terms a serious breach of a provision that is not subject to limitations. If one starts with the nature of the right and then looks at the legislation, in my respectful submission, it then shows what would be required for Parliament to establish that notwithstanding the importance of the right, it's come to the conclusion that it's going to be intruded upon or nullified. But, as I say, it's important to bear in mind in my submission that in this case this is not simply the rights of an individual that have been seriously intruded upon, it's an intrusion on the face of it into the judicial function itself. It is Parliament dictating on the face of it to a Court that thou shalt impose this as a result irrespective of the fundamental judicial function of doing justice in the instant case which means ways of looking at the personal circumstances of the individual, looking at the offending itself. If all this is taken off the table so it represents a, in my submission, this does represent a threat to the constitutional order whereas construing the case in the way contented for by the appellant does not. It ameliorates what is otherwise a significant intrusion by the legislature into the sphere of the judiciary.

Section 4 of the Interpretation Act, I was going to just go to its text…

WINKELMANN CJ:

It's at 8.4 of your submissions.

MR EWEN:

Yes, I would quote from the original, the printed version, when I can. Section 4. Application. "This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless the enactment provides otherwise; or the context of the enactment requires a different interpretation." Now that, in my submission, the Bill of Rights is both paragraph (a) and paragraph (b). Reducing the Bill of Rights to its least it is an interpretation statute, but it is a specific interpretation statute which, in my submission, means that the primacy that is otherwise afforded to section 5 is a statute of general application when it comes to interpretation. It means there needs to be a mediation in the relationship between the two.

I was going to mention *ex parte Simms.* What I say is that this is brought about not only by section 4 of the Interpretation Act but the proper ambit of section 3 of the Bill of Rights Act because both parties have quoted from *ex parte Simms*, and I could probably quote it by heart. I think there's rarely a set of submissions I haven't put it in in the last three years. But *ex parte Simms* is an interpretation of the Human Rights Act 1998, the UK statute. There is a fundamental difference between section 6 of the Human Rights Act and section 3, and the registrar has kindly included it as additional materials. I've put in section 6 of the Human Rights Act. Its application, because it – the Human Rights Act applies to public authorities. "Public authorities" is a defined term. But most importantly, public authority includes court or tribunal, any person, which is interesting when it comes to the judgment of this Court in *Attorney-General v Chapman* [2011] NZSC 110, but does not include either House of Parliament or person exercising functions in connection with proceedings in Parliament. Section 6 of the Human Rights Act expressly excludes its application to Parliament and any application impacting on the legislative process, or, more properly, legislative output, other than the interpretative exercise that the Act creates, whereas in New Zealand

Parliament has voluntarily bound itself to be included by the Bill of Rights Act under section 3, and in my submission this really directly impacts in what kind of language the Court will expect if it's going to come to the conclusion that Parliament has intended to disregard or override a right in the Bill of Rights Act because it means, in my submission, it requires specificity of language in the way that the Court of Appeal suggested in *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 which was where, I think, section 10 of the Parliamentary Privilege Act 2014 was there expressly to override the judgment of this Court in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC).

WINKELMANN CJ:
Is that in *Spencer*? Is that a different *Spencer*?

MR EWEN:
No, *Spencer* makes reference to, as an example of the kind of specificity of language that legislation should require. The Court of Appeal referred to the Parliamentary Privilege Act and section 10 of that Act. The relevant part was in sort of section 7: "This section applies despite any contrary law, including without limitation, every enactment or other law in the decision in *Attorney-General v Leigh*," giving the citation of the legislation that follows.

Another example is the Family Violence Act 2018 section 49 where, I want to say me causing trouble again in the High Court, I got the High Court to declare that proceedings under a police safety order were criminal in nature and therefore the criminal burden applied, as did criminal evidence. That case, that was overridden by Parliament in 49(2): "Subsection (1) applies despite section 48 and despite any other contrary law (for example, every enactment or other law in the decision in *Mark v Police* [2013] HZHC 1041)." This is the kind of specificity that the Court should expect if it adopts what I have called the consistency principle.

I think I have to at this stage make reference to again, your Honour, Justice Glazebrook's judgment in *D* and the reference to magic words and

your Honour set your face against them. In my submission, the characterisation of this kind of language of magic words is misdescriptive for the simple reason that it is simply the adoption of a formula necessary to give legislation a particular desired effect.

There is one that we encounter almost on a daily basis and it's so common that we basically forget about it and that is the inclusion in legislation of "this Act binds the Crown" because unless such language is adopted the courts will take a great deal of persuading in that a piece of legislation does bind the Crown by necessary implication. Necessary implication is a very high test.

WINKELMANN CJ:
So, all you're saying is it's really another expression of what's said in *Simms* and other cases on the principle legality. It is that Parliament must express itself to quote Professor Janet McLean with irresistible clarity if it is to be freed of the obligations it has taken upon itself in the New Zealand Bill of Rights Act.

MR EWEN:
Exactly, your Honour, and I'm saying that the section 3 inclusion of Parliament means that the Bill of Rights and the interpretation exercise takes more than *Simms* would state because in *Simms* they weren't dealing with a bound Parliament where Parliament has bound itself.

So the methodology that I suggest is that instead of putting text and purpose right upfront as per *Hansen* as is suggested by Justice Glazebrook indeed, you put in a step 5 where text and purpose becomes a cross-check against a Bill of Rights consistent meaning because text and purpose has to have a role to play. Moreover, section 4 of the Bill of Rights Act has to have a role to play. There's got to be some legislation to which it applies, but in my submission, if the Court adopts this form of methodology, then section 4 of the Bill of Rights is put in its proper context. It becomes the provision of last resort and it is of, rather than an all too frequent shrug of the shoulders that we can't come up with anything that's consistent because the enquiry has been hobbled several stages beforehand.

The test that I advocate in respect of this kind of case where we're engaged in fundamental rights is that as set out in the judgment of the House of Lords in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 (HL) and I've quoted it in my submissions and I'm not going to repeat it, but it basically comes down to does this wreck, does the inclusion of a Bill of Rights consistent exception such as the one advocated for in this case, does it wreck what is on the face of it an overall encompassing statutory scheme or is it a permissible exception given the mandate of Parliament to be rights consistent as a presumption whenever possible and if one looks at it in that way, it means the carving out of exceptions becomes a legitimate Bill of Rights mandated exercise that neither impinges on Parliament nor affects, but gives effect to the Bill of Rights guarantees.

Now, in my submission, the problem that the Court of Appeal majority adopted is they looked at textual indications in the legislation and the like. This is again, set out in the submissions. In my submission, if one adopts the methodology for which I am advocating, that kind of textual indication or undue resort to parliamentary materials simply falls away as a sufficiently weighty enquiry.

WINKELMANN CJ:
Can I just ask you to break that up because you've combined two things there. Textual indications are within the legislation itself.

MR EWEN:
Yes.

WINKELMANN CJ:
And that is Parliament's, that expresses Parliament's purpose. So you would, it is a valid thing to take into account when you're undertaking this exercise, isn't it, on any analysis, including *Sheldrake*, because you have to check that you're not destroying what Parliament was intending to achieve?

MR EWEN:

Absolutely, your Honour, but in cases of textual ambiguity, where it can go either way, it really has to go in the direction with the presumed presumption of rights consistency.

WINKELMANN CJ:

Yes, okay, but then we go past the – I'm interested to hear what you say about this notion of going back into the select committee reports and the broader inquiries to finding out purpose, because sometimes Parliament gets things wrong, doesn't speak with irresistible clarity, say, but can you go into the other material and say, well, it's irresistibly clear?

MR EWEN:

Not only does it not with irresistible clarity, it very, very rarely speaks with one voice, and there is the real risk of conflating what individual members think, as evidenced by the speeches that they give, with imposing that as part of the will of the Parliament as a whole.

GLAZEBROOK J:

Although normally, to be fair, it would be the Minister's speech or the person who had charge of the Bill that would be looked at and/or the select committee report being the majority report, which does at least provide some guidance rather than what an individual member of Parliament might think.

MR EWEN:

I'm not going to say that we should stop looking at Hansard completely although it would save a significant labour. I'm going to break it down into – what the Crown has suggested, for example, is looking at what wasn't adopted by Parliament as if that assists and that I submit is an especially troubling approach to what Parliament did. Trawling through supplementary order papers to see what was adopted and what was not adopted is to look for meaning where it's not to be found. Parliament may reject a proposed amendment for a number of reasons, one of which is that it's not consistent with the policy thrust of the Bill. Equally available there is it's rejected

because it wasn't necessary because it's already in there by reason of implicit assumptions about rights consistency. Looking at legislative history to see changes in text over the course of the parliamentary proceedings is a useful indicator because, for no other reason my friend, Mr Preston, is relying on it as part of his argument, it does show a change in the approach to language that's been adopted over time, but to look for something by reason for something that wasn't adopted, just look for a black cat in a dark room that may not be there at all. So all I am advocating for is rather than dropping it completely is just that care needs to be used and in the context of Bill of Rights interpretation on important issues such materials as that are apt to be diverting and not necessarily useful but, in my submission, in no way, shape or form sufficient to get over the presumption that the consistency principle would require of the kind of language that you need to see.

WINKELMANN CJ:

So what would be said against you in this case could be the Sentencing Amendment Act in the particular provision does provide a manifest injustice exception but it doesn't apply in this circumstance.

MR EWEN:

And it's provided a manifest injustice exception in two scenarios. When it's – the text employed, I think, in both of those so this kind of -1 and stage-2 offences, it uses "when convicted". However, for a stage-3 conviction it is "if convicted". The temporal changes to the conditional.

WINKELMANN CJ:

Yes, but that's not my point. It allows manifest injustice exception in relation to no parole, but it doesn't allow one in relation to the sentence, maximum sentence.

MR EWEN:

Subject to –

WINKELMANN CJ:

Subject to your argument.

MR EWEN:

Yes, which is why I say this is, when it comes to this kind of approach to a Bill of Rights interpretation it is looking to carve out a legitimate Bill of Rights compliant exception to a general rule. The general rule is going to be the general rule, but unlike the kind of slavish adherence to text and purpose at first point of call, this means it looks at can this exception be reconciled with text and purpose as a legitimate exception because rights consistency may require legitimate exceptions.

ARNOLD J:

I was going to ask a similar question, I guess. I see the force of what you're saying about looking at all the parliamentary material and so on, but in this case, this problem was specifically identified in the legislative process. This issue overreach, of unjust outcomes, it specifically raised a mechanism to deal with it was specifically rejected. Now, that is part of the legislative reality. How do we deal with that?

MR EWEN:

In my submission, your Honour, the answer is in effectively what is a piece of legislative niche marketing on our part. Would a grand manifest injustice, or miscarriage, injustice provision have been a good idea in 86D? I think the Court knows my answer to that, but we're not looking for someone that would've been that encompassing. It would've been far, far bigger than what we are looking at. What we are looking at here is an outcome that is so disproportionate to the gravity of the offending and the personal circumstances of the offender that it is not did they look to put in a safety valve of general application. It's did they look to oust this small set of circumstances where the proper response is the disproportionality is so great that a discharge without conviction is a proper outcome? Again, it could be something that they missed, or it's something that they thought well, no, we've used the word "if", we've used the conditional in 86D and therefore the power

to discharge is preserved. Justice Collins deals with this when he refers to did Parliament intend to be this malevolent. Judges are going to be very slow to import that kind of motive to Parliament.

WINKELMANN CJ:

So, is there another answer you could give which is does it really matter what Parliament intended as you can deduce from the proceedings of Parliament? The Court's task, because the Bill of Rights Act binds the courts, the Court's task is to interpret the legislation. It's not to interpret the tealeaves back in Parliament. It's to interpret the legislation we are given and we are to interpret in accordance with the Bill of Rights Act, so, the Court's task is to interpret what's before it.

MR EWEN:

I will come to raise, Ma'am, that is a simpler proposition than mine.

WINKELMANN CJ:

And so even if we know from the evidence that Parliament intended to achieve something but it misspoke in terms of it hasn't spoken with irresistible clarity that it wants to subject people to disproportionate punishment, we must ignore the mistake. We can't fix it up for them. That's not to do your niche marketing. That's to give you a broader principle answer. I'm just – it's not argument.

MR EWEN:

Which I wholeheartedly adopt, your Honour. I was addressing a specific enquiry, well did Parliament intend, did they intend to manifest injustice? Well, I'm not sure that they did, and the courts certainly have to give Parliament the benefit of the doubt here that again as with Justice Collins' passage in his judgment the Court has to be very slow to come to the conclusion that Parliament could be that malevolent..

WINKELMANN CJ:

Well, because, take us back to the beginning, section 6 is effectively a direction to the Court from Parliament. Assume we don't intend to breach these rights, assume we intend to uphold them and protect unless we tell you very clearly otherwise.

MR EWEN:

Yes.

ARNOLD J:

So, it's implicit in your argument that the sort of disproportionate treatment we're talking about is at the very serious end. It's not a matter simply that, well, we think the sentence that ultimately results from the regime is harder than might otherwise be done in that sense. It's –

MR EWEN:

Exactly, and this is a –

ARNOLD J:

But this is so extreme as to engage the international rights and so on. It's that that sets it apart.

MR EWEN:

In my submission, your Honour, it's so extreme as to engage the international rights. They're engaged, and whether New Zealand is in breach by enacting this legislation is a matter for Geneva in due course if it gets that far. What there is in this case – yes, 86D is going to see unjust outcomes across the board quite potentially although it must be borne in mind that most of the strike offences are really up at the top of the criminal calendar in any event. Indecent assault. Sometimes the stand-over aggravated robbery in the street for a pair of shoes by a couple of 17 year olds. Again, those are some of the few offences in the strike regime that may engage this kind of gross disproportionality. What my friend and I are advocating for is not going to be a panacea for the – some injustices that this regime may create. That is a

matter for Parliament. What we are putting before the Court is the cases of such disproportionality as to engage the balancing of seriousness of the offending with the consequences as required by section 106 and 107.

WILLIAM YOUNG J:

Can I just ask you, aren't you merely talking about any disproportionality that breaches section 9 of the New Zealand Bill of Rights Act? So once section 9 is engaged, on your argument, there has to be a discharge without conviction, doesn't there?

MR EWEN:

Well, again, disproportionality has to be between the sentence that would otherwise be imposed and the sentence that has to be imposed.

WILLIAM YOUNG J:

Yes, I know, but, for instance, in the Crown submissions there are some examples., one at para 70, where there's a required sentence of 20 years for sexual violation, the Court is of the view that in particular circumstances five years would be sufficient. The proposition is put that on your argument in those circumstances the Court must either find that there has been a breach of section 9 in which case there must be a discharge without conviction or alternatively it imposes the 20-year sentence.

MR EWEN:

Well, I'm simply not going to go that far, your Honour, and I'm a firm fan of, when it comes to the facts, waiting for the right case.

WILLIAM YOUNG J:

Well, yes.

MR EWEN:

There is a difference between Mr Fitzgerald's situation where Justice France's starting point for sentencing for him is: "You would not go to prison at all."

WILLIAM YOUNG J:

Well, he had gone to prison for very similar offending before.

WINKELMANN CJ:

Well, quite more serious.

MR EWEN:

No, not –

WILLIAM YOUNG J:

No, one was more serious and one wasn't.

WINKELMANN CJ:

Yes, well, but that could – that's –

MR EWEN:

Factoring in aggravating features personal to Mr Fitzgerald a prison sentence became a possible option but nothing more –

WILLIAM YOUNG J:

Yes, and difficult to reduce to home detention probably.

MR EWEN:

Well, the fact is, as my friend, Mr Preston, pointed out –

WILLIAM YOUNG J:

But in a way this is by the by because no one is saying that seven years would have been the response.

MR EWEN:

Your Honour, as Mr Preston pointed out, Mr Fitzgerald has had treatment resistant schizophrenia since the age of 15. He is now in his forties. The medication regime that was recommended by Dr Edwards of clozapine is something that he cannot get in prison simply because the monitoring regime you need to be subject to on that medication means that you're at risk or your

health is at risk if you get that medication in prison. You need a close monitoring regime. The proper outcome for him, irrespective of notional starting points, was a section 34 disposition to a mandatory inpatient order. Now you compare someone's inpatient order to seven years. There is a gross disproportionality.

WILLIAM YOUNG J:
Yes, yes.

MR EWEN:
In your sexual violation case, your Honour, I would say Judges of this country need a great deal of persuading that the inherent seriousness of a sexual violation is ever such that it could lead to a discharge, but in my submission it's – hypotheticals like that are more apt to divert than elucidate.

WILLIAM YOUNG J:
Do they test the argument.

MR EWEN:
To a degree, your Honour, but I'm in firm favour of testing the facts on the facts.

WILLIAM YOUNG J:
Just going back to the factuals, before the three-strikes regime, there would be no question of a discharge without conviction for your client.

MR EWEN:
I would have to accept that because the only way of avoiding the mandatory consequence of 86D is whether he can be discharged or the if, if convicted.

WILLIAM YOUNG J:
Can I just change topic and go back to something you said before, so perhaps you can look at it in the adjournment, I agree that Mr Campbell's intervention in Parliament suggested that he was of the view that the changes to section,

what became section 106, meant that mandatory disqualification orders were not, were no longer a bar to discharge without conviction. Did his intervention come at the point in time when the minimum penalty had been reinserted into the bill because the select committee took it out?

MR EWEN:
He was a member of the select committee.

WILLIAM YOUNG J:
Then there was the committee of the whole House where a minimum penalty was reinserted now, if the minimum penalty was rein – well, this is what Justice Collins says?

MR EWEN:
No, because again 106 is meant – again, there may be a battle of SOPs.

WINKELMANN CJ:
Well, do you want to come back to that because we don't want to waste time?

MR EWEN:
Certainly, because I know Mr Campbell has stated reasons for inserting 106(3)(c) any other order required to be made, he had a particular concern about indefinite disqualifications.

WILLIAM YOUNG J:
Well, if you could just get the chronology, that would help me.

MR EWEN:
Certainly your Honour.

WINKELMANN CJ:
I have two questions for you and one of them follows on from Justice Young's question. I suppose to use that famous statement, it may be more of a comment than a question. Thinking about the hard cases that Justice Young was talking about and he's asking to imagine cases of serious offending but

the regime resulting in a grossly disproportionate outcome and putting the case of that could not have possibly been Parliament's intention I think. I just was contrasting that in my own mind with the situation where New Zealand's obligations under international conventions mean that we cannot send back to other countries, extradite to other countries, people where they're going to face –

MR EWEN:
Non-refoulement.

WINKELMANN CJ:
– torture et cetera even when we believe, even where we have evidence to suggest they've committed serious crimes.

MR EWEN:
Yes, the non-refoulement principle.

WINKELMANN CJ:
Yes.

MR EWEN:
Yes. That again is an indication that – yes, your Honour, I think that was more of a statement than a question. Is there a proposition that you wish to be addressed on?

WINKELMANN CJ:
No, but did you have any comment about that because I will ask the Crown?

MR EWEN:
Yes, it just shows that we may strongly disapprove of the conduct of people, but the way we treat them says more about us than about them.

WINKELMANN CJ:
Okay, so the other question was, has anyone given any thought at any point in time to the rights of the appellant under the International Covenant on

Economic and Social and Cultural Rights because it just seems that because of his imprisonment he's been subjected to an increase in medication which those medications are, generally speaking, toxic, but also, he's now not capable of receiving the proper medication?

MR EWEN:

There is the most Cinderella covenant of all because ICESCR is the one that's probably received least attention. The highest it got I would say, the majority of the Court of Appeal did raise potentially the Disabilities' Convention and unlawful discrimination on those grounds because of the way he's been treated in respect of his medical status, this inability to get proper medical treatment. No one has, your Honour.

WINKELMANN CJ:

Okay, so those issues have been traversed to some extent, not this particular…

MR EWEN:

It's a covenant that I should read more often.

GLAZEBROOK J:

Well, of course, there also are arguments under the right to life under our Bill of Rights as well, being engaged in situations where matters injurious to health are being effectively imposed on people. I suppose again by way of a comment, and only because that was the answer you gave to Justice Young, but to indicate to the Crown that it is something they have to deal with, at least from my point of view, your comment about the Judges being, well, that there would need to be an awful lot of persuasion to use 106 in case of serious crimes and I have to say that for myself I see that section as something that deals with crimes that are at the lower end of the spectrum and that it wouldn't be appropriate, however disproportionate the Judge might think the sentence would be, to discharge on those grounds, and I think that was your answer to Justice Young, or part of your answer to Justice Young.

MR EWEN:

Well, sort of. I put in my – yes. I put in my submissions that when you're looking to carve out a Bill of Rights consistent exception to a regime, the terms of that carve-out should be as certain as possible, and in this present case, in my submission, 107 provides that test. It does provide a fixed measurable and judicially applied test of assessing the seriousness of the offending and the consequences and the need for it to be so out of proportion that a discharge is the right answer, and sort of the higher the seriousness, I don't discount it as a possibility but I would say as a matter of practical application a judge is going to – great deal of satisfying that a sexual violation is going to warrant a discharge, bearing in mind that, of course, a discharge itself is a discretionary outcome. The Judge notwithstanding having come to the conclusion that a discharge could be made, the Judge still has the discretion to say no.

WILLIAM YOUNG J:

But if the only alternative is a sentence that breaches section 9 then the Judge has no discretion, on your argument.

MR EWEN:

Well, it would call for the application of this Court's analysis in *D* of the exercise of discretionary powers inconsistent with the Bill of Rights Act.

WINKELMANN CJ:

Yes, well, you say your answer probably lies in section 9 anyway because it has to shock the conscience really, doesn't it?

MR EWEN:

Yes.

WINKELMANN CJ:

So that's quite a high standard when you're dealing with serious crime.

MR EWEN:

I agree, Ma'am.

O'REGAN J:

But if it does, presumably section 107 is then engaged, isn't it, because it talks about out of proportion –

MR EWEN:

"Out of all proportion", yes.

O'REGAN J:

– and section 9 talks about disproportionate which is essentially the same thing, isn't it?

MR EWEN:

There is certainly a cross-over in the test but as I say when it comes to a discretionary assessment on whether to refuse a discharge, the seriousness of the offending, its consequences on the victims of the offending, these are all going to be relevant considerations at that level. I can't discount it as a possibility but I would not say it is inevitable in every case. I don't think it could –

O'REGAN J:

So you are saying if engages section 9 it's disproportionately severe, it probably also engages section 107, but, as a matter of discretion, a Judge would be unlikely to give a discharge in those circumstances?

MR EWEN:

I think the answer in large measure lies in the judicial discretion in 106.

WILLIAM YOUNG J:

Discretion to impose a disproportionately severe punishment in breach of section 9?

MR EWEN:

It's not attractive.

WINKELMANN CJ:

No, I think it lies in section 9 personally.

GLAZEBROOK J:

Yes, I think that's probably right.

WINKELMANN CJ:

And also we have to consider whether section 106 is truly a discretion, but if a Court reached the view that it was out of all proportion then they probably…

MR EWEN:

Well, on the existing case law from the Court of Appeal it's said that the discretion at that stage exists but it's generally expressed to be a residual one.

WINKELMANN CJ:

Right.

MR EWEN:

As I say, it was my intention to speak to you rather than quote from my submissions and unless there are points that I can assist the Court with that's what I would –

WILLIAM YOUNG J:

I've been looking through this material about section 65. If Mr Campbell made his speech after the select committee reported but before the supplementary order paper that was introduced in the committee of the whole house that's reproduced in the respondent's submissions.

MR EWEN:

I am absolutely sure it was part of the report of the justice and electoral select committee.

WILLIAM YOUNG J:
Well, in that case it was probably overtaken by the later supplementary order paper.

MR EWEN:
I will dive into the library over lunch-time and get the material because in a number of cases I produced to sentencing courts both the report of the select committee and the committee of the whole speeches because they both contained elucidation on what was otherwise a very oblique provision.

WILLIAM YOUNG J:
Well, they are oblique, I agree. The other point is section 10A was inserted in 2007, so whether there was something equivalent to it in the earlier Act I can't tell because I can't get sufficiently far back on the electronic version.

MR EWEN:
I have the feeling there is more than that, that it was as a result of some reordering of provisions in subsequent amendments because 10A, one of the features of the regime created by the Sentencing and Parole Reform Bill 2001 by Dr Young was a very rigid hierarchy.

WILLIAM YOUNG J:
I agree. It is my recollection it was all the hierarchy.

MR EWEN:
Yes.

WILLIAM YOUNG J:
It's just that section 10A comes in a bit late in the chronology.

MR EWEN:
It originally started at fines and ended up with imprisonment, but as a result of a submission I made to the Select Committee, I actually got the committee to insert that the starting point is actually discharges and come up if called upon

and that became the starting point. It was always there. I think it just maybe some feng shuing of the legislative furniture over time.

WINKELMANN CJ:

Well take – oh, no, we have got another four minutes, or we could take an early adjournment. Mr Butler, will you be addressing us next?

MR BUTLER:

Yes, if you wish to hear from me, your Honour as we'd had a discussion entre nous and here the intention at this stage was that I would follow my learned friends for the appellant if that was suitable.

WINKELMANN CJ:

Yes, well, I would like to hear from you. We shall take an early adjournment and then come back a few minutes early.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.45 AM

MR BUTLER:

Tēnā koe, e ngā koutou, e ngā Kaiwhakawā. Unusual for me, your Honours, I have prepared some speaking notes to keep me making some core points that I'd like to make. I think they will last about five or six minutes. I would like if you would permit me the indulgence of just reading those. I've also then prepared you a road map which indicates a number of the topics I'm happy to talk with or go with, but they will, I think, help.

WINKELMANN CJ:

Are you suggesting we don't interrupt you during your five or six minutes?

MR BUTLER:

Yes, your Honour, that's basically what I'm asking for and then what I propose to do is take you through the road map. There are some additional items that I've included in the road map that really have come out of looking at the various submissions that have been filed by my learned friends for the appellant and by my learned friends for the Crown which I'd like to emphasise, but please don't gasp when you see the road map, but please do apply your glasses is probably which I will be doing here for the purposes of reading it. I will make sure that an electronic copy of that is provided to Mr Registrar if that would be helpful for your Honours. If you could just indicate whether you'd like it in that form, I will provide it in that form.

Your Honours, when boiled down to its essence, the Crown's position on this appeal is two wrongs don't make a right. The first wrong which the Crown

admits is the imposition on Mr Fitzgerald of a sentence of seven years for conduct which would otherwise not result in imprisonment. The indecent assault here, which is the triggering offence, wasn't even the more serious offending in the incident that is before the Court. The assault was. In a nutshell, the Crown accepts that jailing Mr Fitzgerald has breached his right not to be subjected to disproportionately severe punishment and has caused significant exacerbation of his underlying mental health issues. We all agree at least on that first wrong.

The second wrong the Crown says would be for the Court to do anything about it. The Crown says that this Court should simply confirm the first wrong. On the second wrong, we do not agree. Te Kāhui says that for the Court to do something here would not be wrong. We say it is legitimate, indeed mandatory for the Court to discharge Mr Fitzgerald without conviction and thereby avoid the imposition of a grossly, a truly grossly disproportionate sentence. A number of considerations arise.

First, section 6 of the Bill of Rights. The Crown's position is that section 6 is of no avail here and that reliance upon it as suggested by Justice Collins the court a quo would be contrary to this Court's decision in *Hansen*. It would be using it, they say, as a concealed legislative tool. We fundamentally disagree with the Crown's position.

Section 6 requires a Court to adopt a meaning of the Sentencing Act that avoids the outcome that the Crown admits is a wrong if such a meaning can be given. We say that the interpretation we argue for is open on the language of the Sentencing Act and is not inconsistent with the grain of the legislation.

Relying on what Justice Tipping said in *Hansen*, here I'm referring to the Crown's submissions at paragraph [28], the Crown suggests that section 6 does not permit an interpretation that cannot be reconciled with the text and purpose of the Sentencing Act and indeed I just interpolate here, when you look at their submissions, they really are driven not by BORA but by starting

first with the text and purpose of the Sentencing Act and within that, a narrow focus on particular provisions of that legislation.

In contrast, we say that the question is not whether the interpretation we argue for fits with the Sentencing Act, but rather, whether the terms of the Sentencing Act are so clear as to displace an interpretation that would give primacy to section 9 BORA. That way of putting things, we say, reflects the fact that Parliament, through section 6 of the Bill of Rights has imposed an obligation on the courts to give meanings to enactments that are consistent with the Bill of Rights where such a meaning can be given. Presaging a theme I will come to in the road map, it is section 6, not section 4, of the Bill of Rights which advances the twin purposes of the Bill of Rights.

I've a little bit more to say when I come to the road map in respect of section 6 but I just want to make the following points if I may. First, the *Hansen* approach was explicitly not prescriptive. The six steps outlined in it were stated merely to be helpful. Steps, it is true, must be followed in a dance competition but they do not bind this Court in discharging its constitutional role of seeking to find interpretations of legislation that will render that legislation consistent with the Bill of Rights. So rather than starting the statutory interpretation exercise with an eye to the so-called natural and intended meaning of an enactment shorn largely of considerations of the impact that the Bill of Rights might have on the interpretation exercise, we say that the Court must start with a Bill of Rights mindset or orientation. That orientation requires the Court to identify the outcome to be avoided in Bill of Rights terms and to use that outcome which you are trying to avoid, use the outcome you are trying to avoid, as the driver of the statutory interpretation exercise, and I'll have a bit more to say about that a bit later. So at the broad level, the Bill of Rights is our first consideration.

The second consideration which we specifically raised in our submissions is the separation of powers. The separation of powers between the judiciary and the other organs of government lies at the heart of our constitution, even if it is unwritten. That separation is particularly prominent, and from a citizen's

perspective imperative, in the sentencing process. Te Kāhui says the Court should resist any proposition that countenances a dilution of that separation of powers unless the enactment in issue is abundantly clear and leaves the Court with no other option.

And our third consideration is the language and scheme of the Sentencing Act. We say that the interpretation we advocate for goes with, not against, the grain of the Sentencing Act. First, as Justice Collins emphasised in the Court a quo the purpose of the three-strikes legislation was, in the language of its purpose provision, being section 3 of the 2010 Amendment Act, to "impose maximum terms of imprisonment on persistent repeat offenders who continue to commit," and here are the important words, "serious and violent offences." That language of serious offences was used throughout the parliamentary debates as was noted by Justice Collins.

Mr Fitzgerald may be a repeat persistent offender but the conduct which has led to his conviction, while completely unacceptable, and no doubt as is clear from the judgments below, harrowing for the victims, is on no measure serious violent offending. Avoiding the imposition of seven years' imprisonment on Mr Fitzgerald will do no damage, no harm to the underlying purposes of the 2010 Amendment Act. Indeed, it will likely reduce the public contempt it might otherwise be held in. In this country, we like people to get a fair crack of the whip, not a whipping.

Second, section 86D(2) of the Sentencing Act only applies if an offender is convicted. So the provision that the Crown says has the effect that the Court has no ability to discharge without conviction, in fact, on its own plain language explicitly recognises that conviction need not occur. "If" is the language of conditionality. Te Kāhui says the Court will be ignoring that conditionality, those statutory words, if it held, as the Courts below have done, that a plea or finding of guilt leads automatically to conviction without any consideration needing to be given to discharge.

Allied to that, your Honours, using the discharge mechanism here would not produce unacceptable anomalies or arbitrariness. As to anomalies, they can be resolved through other mechanisms, and no doubt I'll get some questions about those when open slather ensues very shortly.

As to unacceptable, just by unacceptable I mean just focusing in on this particular mechanism which is before the Court, it is home book law that it is better to avoid some limits on a protected right that are unreasonable through interpretation even if all unreasonable limits cannot be avoided. In addition, the provision that is relied upon by the Crown to say that you should ignore the words of section 86D(2) if convicted is a proviso to section 106.

What is the purpose of s 106? Te Kāhui says that the purpose of section 106 is: "In its field of operation, to give effect to section 9 of the Bill of Rights." It is one of the mechanisms in the discharge scheme of the Act through which grossly disproportionate sentences can be avoided. Indeed, looking at the language of s 107, that comes through quite strongly. Why then would this Court wish to give an expansive interpretation to that proviso? Typically, provisos are interpreted strictly. We say that approach should be followed here. Nothing in the language of section 106 requires the Court to adopt an expansive approach to it.

Lastly your Honour, if this Court agrees with Te Kāhui that discharge without conviction is appropriate, then we urge that the Court issue a judgment as soon as possible releasing Mr Fitzgerald from imprisonment with reasons to follow whenever those might be ready. Mr Fitzgerald should not stay a minute more in prison. He needs help that he is not getting, it would appear, in his current environment.

Your Honour, those were the opening remarks on behalf of the Commission. If I could turn now to –

WINKELMANN CJ:

Can I just take you up on your indication, so section 106 gives effect to section 9 of the Bill of Rights?

MR BUTLER:

Yes.

WINKELMANN CJ:

That's certainly not the way I see 106 because it certainly wouldn't come within section 9 if somebody can't travel overseas, of they're very young otherwise they would be subject to a conviction?

MR BUTLER:

Correct.

WINKELMANN CJ:

The normal use of section 106 is nothing whatsoever to do with section 9 of the Bill of Rights.

MR BUTLER:

So, the proposition I put was that in its field, section 106 is one mechanism through which s 9 can give an effect too. If I did not say the formula in that way then I misspoke. It is one mechanism through which section 9 BORA can be given effect to, your Honour. So, I'm not saying that it has to, that the consequences have to fit within a section 9 analysis. I don't want to be misunderstood as to be saying that. What I do want to say is that in its field of operation, it does give effect to section 9 BORA. Again, I'm not asking whether your Honour agrees. Does my reply make sense?

WINKELMANN CJ:

No I understand the submission.

MR BUTLER:

Thank you. So, your Honours, if you could just turn to the road map that I've given to you by Mr Registrar. It seemed to me there was some value in touching at least on the items that arise under the second section of the road map which is the Bill of Rights matters. That takes up about two pages of my road map. I won't, unless you ask me, touch much on the additional constitutional considerations in this case being separation of powers. You've got the reference in the road map at page 3 under hearing 3 to the *Fisheries Inspector v Turner* [1978] 2 NZLR 233, 237 case and then I will touch on a number of the Sentencing Act provisions just to really underscore a couple of the points, some of which have been debated already this morning but some of which it seems to me are worth underscoring and elaborating on, so that was the plan of attack as to speak. So like Mr Ewen, I will not be referring to the detailed written submissions you've got. You've got those in advance and your Honours are well able to read those.

So, the first point I wanted to come to, there's been some discussion about this issue of the relationship between section 5 of the Interpretation Act and the Bill of Rights. Taking at its face the proposition that section 5 of the Interpretation Act needs to be applied at least in principle to the Bill of Rights, that must mean that the Bill of Rights itself has to be interpreted in light of its purpose and in accordance with its text. So it seemed to me it was worthwhile just going back and having a look at some fundamentals around what the Bill of Rights is so that we have those fully in mind, indeed at the forefront of our mind, when we are interpreting the Bill of Rights and in particular when we are interpreting section 6 of the Bill of Rights.

The Bill of Rights serves a constitutional function. That was the language used by the Court of Appeal in *Taylor* [2017] 3 NZLR 5, the declaration case. And the Chief Justice in the *Chapman* case referred to the Bill of Rights as being constitutional legislation, and there's two things it seems to Te Kāhui that flow at least from that. First of all, its constitutional nature and status means, first of all, we adopt a broad and generous interpretation to those provisions. We avoid the austerity of tabulated legalism. So that is an

interpretative principle that we apply when we come to consider the meaning of provisions within the Bill of Rights. And second of all, its constitutional nature tells us something about how it's going to interact with other enactments. Now how it's going to interact with other enactments, we say, is clearly relevant to how you would go about interpreting section 6 itself. You recognise that section 6 is part of a constitutional statute. You recognise that status and that tells you, we say, quite a bit about how you would anticipate it will interact with other enactments.

We know that pre the Bill of Rights our courts, when they would recognise principles as being fundamental to our constitution, would be highly sceptical about interpreting enactments as being intended to entrench on those fundamental principles. I've given you a citation, just to justify having the New Zealand Law Reports in my office in hard copy, the citation from a decision of no less authority than Sir John Salmond in the *Frazer* case. It's *New Zealand Waterside Workers Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC). The question there was whether or not section 96, I think it was, of the relevant Arbitration Act, here we're talking about the Labour Conciliation and Arbitration Act which was written in very broad terms. It was sufficient to prevent the then Supreme Court and the ordinary courts of judicature to use the phrase of that section from being able to review for lawfulness a decision of the Arbitration Court. What Sir John said in his judgment is what I've reproduced there at 702. "Parliament needs to use language so clear and coercive as to be incapable of any other interpretation," and that, your Honours, was a statement he made in light of the fact that he had recognised that doubtless, if the words of section 96 are to be read literally, they justified this contention, the contention being that the jurisdiction of the Courts should be ousted. So the proposition I'm putting there is twofold. First of all, the constitutional status of norms and purported entrenching upon them has always in our tradition produced a response from the Courts to say: "Are you sure?" We are not challenging your authority. Go over the page to 703, your Honours, if you want, when you get back to your rooms, and see that his Honour, Sir Justice Salmond, absolutely accepts that, of course, Parliament could achieve that outcome if it wished to. But the

language of that provision, have a read of it, notwithstanding how strong it was, fully insufficient to convince the Court that that was the intended outcome.

And that goes to demonstrate the point I've made at the last paragraph under the heading "Constitutional Nature and Status of BORA". We say that like all constitutional norms the Bill of Rights is part of the fabric of the law. It is always there. It does not stand apart. We are not in man-alone territory here, your Honours. The Bill of Rights is a part of the crowd.

In *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA), *Goodwin's* case, Sir Robin Cooke said the Bill of Rights is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance." And again, we say that when you take on board that mindset, that it is part of the fabric of the law, it is woven into the fabric of the law, that means you don't put the Bill of Rights over here and the rest of the law over there. Rather, the law is, particularly when it comes to statute law, is a compound product. It's a product of the impact that the Bill of Rights will have on the interpretation of the statute as well as the other principles that can be relevant to the interpretation of statutes.

I thought it is also important that we go back and remind ourselves of what the twin purposes of the Bill of Rights are because it is often taken for granted but the significance of them is often forgotten. It was touched on by my learned friend this morning Mr Ewen. But the twin purposes are set out in the long title. First of all, it is to protect the guaranteed rights, which rights of course, it's important to remember, are described as fundamental by the long title itself.

Now, of course those rights can be reasonably limited. We know that through section 5, but the important thing to recall is that the purpose of the Bill of Rights is to protect those fundamental rights.

The second purpose of the Bill of Rights is to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. Te Kāhui submits that it is section 6 of the Bill of Rights which gives effect to or advances those purposes, not section 4.

If we turn then to the text of the Bill of Rights, start with section 5. Section 5 says that the rights and freedoms guaranteed by the Bill of Rights are to be: "Subject only to," reasonable limits, so that sets a standard. Standard is – a standard expectation is that rights and freedoms guaranteed by this constitutional document are to be subject only to reasonable limits. Yes, we accept that is subject to section 4, but the standard which is set is that which is set out in section 5 and as my learned friend Mr Ewen pointed out earlier today and I've pointed out on previous occasions before this Court, that is a standard which Parliament has set for itself through section 3 the application provision. Yes, it has reserved to itself an opt out through section 4, but the starting point is that Parliament itself has signed up to and bound itself to respect the rights in the Bill of Rights and therefore we say wants you to adopt that approach, that mindset, when you come to interpret its enactments. When you do that you respect Parliament's choice. You are acting constitutionally appropriately we say.

Your Honours will be well familiar with how often you give effect to that standard and what have you and I've given some examples in the second paragraph.

So section 4, what does section 4 do in this overall scheme? Section 4 is not referred to in the purpose, the long title to the Bill of Rights. What section 4 does in Te Kāhui submission is it is a direction to the Courts as to what they are to do after another enactment has been interpreted with the benefit of section 6 of the Bill of Rights. What it says is that: "No court shall decline to apply or to invalidate or to impliedly repeal an act and enactment by reason only of its inconsistency with the Bill of Rights." Section 4 does not say how that enactment, the other enactment, is to be interpreted. It tells you what to do after interpretation has occurred.

WINKELMANN CJ:

So, writing in another forum, you have said that –

MR BUTLER:

Many things, your Honour.

WINKELMANN CJ:

Yes. These two provisions 4 and 6 pull in different directions.

MR BUTLER:

Yes.

WINKELMANN CJ:

But as you have just articulated them and as in my view, they're plain reading, they do not pull in different directions. They actually are simply an articulation of the constitutional role of the Court and of Parliament.

MR BUTLER:

Yes, and I accept that. Doing this case has caused me to go back and look at some of the heresies I have written in other places, your Honours, and I'm grateful for the opportunity to have done that, but that was one of the things when I was trying to describe it at a broad level – I'm not here to defend myself – but a broad level, the tension, or a tension that appears to reside under the Bill of Rights, but the extent of which that is relevant to the interpretation exercise and particularly what meaning you give to section 6 of the Bill of Rights, I've got a more nuanced proposition to put to you now which is the nuance I have put today.

So what I say is that section 6 and general constitutional norms supply the answer to how you go about understanding the role that section 6 itself can have in a particular case.

Section 6, it's a legislative instruction and I think there's something really important about just standing back. I know we take it for granted because

we're so used to working with this thing on a daily basis, but it's really important to stand back and recognise it for what it is. We are no longer in the area of principle of legality where the judges have constructed a framework for interpretation. With section 6 of the Bill of Rights we now have a legislative direction, an instruction to the courts as to what to do and not only what to do, but we say that pivots off an assumption that Parliament wants you to adopt when undertaking interpretation exercises.

The Court of Appeal in *R v Poumako* [2000] 2 NZLR 695 (CA) said of section 6: "It is not a matter of what the legislature or an individual member might have intended, the direction is that wherever a meaning consistent with BORA can be given it is to be preferred." Nice and simple and that language of instruction or direction is one which your Honour Justice Glazebrook used that language as well. I've just put in a citation to that from *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) case in the Court of Appeal.

Now, one of the things I do say in that book your Honour, or that we say in that book, is, which I won't resile from, is that criteria are not provided for in section 6 itself as to how to go about giving effect to the legislative direction, so that means Parliament has left the job of implementing it, of giving effect to the direction of section 6 ultimately to the courts and here I want to make a point, if I may, just about the evolution in time and thinking and why perhaps now is a good opportunity for this Court to look afresh at what has been said in previous cases around the role of section 6. We say that the courts will work out over time what section 6 is about and I say if you have that mindset, you can understand why there was caution correctly expressed by the Court of Appeal in *Moonen's* case and then by Justice Tipping in this court in the *Hansen* case because his Honour was very clear the steps were helpful, not prescriptive.

And I think it's also important to understand what *Hansen* was about. Yes, there were two things going on in *Hansen. Hansen* was a case about section 5 and it was a case about section 6, I have to accept that, but the

principal revolution of *Hansen* was the acceptance that section 5 is absolutely relevant, or can be relevant, to an interpretation exercise. It's hard for us to believe now in 2021 that looking back to *Hansen* then, that that was a revolutionary proposition, but remember, that is what the academics and courts were arguing about at the time. Resolving that issue was a principal function of the decision of this Court in *Hansen* which everyone agreed with bar the Chief Justice who didn't really see much point to section 5 in pretty much any statutory interpretation exercise, but all the other four members of the Court and judges since then have come to realise that the point of *Hansen*, the real point, the real revolution of *Hansen*, was section 5 is relevant to interpretation. How I say you look at *Hansen* and the six steps is you look at them in context of the Court trying to work out a way of understanding section 6 and the particular context that was before it.

What was the context? What does the word "proved" mean? Well, the Court of Appeal had indicated as far back as *R v Phillips* [1991] 3 NZLR 175 with reference to the Glanville Williams article was used successfully by the appellants in *Lambert* in the UK Supreme Court that proved doesn't mean proved. It means something, I would say, completely different and what I read the Supreme Court really trying to say in *Hansen* is there are limits to how far you can push this legislative instruction in section 6 and trying to articulate what those limits might look like, but it is not an expression of opinion which is designed to govern every case.

ARNOLD J:

So just taking that point because it does arise in section 6 where it talks about an enactment can be given a meaning, and what do we mean by that? And there are a number of approaches that you could take but as I understand it what you argue is that, or bearing in mind that we're talking here about a fundamental right, a breach of which cannot be justified, what you're looking for is language which is absolutely clearly and inevitably indicating that that's exactly what Parliament wanted to do, breach that fundamental right.

MR BUTLER:

Yes, that is our primary position, absolutely.

ARNOLD J:

Absent that, then a meaning, an enactment can be given a meaning which avoids that outcome if the language is not so powerful, so obvious, that it takes to the –

MR BUTLER:

Yes. Can I put in a very, well, I hope it's a bit of a broad sense? Given the choice between statutory coherence and elegance of the other enactment and giving effect to fundamental rights, we say the choice is clear. You go with the fundamental right, even if that produces an element of awkwardness or an element of incoherence or inelegance in the other statute. That's the choice we say that Parliament would prefer you to make. Now we do say in our submissions we recognise that the Court can have regard to things such as not going against the grain of the legislation. There's an element of judgement to be exercised when deciding whether something is or isn't, goes against the grain of the legislation. We say that when you look at the UK authorities they get it more or less right, which is you're not going and looking at the individual word of a section or an individual particular micro-provision and say, right, well, that's the grain of the legislation. The grain of the legislation is at its broadest level, much as the High Court did in the *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC), case. You know, the one about adoption and the meaning of spouses and so on. It's quite a good example, or what her Honour, Justice Courtney, did more recently in the *Re Gordon* [2019] NZHC 184, [2020] 2 NZLR 436 case which is in my bundle of authorities, also in the adoption area. Tell me, tell me, effectively is what they are saying, what is it that is in this other enactment that makes it so wrong for fundamental rights and freedoms to be respected in this statutory context. When you strip it all away, that's fundamentally what's driving, and that's why I say that when thinking about this case and/or what the role of section 6 is, that mindset orientation is really important and it's the right mindset and the right orientation to have because it properly reflects

when you look at it the constitutional nature, the purpose and actually the language of the Bill of Rights itself. So we say, Sir, just coming –

WINKELMANN CJ:
Can I ask you one question about section 5?

MR BUTLER:
Yes, your Honour.

WINKELMANN CJ:
The rights that are articulated in the New Zealand Bill of Rights Act do not express any – do not generally, I think – I haven't gone through and checked – express any –

GLAZEBROOK J:
Unreasonable search and seizure is the section, I think.

WINKELMANN CJ:
Unreasonable and seizure – yes, that's it. Express any limitation. But a lot of the international conventions, et cetera, do have limitations expressed, and also over time case law has suggested what is the natural limitation. So how does that figure in in the general interpretive exercise, because I suppose one could say that the rights that are – that your rights maximising interpretation under section 6 will be rights with those natural limitations, with those limitations?

MR BUTLER:
Yes, correct. So the Commission Te Kāhui accepts the proposition put forward by Professor Rishworth and referred to with approbation in a number of cases, I meant to get the citations for you last night but I forgot, so I can have those provided for you if you wish, but that the Bill of Rights is a Bill of reasonable rights. So we accept that Parliament has reserved to itself the ability to reasonably limit rights and that's an essential feature of the Bill of Rights, so we accept that it would be wrong to rely on the Bill of Rights as

such to reach an interpretation of a statute which would preclude, or which operates on the basis that we're not going to give effect to an interpretation of a statute that only imposes a reasonable limit on a right. So that reasonableness has to be part and parcel of the interpretation exercise and that's why in our submissions, your Honour, just to, and to you directly, we say that where you start from is not just with the right, but expanding on that, the right plus the reasonable limits. So we say what the Court engages in is an exercise of identifying what is the outcome, or what are the outcomes, to be avoided through this interpretation exercise?

WINKELMANN CJ:
Which is what Justice Tipping actually said in *Moonen*, didn't he? He said, you start with the right and you explore its scope?

MR BUTLER:
He did and now where we would say things went slightly askew, and I remember having to argue this in *Moonen* number two and getting told: "Sorry, you had your chance in *Moonen* number one." We say well, look, we're – in fact, now I remember, sorry you and I were there with the intrepid duo and we got told to: "Yes, not interested." Actually, you will have it firmly imprinted because I gave you the bullets, you had to shoot them. What we were trying to argue in that particular case was hang on a moment, when you're looking at giving effect to section 14 of the Bill of Rights freedom of expression, we can reasonably limit freedom of expression. We don't want any view going out there that somehow you should be interpreting statutes aggressively so as to not allow for reasonable limits on freedom of expression.

Now, why the Court of Appeal wasn't interested in that argument for various reasons in that particular case, I say that over time, as a result, for example, of *Hansen*, there's a greater understanding of this ability to reasonably limit. Have a look at *Schubert v Whanganui District Council* [2011] NZAR 233 (HC), for example. That's the Whanganui gang patch case, his Honour Justice Clifford. We would say that's a really good example. His Honour said: "Well, look, these are bylaws. Parliament has enacted a statute which allows for

gang patch bylaws to be made in the Whanganui district." Politics, ah. So, the question then becomes how do you interpret the empowering provision. I can't interpret the empowering provision as prohibiting any limits on freedom of expression because clearly Parliament has given authority to the Whanganui District Council to interfere with or limit freedom of expression. Ah, right. The solution is what the proper interpretation of the bylaw provision is, is that the boundary is unreasonable limits on section 14. So I will interpret the bylaw making power as if read into it you can make bylaw you wish so long as it is not a bylaw which unreasonably limits section 14 of the Bill of Rights and we say that is absolutely the right approach to adopt.

May I say, your Honours, that is the way it is done overseas. Presumptions of constitutionality, which is the language that is often used in the States, will always take into account the fact that in many situations, rights are able to be reasonably limited and it is important that the courts respect democratic choices and ability moreover of a Parliament to limit rights so long as it is done reasonably. That's the standard Parliament has set for itself.

WINKELMANN CJ:

And you would say what is the protection against those rights on that approach being whittled away over time, who has the matter of reasonableness?

MR BUTLER:

The courts. First of all, Parliament and then the courts in the usual way. You will always be there, we would hope. So that's why I used the language. Does that help in terms of understanding what I'm getting at? I'm not asking whether you agree. I hope you do, obviously, but do you understand why I'm using this language of the outcome to be avoided as a result? So that is a compendious term which is designed to wrap up where appropriate the right and reasonable limits on that right, whether it be through section 5 of the Bill of Rights or whatever it is in here and that right through the internal modifiers that exist within the right.

So we say that “can” is an enabling, not a confining word a such. It’s a broad term of possibility and its scope, in answer to the question your Honour asked me, I suppose I’m just repeating myself so I should just move on, its scope is dictated by its purpose and its nature.

WILLIAM YOUNG J:
So, do you say that it permits an interpretation which is inconsistent with text construed in light of the purpose?

MR BUTLER:
That’s a very abstract question your Honour so, like my friend Mr Ewen, show me the example because there is an element of judgement involved in that and I just, I’m reluctant to get drawn in –

WILLIAM YOUNG J:
Well say it were the case here that it was clear that when section 106 was enacted that the minimum penalty provision was reinserted because of section 65, to preserve the effect of section 65.

MR BUTLER:
The first thing I would saying is the idea that section 65 of the Land Transport Act 1998 is going to drive the proper interpretation of 106 in a case like this just it has it the wrong way around.

WILLIAM YOUNG J:
Well if you don’t want to engage with me I’ll flag it.

MR BUTLER:
Yes.

WINKLEMANN CJ:
No but I think you can – I think you do have an answer.

MR BUTLER:
No, no Sir, I’m not meaning that I’m just saying as a starting point Sir sorry.

WILLIAM YOUNG J:

What I'm saying, you are rejecting the proposition I'm putting to you in limine. Now let us say that if a select committee report indicates that there was considerable concern about driving while disqualified, drink-driving offences and the consequences which I think is true let us say the select committee report took out the minimum sentence provision because of anxiety about that. Let us say that anxiety was then turned on its head and the minimum sentence came back into effect. Let us say that the issue that now arises, that is what minimum sentence means, failed to be determined in 2005 by reference to a section 65 case. Say the case held, now it's perfectly clear that section 65 was in the mind of the legislature this is a minimum sentence, you can't discharge without conviction because that breaches section 106, right?

MR BUTLER:

Okay.

WILLIAM YOUNG J:

Now let us assume this case comes along now would you say that section 6 has to be construed in light of the three-strikes regime and inconsistently with what a court has legitimately held to be its purpose in 2002?

MR BUTLER:

Yes I would.

WILLIAM YOUNG J:

Okay all right well that's all right. So you would – the answer to my question is text and purpose you say yes you can come up with an answer inconsistent with text and purpose?

MR BUTLER:

No but the premise behind your question which is what I was trying to –

WILLIAM YOUNG J:

Well you're not accepting it's the purpose and that's fair enough.

MR BUTLER:

Yes.

WILLIAM YOUNG J:

But say the Minister said "well we cannot ever have a situation where section 65 is avoided and therefore we have reinserted the minimum penalty provision"?

MR BUTLER:

So part of it –

WILLIAM YOUNG J:

So the question of purpose, the purpose of catching as a minimum sentence a sentence required to be imposed by reference to previous convictions was clear as possible.

MR BUTLER:

And so –

WILLIAM YOUNG J:

Now you would say that despite that, come along the unexpected three-strikes regime then that purpose and text can be ignored?

MR BUTLER:

No you see that's what I'm trying to say your Honour is I disagree with the premise behind your question because first of all, in a case like that section 9 is highly unlikely to be engaged in the first place.

WILLIAM YOUNG J:

Of course it's entirely unlikely, I agree.

MR BUTLER:

Yes so the point that has been made on behalf of the appellant in which Te Kāhui supports is then how you come about interpreting the provisions that are in front of you to produce a Bill of Rights consistent outcome. You could

say, for example, here that the key words that, and you wish to focus on, is to look at section 86D(2) and say looking at the language of section 86D(2), as has been suggested by my friends, the sentence described in that particular case has a particular level of conditionality about it which means Parliament did not intend section 86D(2) to be the type of matter which has been referred in 106 and you could say that, as a matter of proper interpretation, say –

WILLIAM YOUNG J:

That's a different interpretation, the one that's been favoured by Justice Collins, he just says: "Minimum sentence doesn't include sentences required to be imposed by reference to prior convictions."

MR BUTLER:

That's certainly one approach that he adopts and that's a carve out on a carve out.

WILLIAM YOUNG J:

Now if the purpose argument that I, if the purpose that I have attributed notionally or hypothetically to the legislature was established then that would be inconsistent with that interpretation of section 106.

MR BUTLER:

And that and again, so coming to that that's where I again, with respect, disagree and because that purpose can have its effect as was intended without necessarily in any way infringing on section 9 BORA, so what the Court does is say that section 106 can have its ordinary or natural or whatever words when one sees its intended purpose within the scope of its intended purposes because nothing we are submitting would say you shouldn't give effect to section 106 proviso in that way if that can be done by –

WILLIAM YOUNG J:

Well, I suppose it depends on whether you think the mechanism by which you get to a result is important. I mean Justice Collins' judgment, that depends on a particular mechanism.

WINKELMANN CJ:

So, what Justice Young is asking you is can we one day in relation to the Land Transport Act construe section 106 and the provisos so that it does apply to people who are convicted a second time or whatever it is, but then construe it effectively a different way on a later occasion in this context where the stakes are far higher?

MR BUTLER:

Yes.

WINKELMANN CJ:

So, and simultaneously hold those two interpretations of that section in play in the law?

MR BUTLER:

Yes. Yes, you can through a caveat to the caveat or a proviso to the proviso. That is the way you would ordinarily do it if you were looking to read out or read down the particular provision.

WILLIAM YOUNG J:

How would you read section 106 then?

MR BUTLER:

Well, you would look for example –

WILLIAM YOUNG J:

Let us say you can't say it applies only to penalties stipulated in the offence creating provision. Let's assume that it just means a sentence which below which a Court can't go.

MR BUTLER:

Well, the first thing I suppose is to try and understand what the relationship between section 86D(2) and 106 is and that is why I suppose the difficulty I suppose I'm encountering, and I really am trying to engage your Honour, is

because we come at it from the point of the different mindset or orientation, we see the possibilities being of the type that's been described that you say in section 86D(2) because of the conditionality and it's of a different type from the type of provision which it has had in mind through the proviso itself.

WILLIAM YOUNG J:
I see the issue is interpretation of section 106 which is not in itself an obviously rights infringing provision.

MR BUTLER:
No, but the rights infringing applications become manifest in this case.

WILLIAM YOUNG J:
Yes, which comes later.

MR BUTLER:
Which leads me to the second point I was going to make which is of course the Court is used to revising opinions or interpretations of statutes when a Bill of Rights problem comes along.

WINKELMANN CJ:
It's not a right's infringing provision, but it's a provision which is intended to ensure that, in part certainly, that rights are protected and maximised it.

MR BUTLER:
Are protected, correct.

WINKELMANN CJ:
For instance, in the Sentencing Act, it's intended to ensure that the outcomes of the Sentencing Act are secured, including section 8(g), and I think were just the purposes. Is that the one, the purpose of the Sentencing Act to ensure that it is proportionate?

MR BUTLER:
Yes.

WINKELMANN CJ:

So, yes, so it is consistent with. It's a rights maximising provision in itself I suppose is what I'm trying to say.

WILLIAM YOUNG J:

That's the minim sentence restriction?

WINKELMANN CJ:

No. Section 106 generally and the minimum sentence is a proviso to it.

WILLIAM YOUNG J:

The simplest reading of it is that if there's a sentence below which a judge can't go on conviction, then that isn't to be avoided by discharging without conviction, that's the view that would have seemed unanswerable to Justice France.

MR BUTLER:

And that might be a view of the state of that provision that you would have a first impression, but of course we say that when you're engaged in an interpretation exercise today under the Bill of Rights, you just don't go with first impression and so the question I suppose I put back rhetorically is how would it be going against the grain of this enactment to allow the proviso to be available in this limited set of cases?

WILLIAM YOUNG J:

I mean I accept that. That's an approach to the issue, but another approach is if you look at the Interpretation Act text and purpose, then it does point in a different direction.

MR BUTLER:

And again, that's probably where we're slightly coming at it from a slight difference because I say you must look. If section 5 is going to affect enactments, it must also affect the Bill of Rights. So it's not a battle between the two things, it's a question of trying to say: "Well how far are you entitled to

go, how far are you required to go in order to give effect to the direction in section 6." I say when you use section 5 of the Interpretation Act to interpret section 6, a long way is the answer.

WILLIAM YOUNG J:

You couldn't really, or perhaps you could, I don't know, could you have an interpretation of section 106 that it excludes a discharge where there's a minimum sentence except where the minimum sentence is regarded as disproportionate by the Court?

MR BUTLER:

As infringing section on Bill of Rights, yes. That's one reading, yes, because again you go back and you say, well, that's consistent with the underlying purpose. Realty is – I might just take you to one or two of those provisions. Just conscious of time and I might need to yield to my friends for the Crown. But I think it's in – can I just hop to this part that's in my road map, just for your Honours' benefit? I just think it's –

WINKELMANN CJ:

The Court is prepared to sit a little bit late today, I think, because these issues are important, Mr Butler, so…

MR BUTLER:

Well, I certainly don't want to hog the limelight because I'm only here as an intervener.

WINKELMANN CJ:

Yes. When you start to hog the limelight we'll tell you.

MR BUTLER:

You'll tell me, thank you. One of the things I think is interesting about the history of 106 and so on, I think it's just worth having a look at that because this goes again to our point about how you look and the orientation you come at things from, because if you start with our orientation then you become a bit

more sceptical. Are you allowed to be a bit more sceptical about some of the textual indicators or the legislative history? And I address this under my heading on page 4 of my handed up road map under “History”, and I have a little hand-up which I might ask –

WINKELMANN CJ:
Is that page 4? Paragraph 4?

MR BUTLER:
So page 4. I haven’t put a page on it. Do you see there’s an underline heading “History”, your Honour, on my road map? It reads: “History indicates proviso was designed too.” Does your Honour see that? It should be page 4.

WINKELMANN CJ:
Yes.

MR BUTLER:
A haon, a dó, a tri, a ceathair, three, four. So one of the things I think that is interesting is, and I think I’m right about this but if I’m not I’m sure I’ll be told, is that the proviso into 106, when you look at where it came from, and this was touched on by the Court of Appeal and below, came from section 42(1) of the Criminal Justice Act 1954. Now that provision applied only in the summary jurisdiction. It only applied to decision of magistrates. In contrast, in the indictable area, which was governed by section 42(2), there was no proviso and indeed the strength of the ability to discharge was emphasised in section 42(2) by the fact that it read “notwithstanding any other enactment”. I should have that. I should probably just draw your Honours’ attention to it because – it would be in volume – so it’s in the Crown’s bundle. It’s their first authority. Have your Honours got that?

WINKELMANN CJ:
The Criminal Justice Act 1954?

MR BUTLER:

Criminal Justice Act 1954.

GLAZEBROOK J:

I'm sorry, I've just – it hasn't come up properly so – just carry on.

MR BUTLER:

So the marginal note to section 42 reads: "Power of Court to discharge offender without conviction or sentence," and then 42(1) says: "Where any person is accused of any offence, any Magistrate's Court, after inquiry into the circumstances of the case, may in its discretion discharge that person without convicting him, unless by any enactment applicable to the offence a minimum penalty is expressly provided for." So the first point I just wanted to emphasise is so that's in the summary jurisdiction, not indictable. Now you might think that might be something that's relevant to the overall understanding of the intent and purpose of the legislation because it contrasts, perhaps, with section 42(2) which reads: "Notwithstanding anything in any enactment, where any person is committed to the Supreme Court for sentence…or having been committed for trial in respect of such offence, pleads guilty thereto before trial, the Supreme Court may, in its discretion, instead of sentencing the offender, direct that he be discharged." So no similar proviso.

When I looked at the explanatory note to the Criminal Justice Act 1985, and this is where my learned junior will come to my assistance because he'll remind me, I'll ask for it to be handed up, if you look at the explanatory note to the Criminal Justice Bill as was, it says, shall I just continue?

WINKELMANN CJ:

Yes, carry on.

MR BUTLER:

"This bill revises and reforms the law relating to criminal justice and repeals and replaces the CJA 1954. The principal features of the bill are summarised

below." So, we've got a heading on "general principles of sentencing". I won't take you to that. There's a heading: "Discharge without conviction, conviction and discharge and deferment of sentence. The power to discharge without conviction is retained in its present form, clause 17, and the power to convict and discharge is given a clear statutory basis. The power to convict and ordered to come up for sentence if called upon is revised. The period during which an offender may be called up for sentence is reduced from three years to one year," blah, blah, blah. So the reason just to put that material in front of your Honours is to support a submission I make in my road map which is as I see it, and I think it's open to the Court when I'm trying to understand the current form of the proviso, that the proviso had its origins in the 1954 legislation in the summary, not the indictable area. There's no reference in the explanatory note saying anything other than this is a repealing and replacing. There's no indication that the past practice, namely that in the indictable area you could discharge without conviction notwithstanding any other enactment was intended to be departed from. Rather, I say, you can look at the way in which the general provision in the Criminal Justice Act 1985 which subsequently became the 2002 Act, was intended just to be a simplification and that that it's a restriction. But the question is what is the restriction aimed at by dint of its legislative history?

WILLIAM YOUNG J:

To bring the position on trials, cases on indictment into line with that in the summary jurisdiction.

MR BUTLER:

And it doesn't say that, I say, in the explanatory note.

WILLIAM YOUNG J:

That's the effect of section 19, isn't it?

MR BUTLER:

If you look at the words, that could be true, but if you're trying to understand the purpose of it, it's not necessarily true, Sir.

WILLIAM YOUNG J:

What do you say it means?

MR BUTLER:

I say that when you're trying to understand the scope and reach of the proviso, it is legitimate to look at that history and say that if you put a proviso on the proviso as I have suggested, that you're not acting inconsistently. The sorts of penalties or sentences you are likely to be talking about in the summary jurisdiction are highly unlikely to be the sort of ones where you're going to be eager to want to exclude the availability. Sorry, have I got it the wrong way round?

WINKELMANN CJ?

So, more serious areas, you're more keen to protect the sentencing jurisdiction of the Court?

MR BUTLER:

Correct.

WINKELMANN CJ:

That is what section 106 does, of course.

MR BUTLER:

That is what section 106 does. I say if you just look at it –

WINKELMANN CJ:

It cuts out for the courts the fundamental task of the Sentencing Act of securing just outcomes.

MR BUTLER:

Correct, correct. So, I say that when you're looking at what might be regarded as just a simplification of the way in which provisions are drafted, you can have some regard to the origins of the proviso and see it for what it is we

would say, which is that its intended scope of application is not as wide as to have application in a case like this. That's all I'm saying in terms of purpose.

WILLIAM YOUNG J:
The effect of section 19 was to bring it into play on indictable cases where it previously hadn't been.

MR BUTLER:
That wasn't stated to be its purpose in the explanatory note.

WILLIAM YOUNG J:
I know it's sort of old-fashioned to look to the statute first before interpreting the history, but it does say: "Where a person is found guilty or pleads guilty, there can be a discharge unless a minimum penalty is expressly provided for."

MR BUTLER:
I can't take it any further. Your Honour is referring to the text. I have indicated the origins of the provision and the proviso and I say that's relevant to understanding what its purpose is. I can't take it any further and I won't, but I thought it was interesting notwithstanding any other enactment. That is how keen the Parliament was to preserve that ability to discharge without conviction.

So, if I could just come back to the road map where I was talking about the Bill of Rights, I've made reference, if you look at the paragraph consistent with the principle of legality and I've made reference to the fact that that principle is applied by the majority of this Court in *D's* case and then I've also referred to the presumption of consistency with international law and helpfully the relevant case law is gathered in your Honour Justice Glazebrook's judgment at footnote 196, probably worth just pausing there just to note by the by that at least in its New Zealand life a principle of or presumption of consistency with international law is a strong presumption of consistency and if you look at the article by Professor Geiringer in the *New Zealand Journal of Public and International Law* from 2008, I'm sure it's in the bundle and that's a strong

point that she makes about the strength of that presumption. So we're talking about strong presumptions and constitutional norm jurisprudence well-known to our common law and so I have referred to all of those things. But here what section 6 is, is it's an explicit legislative direction when BORA rights are engaged. So I say that as a result of that the Court's going to act with extra surety that they are acting in a constitutionally appropriate manner when giving an interpretation consistent with BORA, put another way the Courts do Parliament's bidding when they give effect to rights using section 6 of the Bill of Rights. What does this all mean? So we submit that section 6 drives the interpretation process so achieving BORA consistency wherever possible is a primary goal of statutory interpretation. After the enactment of BORA the meaning of an enactment is one reached after BORA has been factored in. I say that message needs to be – is an opportunity for this court to reinforce that message.

WINKLEMAN CJ:
What paragraph are you in?

MR BUTLER:
I'm in the middle of page 2 of my road map your Honour and there's the five indented bullet points.

WINKLEMAN CJ:
When you say "when the BORA rights are engaged", of course, I mean the BORA issue comes up, the three-strikes legislation and it lands in this unlikely provision. So it's one of those cases that where it's peripheral provision in a way which is engaged in something having to carry all this weight?

MR BUTLER:
That's correct.

WINKLEMAN CJ:
And are there any authorities you can refer us to where the English Courts have dealt with such a thing?

MR BUTLER:

Could I just –

WINKLEMAN CJ:

Reflect on that, right.

MR BUTLER:

Take that under advisement and come back after lunch perhaps or by way of memorandum, whatever works best, just conscious of not cutting across the Crown.

WINKLEMAN CJ:

All right thank you.

MR BUTLER:

So we say that the Bill of Rights consistency to use the words of my learned friend Mr Ewen from this morning is an integral part of the interpretation of all statutory provisions by, among other things, requiring a consideration of a compound legislative purpose. The purpose of the statute under challenge applied harmoniously with BORA's purposes, in other words BORA's purposes are front and centre.

WILLIAM YOUNG J:

Can I ask a question. Section 86D(2).

MR BUTLER:

Certainly Sir.

WILLIAM YOUNG J:

Says: "Despite any other enactment if on any occasion," et cetera, et cetera, what could the other enactments be?

MR BUTLER:

No idea Sir, sorry I don't mean that flippantly I just mean…

WILLIAM YOUNG J:

Can it only – but does it include the New Zealand Bill of Rights Act?

MR BUTLER:

I wouldn't have thought so Sir.

WILLIAM YOUNG J:

But what else, it's just a bit hard to see what else it could refer to?

MR BUTLER:

Well again I think it's, it doesn't quite have that specificity. It's not an uncommon drafting technique to indicate that, you know…

WILLIAM YOUNG J:

The section is predominant.

MR BUTLER:

Yes the question then becomes predominant in what context and so it's that contextual matter which needs to be resolved.

WILLIAM YOUNG J:

Well wouldn't it, I mean it is open to interpretation that it means, notwithstanding any arguments about proportionality under the New Zealand Bill of Rights Act 1990 because that's the most obvious counter argument to the application of section 86D(2).

MR BUTLER:

Well for our part we're not –

WILLIAM YOUNG J:

We'll nominate an alternative after lunch if you like.

MR BUTLER:

I will, I'll certainly do that.

WINKLEMAN CJ:
You would say if it's going to say notwithstanding the Bill of Rights Act you'd say notwithstanding the BORA?

MR BUTLER:
Yes correct.

WINKLEMAN CJ:
Because it's quite a remarkable thing for Parliament to say put the Bill of Rights Act to one side?

MR BUTLER:
And again it's not just any old right in the Bill of Rights, you know, this is a right that has been recognised down through the ages, this wasn't something that came along as a Johnny-come-lately in 1990, you know, this can be traced all the way back to Magna Carta, Bill of Rights 1688, all of that kind of stuff, to use a legal term.

WINKLEMAN CJ:
That kind of stuff, right.

MR BUTLER:
Obviously, I will come back after lunch but, of course, an important point to try and understand is when it says "notwithstanding any other enactment to the contrary" or whatever the formula is, I've just forgotten, the question then becomes to what end, because there is still inherent in section 86D(2) that conditionality. So you've got to understand the effect of the "notwithstanding" clause in its context.

So coming back to my second bullet point, in reference to the Human Rights Act (UK) section 3, the equivalent to our section 6, Lord Justice Sedley said extrajudicially in his Hamlyn lectures from 1999 that section 3 would say section 6 is like a dye that colours the fabric of our law except in those cases where the fabric is impervious to it. We say that when you look at section 6,

section 6 authorises revisiting, indeed the dropping, of previous interpretations that are not BORA consistent. The cases are gathered in Burrows and Carter and also in the other text book.

By dint of logic, if the Bill of Rights can be a reason to adopt a different meaning of a statutory provision from that which it has held without the influence of the Bill of Rights, then that by dint of logic surely must authorise the Courts to achieve BORA consistency when interpreting statutory provisions that do not yet have a fixed meaning. Presumably, those other enactments that had a previous fixed meaning had that fixed meaning by reference to matters such as section 5 of the Interpretation Act, or its predecessor, obviously, being section 5(j) of the Acts Interpretation Act 1924. So they had a natural and intended meaning but that natural and intended meaning did not prevail because of the impact of section 6 of the Bill of Rights. If we can do that for previous interpretations, surely when interpreting statutory provisions that don't yet have a fixed meaning we must do so all the more.

And we say section 6 therefore enables language to be interpreted restrictively or expansively. It can require a court to read inwards which changed the meaning of the enactment so as to make it BORA consistent. A court can modify the meaning and hence the effect of an enactment. But all that must go with the grain of the enactment. Here we're referring to *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 which was applied by her Honour, Justice Courtney, in *Gordon's* case. And, of course, in any particular case as to whether it does or doesn't go with the grain of the legislation, that is going to be an exercise of judgement, the sort of judgement the Courts undertake all the time when undertaking statutory interpretation exercises. There's nothing new or radical in that. It's really just a question of the extent to which that orientation derives the interpretation exercise.

So that methodology, the maths homework that my learned friend, Mr Ewen, referred to earlier, what's the methodology? We say identify the outcome to be avoided. The outcome can be otherwise described as no unreasonable

limit on the particular right in issue. Now obviously it's going to be a more granular exercise than that because you'll know it's with the arguments of the parties, what the particular argued for limit is.

WILLIAM YOUNG J:

Let's just come back to this because if section 86(2) means what you say it means, that despite any other enactment except for the New Zealand Bill of Rights Act it applies, that would mean if that were the right then the requirement to impose a maximum, a minimum sentence wouldn't apply.

MR BUTLER:

I'm sorry, Sir, my head's in a different space so I'm just trying to catch up with you.

WILLIAM YOUNG J:

If subsection 86, sorry, I just have got the top of the section obscure. If section 86D –

GLAZEBROOK J:

But isn't the question here section 106, not 86?

WILLIAM YOUNG J:

No, but at 86, if we look at 86D, if section 86D(2) says, effectively, "subject to the New Zealand Bill of Rights Act the Court must", which is I think what you're saying it should be construed as meaning, is that right?

MR BUTLER:

I wasn't saying it should be construed that way but rather it was put to me, well, what else can it mean, and so I would say, yes, no, it could certainly mean that. What I'm more focused on when I came back to you a second time, your Honour, I came back to you saying what, that phrase, notwithstanding any other enactment, or notwithstanding any other enactment, you still need to understand the reach of that in the context of the particular statutory provision which preserves –

WILLIAM YOUNG J:

Well, say there is effectively a proviso unless the sentence would be disproportionately severe for the purpose of section 9 of the New Zealand Bill of Rights Act?

MR BUTLER:

It certainly would be another. Whether that is available to us to argue today I'm not sure in light of the leave that was given, but for the purposes of the argument today, I am able to argue that that phrase, notwithstanding any other enactment, does not displace the conditionality which is apparent on the face of –

WILLIAM YOUNG J:

Well, I'm not worried so much about conditionality. I'm saying that if subsection (2) is subject to compliance with the New Zealand Bill of Rights Act, then there's a big carve out in the section itself?

MR BUTLER:

Yes. It doesn't trouble me or the Commission, but I don't think today I need to go that far, but I accept it's illustrative of where we would say the interpretation exercise might well drive you.

So, your Honours, I just have those bullet points identifying a BORA driven methodology, so identify the outcome to be avoided and then second approach to the Interpretation Act exercises the avoidance of that outcome firmly in mind, so primacy to be given to the BORA rights and here I cross-refer to the judgement of his Honour Justice Collins in the court below: "Seek out possibilities to avoid that outcome using ordinary judicial techniques of interpretation without any preconceptions."

WILLIAM YOUNG J:

Do you say that if a penalty that is required to be imposed is severely disproportionate, then there has to be a discharge without conviction to avoid that?

MR BUTLER:

That is the thrust of what section 107 says.

WILLIAM YOUNG J:

That would be reading severely disproportionate and out of all proportion in the same general way which would seem to be fair enough?

MR BUTLER:

Yes.

WILLIAM YOUNG J:

So, there isn't really an outlet along the lines that Justice Collins suggested?

MR BUTLER:

If the Court was troubled, for example, the example I think your Honour put to my learned friend Mr Ewen the example in paragraph [70] I think it is of the Crown's subs, if the view was well that does violence to or goes against the grain of the legislation in a particular case or that it is inapt or inappropriate to use section 106 or 107. You will have recorded, you will have noted no doubt, in our submissions we have noted that the discharge provisions is not the only mechanism through which section 9 BORA rights can be protected.

WILLIAM YOUNG J:

The alternative being judicial review or the judge – but it's a bit late in the day for that now.

MR BUTLER:

Substituting an alternate offence. Exactly so, that's the point I'm making. In this particular case, that's too late, but all I'm saying is to the extent the Court is worried about anomalies in future cases, I wouldn't mind having a crack at a judicial review and in that regard, what's interesting, I just note that in the select committee report, it's worth noting, there's a footnote indicating that all police prosecutions would involve a –

WILLIAM YOUNG J:
Should be peer reviewed.

MR BUTLER:
– third will be peer reviewed by Crown law.

WINKELMANN CJ:
Yes, well Justice Arnold, we should probably highlight for the Crown solicitors that we did want to ask about whether that peer review system had been put in place and whether it had occurred in this case.

MR BUTLER:
It was something that did occur to me as well. I don't have an answer to that, but I'm sure the Deputy Solicitor-General will, but it did seem to me to emphasise the appreciation that was had that this is a big deal and you really need to peer review it and I would feel pretty comfortable, I'm not saying I would win, but I wouldn't feel like a fool, getting up and arguing on a judicial review that while generally speaking, prosecution decisions are not subject to interference on judicial review where what we're talking about is something that could be described as grossly disproportionate. That is a judicial review would be an available mechanism and what you'd be looking for the prosecutor to do in that case is either not prosecute and/or prosecute on a lesser charge that might avoid the application of the discharge provisions. And to the extent that somebody says: "Well, goodness me, that can't be right," the exact example that your Honour used of non-refoulement, non-refoulement, that's all we do. We say notwithstanding the fact that there is somebody accused of something really horrid here, we have to look at the other matters that are in the balance. If we're prepared to do that for foreigners, why wouldn't we do it for our own people? So, it's with the Irish accent.

So, your Honours, I see we're bang on one.

WINKELMANN CJ:

Are you nearly finished?

MR BUTLER:

Do you want me to keep going?

WINKELMANN CJ:

How far are you from finished?

MR BUTLER:

I probably need – you've got, you had one or two bits of homework for me to do over the lunchbreak.

WINKELMANN CJ:

Shall we come back at two?

MR BUTLER:

I was going to say, if you're happy to come back at two.

WINKELMANN CJ:

And will you finish in 15 minutes?

MR BUTLER:

And then I should be done quicker than that unless your Honours have more questions for me. I intend to be done quicker than that. I just intend to touch briefly on one or two of the items under the Sentencing Act provisions to draw them to your attention, a bit like what I did with the Criminal Justice Act 1954 antecedent. It's just material of that sort. I don't wish to go over the ground that's been covered by my learned friends for the appellant, so 10 minutes.

WINKELMANN CJ:

Ms Laracy, how long do you think you'll take?

MS LARACY:

With respect, Ma'am, I doubt I would need more than an hour and a half.

WINKELMANN CJ:

All right, so I think that's all right. We might just have to sit a bit late, but possibly not. We will come back at two.

ARNOLD J:

Could I just intervene before we finish because I do want to follow up on that point Mr Butler raised about the Cabinet agreement on 1 March 2010 that the Commissioner was directed to refer or prosecutions of stage-3 offences, strike-three offences, to the Crown Solicitor I think it said, peer review. Now, can we get a copy of the Cabinet decision? Do you have that?

MS LARACY:

I don't have it and I haven't seen it, but I can made enquiries at the lunch adjournment. That can be provided and shared.

ARNOLD J:

Secondly, was there some policy developed to deal with that or not within the Crown Law or the Crown solicitors?

MS LARACY:

There was and there is and I have, in the short time I've been in the role, seen that in operation. What I don't know and I will also find out is how that policy is documented, which way it is given effect.

ARNOLD J:

Thank you.

WINKELMANN CJ:

Right, we will take the luncheon adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.02 PM

MR BUTLER:
Tēnā koe e ngā Kaiwhakawa.

WINKELMANN CJ:
Mr Butler, before you get going, Justice Arnold has a question for, or more of an observation.

ARNOLD J:
It was just arising out of the exchange you had with Justice Young in relation to 86D(2) which says despite any other enactment, the following must happen, and the question was, well, does that "any other enactment" include the New Zealand Bill of Rights? Now if it doesn't because of the particular status that the Bill of Rights has and the kind of language you would expect to see if you were effectively removing it from consideration, a possible solution to the problem is to say, well, "despite any other enactment" doesn't exclude the Bill of Rights, so that in a situation the very high test of shocking the conscience of the nation, that sort of thing, is met. Section 9 would bite in in subsection (2) and that would actually open up the full range of sentencing options. One of the very unattractive features I think of the 106 argument is that it offers two extremes. You either have the third-strike maximum or you have discharge without conviction. In that, it's a sort of unattractive set of options. But if you could read it in through section 86D(2), and it would only operate in a small group of cases that reached this extreme level, it then opens up the full range. Anyway, that's a possible way of looking at it. I just wondered if you had any comment on that.

MR BUTLER:
And from Te Kāhui's perspective that is absolutely an interpretation that we would support.

ARNOLD J:

But it ultimately deals with the problem better because the problem arises at the third-strike level really, I think.

MR BUTLER:

Yes, that's right, and what it would enable is a targeted response that reflects the spectrum of cases that might come before. We accept that probably that the solution involved here really is designed to deal with the extreme end of disproportionality, to use the phrase that my learned friend, Mr Ewen, used earlier, to which we would say, well, if at least you deal with that end of the really grossly severe, like really, really grossly severe things, at least you're doing something. It's better than nothing. But what your Honour has suggested obviously is a much more – there's more of a range to it.

ARNOLD J:

Personally, that sort of analysis would apply in the extreme cases only.

MR BUTLER:

In any event?

ARNOLD J:

Yes.

MR BUTLER:

Quite, quite.

ARNOLD J:

Because that's really where, in particular, the international obligations bite and…

MR BUTLER:

That's right, and the Court has been very – this Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, *Taunoa's* case, was quite clear about, you know, there's a difference between section 9 and 23(5).

I don't need to rehash the whole thing. It was quite clear about pitching, the reach. The scope of section 9 and what it prohibits are really at the extreme end.

ARNOLD J:
Yes. All right, thank you.

MR BUTLER:
Thank you, Sir. So I was given a bit of homework over the luncheon break. Unfortunately, my homework effort has been…

WINKELMANN CJ:
A D?

MR BUTLER:
Hasn't got me very far. So what I was going to indicate was would it be acceptable if I could have a day or two just to come back to your Honour on the sort of example your Honour was just positing, whether I can find something in UK case law?

WINKELMANN CJ:
Yes, well, that, Justice Arnold's suggestion, meets my concern, of course, because –

MR BUTLER:
Yes, I was going to – correct, it would.

WINKELMANN CJ:
Because the concern that is that if you're engaging with – if you're altering the meaning of sections which are not really at the heart of the problem, you might have sections having multiple meanings in different circumstances.

MR BUTLER:
Quite. Not something we'd be uncomfortable with. But I can understand where the Court is coming at it because often there is a desire to cleave to

statutory scheme coherence, elegance, the sort of things that I touched on earlier, so I get it, so as to speak.

GLAZEBROOK J:

Can I also just indicate that, and it's following on from the point made by Justice Arnold, that if this is correct then in fact the first time, and let's assume there was no other offending associated with this, when Mr Fitzgerald came up for sentencing in fact he should have been, on this argument, discharged without conviction, and yet what we have here is somebody who quite clearly is in fact a danger to the public. So the choice between discharging without conviction or seven years, again it's just that unattractiveness of that proposition. Now at the moment, given that he's spent already all this time in prison, it's not an unattractive proposition but it certainly would have been at the time of first sentencing given that in fact what should have happened most probably is that he had the assistance that he needed through the Mental Health outlet in fact, and that would have been good not only for him but also for the safety of the public.

MR BUTLER:

True to a point, your Honour, and just simply to elaborate on that, what I simply mean, it goes back to a point I made in my opening remarks which was that, of course, there was other offending that occurred here which in fact in the overall scheme of things was probably more serious, the actual assault, as opposed to the indecent assault. The only reason that the Court wasn't able to deal with them in the way in which you've indicated –

GLAZEBROOK J:

No, no, I understand. I was positing a situation where there wasn't any other offending here. Here obviously there would have been a most sensible way of dealing with it and another sensible way may have been not charging him with indecent assault but merely assault on the…

MR BUTLER:

Not charging him. Yes.

GLAZEBROOK J:

So I was positing a situation where there wasn't any other means of dealing with him because there was no other offending.

MR BUTLER:

Yes, I understand the point and, as I said, I can understand the dilemma in those sort of circumstances. So I really am conscious, I said to my friend that I would be for sure done by 2.15, so shall I just crack on with just one or two of the final points I wanted to touch on? So here what I'm looking at is just the Sentencing Act provisions part of my road map and I literally am just going to touch on lightly a couple of points. I'm not going in detail to them. The first one is just under the heading of Sentencing Act. It was interesting to see that in the Court of Appeal decision of *Barnes* the way in which the Court of Appeal read the three-strikes legislation in that particular case led it to deposit that an approach that avoids manifestly unjust outcomes will be in accordance with the legislative intent. I just think that's just, again when you're coming to look at the Sentencing Act and figure out what's it actually doing, it was a recognition by the Court of Appeal albeit in respect of a second strike offence and that it was legitimate for it there to search for an outcome it had found that avoided a manifestly unjust outcome. I won't go into the detail of the case, it's slightly involved your Honours, involving parole and ineligibility for parole and therefore have something backed on what the actual sentence is that you sentence somebody to to give somebody a –

WINKLEMAN CJ:

Yes we're all familiar with that.

MR BUTLER:

Great, super. I just wanted to just show you the reference when I talked earlier about the worst repeat violent and sexual offenders I just have a reference, you'll see the second paragraph from the bottom of that page to the relevant select committee report and that's a reference to the Crown's bundle of authorities, so I just wanted to note that. Over the page, your Honours, under the heading of *anomalies* I just want to provide you with a reference to

some material which might help in terms of, even if you can't do everything to avoid inconsistencies going at least some of the way is appropriate and so I have made reference to a text but I've also referred to *AMM* and of course I should have referred to *R v Pora* [2001] 2 NZLR 37 (CA) which is another example of that.

WINKLEMAN CJ:
Where are you, is this on the bottom?

MR BUTLER:
So I am on page 4, do you see there's a heading underlined called *anomalies*?

WINKLEMAN CJ:
Yes got it.

MR BUTLER:
So it's the first paragraph of that your Honour. And then lastly, there was a point raised by your Honour the Chief Justice just about ICESCR and had anybody made reference to that, not in terms but it's clear that there was concern raised obviously about the experiences that Mr Fitzgerald would have if incarcerated. Your Honour's point was to add on top of that inability to get the right medication and those sorts of things, yes we would say those sorts of issues are relevant. What the impact of imprisonment can be in the usual way is something that the courts typically have regard to when discharging the sentencing provisions. I just simply refer your Honours to a case where section 9 was seen as potentially relevant to whether or not imprisonment should be imposed when somebody had been convicted of a rape. So that's at our bundle, tab 30, a decision of his Honour Justice David Williams. More broadly the reference had been made by my friend Mr Ewen and I mean no criticism of it when I think he indicated that ICESCR was a covenant that not receive so much attention or the status of its not so clear, I think. Yes exactly Sir probably hasn't been, it hasn't had the provenance of what perhaps it might have. So I just wanted to remind the Court.

WINKLEMAN CJ:

What hadn't had the provenance, sorry?

MR BUTLER:

ICESCO.

WINKLEMAN CJ:

Okay sorry, sorry.

MR BUTLER:

Yes so I just wanted to remind the Court that in fact ICESCR has been referred to in quite a number of cases, including I'm sure in this court, and if it would be helpful to your Honours for me to just do a short list of those things for you I'd be more than happy to do that. You will understand that for its part Te Kāhui very much adopts the approach that the international covenants are indivisible. It's not just – while we talked a lot about ICCPR, we see them as very much complimentary, it's the indivisibility and universality of the covenant is really important from us, so with the issue having been raised, and we would not wish to miss an opportunity to just remind the Court of the prominence or otherwise of the ICESCR and just in that regard it's probably worth noting that there is now an optional protocol for communications under ICESCR, it was the one, the last one and that's finally come through and if I remember rightly New Zealanders, complaints from New Zealand can now be made under ICESCR, I'm pretty sure, under that optional protocol but I can clarify that for your Honours so that would be only by your Honours' leave.

WINKLEMAN CJ:

Yes that you can file a memorandum setting that out.

MR BUTLER:

Thank you it would be very short and just contain references to the relevant cases. Your Honour, unless, your Honours, unless you have any other questions for me that was all I have proposed to deal with and I'll yield to my friend.

WINKLEMAN CJ:

Thank you Mr Butler.

MR BUTLER:

Thank you.

MR EWEN:

There was one point on discussion with Ms Laracy in relation to the hierarchy of sentences and when 10A came in. I've looked at that in more detail. When the Bill was enacted, it did not contain a single section that had the hierarchy of sentences. What it had was sections 11 through to 16 which started off with discharges, then a fine and the only time the Court is entitled to step up to a community-based sentence is a fine wouldn't do. 10A came in when Parliament enacted intensive supervision, community detention, home detention as discrete options, so that's when it came in as a discrete section setting out the hierarchy, but it had been there in a series of sections in de facto form beforehand. Just to clarify matters.

WILLIAM YOUNG J:

The other point is that Mr Campbell's speech which you referred to did come after the supplementary order paper, but I can't reconcile it with the supplementary order paper. It's as though he hadn't read it.

MR EWEN:

I'm in the process of going through the legislative materials and the way –

WILLIAM YOUNG J:

Well, I mean he talked about what they did in the select committee and he says that it is good that it is now possible to discharge people without conviction despite these sanctions, but it doesn't actually correlate to what the supplementary order paper has said.

MR EWEN:

Yes, I'm still working my way through that one, your Honour.

WILLIAM YOUNG J:
Okay.

MR EWEN:
I will address that in reply hopefully.

WILLIAM YOUNG J:
thank you.

WINKELMANN CJ:
Ms Laracy.

WILLIAM YOUNG J:
I shouldn't say he didn't read it. He didn't engage with it.

MS LARACY:
May it please the Court. For the Crown I propose to make a few very introductory statements about the Crown's position and then it seems to me that it would be most useful for me to turn to the words in section 86D and then particularly the word "if convicted" and then turn to a discussion of section 106.

Before I do that, I wonder if Ms Hamill could have the leave of the Court simply to address the matter that arose just before the adjournment about the Crown's position in terms of providing peer review advice to the police? A document has come through and it has come to her rather than me.

WINKELMANN CJ:
Yes, she can.

MS HAMILL:
Thank you, your Honours. Mr Registrar I think has distributed a document to you electronically. I just want to check if you've received it. It's a

memorandum of understanding between the Solicitor-General and the Commissioner of Police.

WILLIAM YOUNG J:
Whereabouts is it in the document?

MS HAMILL:
If I can refer your Honours to page 12 which is schedule B of the document and point 2 on that page.

WINKELMANN CJ:
Sorry, what is the paragraph number?

MS HAMILL:
So it's schedule B on page 12 of the document point 2 paragraph [2] and I will read it out just for the benefit of the record: "The Police at Police cost will refer all prosecutions involving a stage-3 offence as defined in section 86A of the Sentencing Act 2002 to the Crown Solicitor for peer review either pre-charge or by the second appearance." So, this memorandum essentially sets out that agreement between the police and the Solicitor-General and that is in force and it is operating at this time.

Enquiries were made over the lunchbreak to see if the Cabinet paper could also be obtained. Unfortunately, at this point, we have got no further than this memorandum of understanding, so that is before your Honours.

WILLIAM YOUNG J:
Are charges like this sometimes just pleaded down?

MS HAMILL:
That's something I wouldn't be well placed to answer at this juncture having just made those preliminary enquiries.

WINKELMANN CJ:

So, we don't know if that practice was followed here then?

MS HAMILL:

We know that what happens is the charges are referred to the Crown Solicitor for peer review in these cases.

WILLIAM YOUNG J:

So, we don't know whether that's just as to whether the charge can be made out or whether this is an appropriate case to invoke there three-strikes regime?

MS HAMILL:

No, not at this juncture and obviously this case will have some significance to that, that consideration. Unless I can assist your Honours any further on that point, I will revert to my learned senior Ms Laracy.

MS LARACY:

I can confirm that the Crown Solicitor at Wellington did review the police charging decision in this case pursuant to that memorandum. The responsibility on the Crown Solicitor in that situation is obviously to look at the prosecution guidelines that the Solicitor-General has promulgated and take into account not just the adequacy of the evidence, but also the public interest which would include Bill of Rights considerations.

WILLIAM YOUNG J:

Is that included in the Solicitor-General's guidelines or is it just implicit?

MS LARACY:

That there are two aspects to the, yes?

WILLIAM YOUNG J:

Yes, the proportionality of the charge.

MS LARACY:

In every charging decision there are two factors that must be considered. One is the sufficiency of the evidence and the other is the public interest. Of course, the public interest is not exhaustively defined, but it does take into account the severity of the impact on the individual and mitigating factors personal to the individual.

The Crown's position on this appeal is that the words and purpose of section 86D(2) require the Court to impose a sentence which is, in this case, manifestly unjust and severely disproportionate in all the circumstances of the appellant's position.

While this particular case and circumstances could of course never, or were not contemplated by Parliament, that would be impossible, the proposed law – while his particular circumstances were of course never contemplated, that the proposed law might have seriously disproportionate results upon the third strike was and the words of the section 86D are clear that the sentencing court should not be able to ameliorate the effect of that by imposing a lesser lead sentence.

WINKELMANN CJ:

Sorry, where are you reading from?

MS LARACY:

These are simply some introductory words which explain the position that the Crown has taken in our written submissions.

WINKELMANN CJ:

Can you just repeat what you said because I'm not sure whose purpose that was you were saying?

MS LARACY:

The point I have made is that the words of section 86D and the purpose of that enactment are clear and their effect is to prohibit the Court through an

exercise of discretion from being able to ameliorate the effect of that section. That section requires the Court to impose the maximum lead sentence and the effect of that section is to oust any discretion on the part of the sentencing court.

My submission is that there is no alternative meaning available to the Court that can be resolved by application of section 6 of the New Zealand Bill of Rights Act without doing significant violence to the provisions of the Sentencing Act, both section 106 and section 86D, and to guiding principles in the Act that are critical to the everyday working of the Sentencing Act. It would be in a significant number of cases to do what the appellant requests and would create distorted and perverse outcomes when it comes to sentencing and the application of section 106. My submission is that some of those outcomes would themselves be, for a variety of reasons, an affront to justice.

So in conclusion for the introductory remarks, it is submitted that the majority in the Court of Appeal were right to find that the meaning of section 106 and the meaning of section 86D were clear and unambiguous having regard to the text of those provisions, the purposes of those provisions and the scheme overall –

GLAZEBROOK J:
So are you suggesting you need an ambiguity before section 6 of the Bill of Rights can come into play, or do you merely need another available interpretation?

MS LARACY:
You need another available interpretation.

GLAZEBROOK J:
So it doesn't matter whether it's clear and unambiguous because an ambiguity is not needed, you accept that?

MS LARACY:

I accept that the meaning must not be inconsistent with the –

GLAZEBROOK J:

So you're accepting it's not inconsistent with the –

MS LARACY:

The text.

GLAZEBROOK J:

The text and purpose?

MS LARACY:

And purpose, yes, Ma'am. One of the things in my submission that it's important to understand about this case is that the breach of section 9 here does not concern the fact that a discharge without conviction is unavailable. There is no right, there is no fundamental right, there is no right in the Bill of Rights, there is no right in the Sentencing Act, to a discharge without conviction in any circumstances.

What we have in section 9 is a negative right that the citizen holds against the State to ensure that they are not the subject of disproportionately severe punishment. Turned into a positive right that the Courts can and must work with every day when sentencing, my submission is that what that right means is that individuals who come before the Court have a right to a proportionate sentence.

Proportionality in New Zealand has been most recently codified and reflected in the Sentencing Act. I don't suggest those principles weren't always there, but that's one of the great values and achievements and purposes of the Sentencing Act was to pull all those principles together, codify them and make them transparent and readily available and clear, and those fundamental provisions in sections 7 and 8 of the Sentencing Act, provisions such as the

indication around how the hierarchy of sentences work, all of those provisions are designed to assist the Court ensure proportionate sentences.

So if the words of section 86D(2) do indeed, and we'll obviously have to come onto this, if they do oust the ability of section 106 to operate, my submission is that they also preclude the ability of the Court on a third strike to give effect to those other really fundamental principles and purposes of sentencing which are designed to achieve justice in every case while recognising that the way in which cases come before the Court reflects many different circumstances, both of the offending, of the offender, the nature of the charge. So if that –

GLAZEBROOK J:
Is this the submission then that section 86D(2) stands on its own –

MS LARACY:
Yes.

GLAZEBROOK J:
– totally outside any of the principles of the Sentencing Act and the Bill of Rights that would otherwise apply, because if so it's, to me, slightly an odd submission?

MS LARACY:
Yes. Yes, Ma'am, it is essentially.

GLAZEBROOK J:
Because I thought the submission was the whole scheme of the Act, and that's what you said at one stage, that the whole scheme of the Act means that in fact you do injustice to the whole scheme of the Act. What you really say is you do injustice to section 86D(2) which stands on its own and the rest of the Act has no application whatsoever, including those fundamental principles in the Act itself and in the Bill of Rights?

MS LARACY:

That's right, and that is the –

GLAZEBROOK J:

That's the submission?

MS LARACY:

Well, that is the effect of section 86D(2). That is not to say that in every case where section 86D(2) is applied it will necessarily be disproportionate. There are cases where the maximum sentence is appropriate and is proportionate.

WINKELMANN CJ:

Is it really? Is there not another way of looking at the section which is that Parliament is saying we are telling you this is proportionate, because we have said people who repeatedly violently offend in a serious fashion and ignore warnings, the need for deterrent ups and therefore this is a proportionate response?

MS LARACY:

My submission on that, and it does require having regard to core parliamentary materials, is that Parliament itself was aware that there would be cases where its application of section 86D(2) was going to be disproportionately severe, that it was going to be extremely harsh and in normal circumstances would be unfair, but the public interests in general deterrence and in certainty of sentence and in certainty of outcome…

WILLIAM YOUNG J:

And incapacitation, I guess.

MS LARACY:

Sorry?

WILLIAM YOUNG J:

Incapacitation.

MS LARACY:

And incapacitation. Those public policy imperatives justified it.

ARNOLD J:

So are you saying that Parliament understood in these extreme cases, which is what I'm concerned with and I think everyone accepts this is one of them, in that very extreme case, that New Zealand would breach its international obligations and, moreover, require the Courts to facilitate that breach?

WILLIAM YOUNG J:

I think the answer is yes, isn't it?

MS LARACY:

To answer your question directly as it has been put, it is appropriate to say that in the materials I haven't seen anything that expressly recognises that Parliament said this is what we are doing. However, a step back from that, it is implicit that that is the logical consequence because Parliament was aware that section 86D(2) and it's mandatory nature and the requirement to impose a maximum penalty and the failure to create any sort of safety valve, would, given the wide range of circumstances of offending that come before the Courts, would create a one-size-fits-all that for many of the cases within that size would be disproportionately severe, and I can take the Court, it's in our submissions, but I can take the Court to parts of the legislative materials where it is clear that that is the very thing that was before Parliament. And nonetheless, that notwithstanding those interests of certainty and deterrence and clarity, and a concern that the Court might get around the provisions if they weren't very rigid, if the qualifying criteria wasn't very clear, those were the imperatives that led to section 86D(2).

GLAZEBROOK J:

Well, of course, there's all sorts of ways of getting round it, by the Courts and also by prosecuting authorities by charging different offences, by not charging someone, by providing warnings, by discharging without conviction at stage 1 and 2, all of which get around what you say was the requirement of section 86D(2) which is that everybody who's on a third strike is actually sentenced to the maximum.

MS LARACY:

That's right, Ma'am. The difference is that Parliament is governing the thing that the Sentencing Act can govern which is the –

GLAZEBROOK J:

Well, it could have governed all the other things as well. It could have said you're obliged to charge, there can't be any warnings given, you can't discharge without conviction at number 1 and number 2.

MS LARACY:

It governed the position after conviction.

WINKELMANN CJ:

So you're not saying that there's anything expressly in section 86D which says disregard, this overrides section 9 of the New Zealand Bill of Rights Act?

MS LARACY:

No, those words do not appear. What I say is that the –

WINKELMANN CJ:

No, but it's not necessarily implicit in a sense used in *Simms* and some other cases. It's not an inevitable conclusion there that Parliament intended – are you saying it's an inevitable conclusion that Parliament intended to require courts to impose sentences which were in breach of section 9 of the Bill of Rights Act, disproportionately severe?

MS LARACY:

I'm saying that Parliament intended and it –

WINKELMANN CJ:

I know you're saying Parliament intended.

MS LARACY:

Yes, in a very – and the enactment envisages –

WINKELMANN CJ:

But quite apart from the vibe of what Parliament did, I'm asking you what concrete materials you would refer us to to satisfy us that Parliament intended to require the Courts to impose sentences which were in breach of section 9?

GLAZEBROOK J:

Section 9 being, of course, a very high standard as *Taunoa* makes clear, not just merely a disproportionate sentence but one that shocks the public conscience or whatever the terminology is.

MS LARACY:

My submission is that the words of section 86D(1) are clear in terms of creating a rigid threshold for when that section is engaged and for creating a very – an unambiguous mandatory direction that the maximum sentence must be imposed. There is no exception there and nor is there any sort of qualifying proviso to it in the nature of the manifest injustice safety valve.

WINKELMANN CJ:

But in another section, in another piece of legislation, Parliament has told us to assume that we're not intending to breach section 9. So it's said to us, whenever we read – when courts, whenever you read legislation from us, assume that we're intending not to breach section 9.

WILLIAM YOUNG J:

Always assume?

MS LARACY:

My –

WINKELMANN CJ:

Yes, unless there's counter-indication.

MS LARACY:

In the generality of cases, Parliament no doubt did not think it was breaching section 9. As I have said in my introductory words Parliament did not specifically contemplate a case exactly the same as –

WILLIAM YOUNG J:

Can I just pause there? There was a section 7 report although it was in relation to the Bill as earlier formulated.

MS LARACY:

There was.

WILLIAM YOUNG J:

But that addressed serious disproportionality, didn't it?

MS LARACY:

It did. So that was at the point where, obviously, where the section 7 report is filed after the Bill has been introduced and it raised the express issue of breach of section 9 and disproportionately severe treatment and it also made the point that there was no scope under section 5 for justification if that breach were to arise in a particular case. It identified that the proposed Bill would, and this is the way talking about the whole of the three-strikes regime would, create disparate treatment of offenders without a rational basis in the sense that the escalating penalties weren't necessarily referable to the gravity of the offending on any particular occasion.

The significance, or the lack of significance perhaps in this case, of the Attorney-General section 7 report is that it was made in the context of the

original bill and it changed significantly in the original bill provided for a life sentence for everyone who qualified at stage-3. Now that is obviously ameliorated by Parliament having taken account of the, among other things, the Attorney-General's section 7 report, but those concerns about disproportionately severe treatment and that language was carried through right to the later iterations of the bill. So, the Minister's speech in introducing the bill for the third reading, for instance, turned to discuss the amendments that had been proposed late in the piece by Labour members of the committee and noted that the reason for those proposals was in order to reduce the potential for disproportionate sentencing and unjust outcomes. The Honourable Minister Collins said: "These amendments did not receive the majority support of the committee. The opposition fails to understand that this bill deliberately puts in place an escalating regime of penalties for which I make no apology."

WINKELMANN CJ:
But, all the same, she's not saying she wants to impose, wants the Act to operate to impose sentences which shock the conscience of the nation or whatever it is that *Taunoa* says.

MS LARACY:
I couldn't argue against that.

WINKELMANN CJ:
I was going to say the second point is what are we meant to make which is something I raised with other counsel, what are we meant to make of all this peripheral material because really what the Bill of Rights Act tells us to do is to look at the words of Parliament as an act of the legislation?

MS LARACY:
Yes.

WINKELMANN CJ:

And so we start with it is now part of the fabric of our nation that our Parliament intends to uphold its international obligations and to promote rights. So, when we look at a piece of legislation, we're looking at it as sitting in that fabric. It's part of that fabric and yes, it's free for Parliament to say: "But on this occasion we are going to authorise or require the courts," who are bound by the Bill of Rights Act because it's actually speaking to the courts because the court is the sentencing body. We're going to require the courts to impose sentences which are in violation of section 9. If it was going to say that, wouldn't it be speaking much more clearly than it does in section 86D?

MS LARACY:

My primary points in response to that Ma'am are that, as I will attempt to go on to show, the words of section 86D(2) are clear, in particular what those words: "If upon conviction" mean, and I will come onto that.

The second point is that shouldn't, or do I accept that Parliament didn't use a particular formula of words to indicate that it was creating, it was prepared to create a disproportionately severe outcome and it should have said that in express language.

GRAZEBROOK J:

D (SC 31/2019), or the majority decision in *D (SC 31/2019)* would suggest that is the case wouldn't it?

MS LARACY:

Well, what I do rely on from *D (SC 31/2019)*, with respect Ma'am, is the statement in your Honour's decision that no particular – and in *Butler and Butler*.

GLAZEBROOK J:

No, no, but that was a minority decision. It was overruled. So the majority came to a totally different decision so you can't rely on anything I've said.

WILLIAM YOUNG J:
But not on this point though.

MS LARACY:
I didn't read the majority as saying that there needed to be a magic formula of words. The concern –

GLAZEBROOK J:
No, no, it didn't say be clear.

WINKELMANN CJ:
It said clear.

MS LARACY:
Yes. Has to be clear, and clarity means unambiguous and not susceptible to an –

GLAZEBROOK J:
But I would have thought clarity in terms of actually overriding the particular right in question, *D (SC 31/2019)* was slightly complicated by the fact that the section 7 report actually did justify the register in its first place. It was merely the inability to review. So it was a slightly different situation in terms of what was being breached here, compared to this breach which section 9 must be one – a breach of section 9 must be one of the most serious breaches you could have of the Bill of Rights.

MS LARACY:
And in this case what that means, in my submission, for what it's worth, is that a requirement to impose in every qualifying case the mandatory sentence in the context where it's recognised that those qualifying cases vary hugely from relatively minor to very serious, that that requirement can have disproportionate effects. That's the right that is engaged here, and one of my points is that section 106 is only engaged in this case because Parliament has indeed done that very clearly. It has not left any room for a proportionate

sentence to be imposed. The only possible outcome is a discharge without conviction, at the complete opposite end of the spectrum.

GLAZEBROOK J:

Well, except if Justice Arnold's interpretation of section 86D(2) applies in which case – in fact all of the sentencing options would in fact be available in order to remove the section 9 disproportionality, which is different from just disproportionality.

MS LARACY:

And I will come on to that.

WINKELMANN CJ:

Because there is a gap in your submission, I think, because I think there is something in what you say that it appears the clear parliamentary intent, appears to be. I would put it like this. Parliament has said that people who are seriously violently offending repeatedly and ignoring warnings have to – need high levels of deterrence. So we are prepared to require – and there's a general deterrence for consideration. We are prepared to require disproportionate sentences, so the principles in that part of the Sentencing Act, section 8, to the extent they require proportionality are suspended. But it doesn't go – but there is a gap between that and a section 9 breach. Disproportionality reaching the level of section 9. And that's the gap that I'm not seeing your submissions addressing really.

MS LARACY:

That in my submission turns on a close reading of the words of section 86D which I'll come onto. Just before I do that, can I just address an important but perhaps a preliminary issue that has come up and that is what role parliamentary materials and how far should the Court go in looking at what particular materials. I don't propose to suggest I have a submission that comprehensively answers that but I do make two submissions in that regard. One is I would adopt Justice Arnold's – the point inherent in the question he put to my learned friend about this earlier, that it must be reasonable to look at

relevant parliamentary materials like the explanatory note and potentially supplementary order papers where this particular issue was specifically identified and rejected because that is part of the legislative reality. Those were his words.

The other point is, and perhaps this is even more relevant here, the Crown's case and the majority's case doesn't rest on trying to glean parliamentary intent except from the text and the purpose of the enactment. There have been references made by all parties and the Courts in this case to Parliament's intent but my submission is that that's not critical for resolving this case. However, it does become particularly –

GLAZEBROOK J:
Can I just check that there was quite a major reference in the majority's decision to parliamentary history so I'm not entirely sure what the point there is?

WILLIAM YOUNG J:
It's purpose. But that's purpose rather than intent, isn't it?

MS LARACY:
I know, I would suggest –

GLAZEBROOK J:
No, no, it's absolutely fine if we're making the distinction between purpose and intent.

MS LARACY:
Yes, I do.

GLAZEBROOK J:
What I wasn't sure is whether you were saying they only looked at the text because I'm not sure that's right.

MS LARACY:

No, no.

GLAZEBROOK J:

And I'm not sure your argument raised it just on the text.

MS LARACY:

There is a difficult perhaps intangible line between where looking at certain materials from the House remains in the sphere of parliamentary intent enquiry as opposed to legislative purpose. But what I say is this case rests on understanding the text and the purpose of the enactment in an orthodox sense, but I do say that the parliamentary materials do become relevant where the proposition that is put is that Parliament can't possibly have realised that it was going to have this effect. Parliament can't possibly have been prepared to be so harsh. It can't have realised that there would be very minor cases caught by this sort of provision. A range of the Parliament, these submissions have been made, in large part the minority judgment in the Court of Appeal rests on that type of reasoning. And reference to the parliamentary record does provide an incontrovertible basis for saying to the extent that rather optimistic submission is made, that Parliament can't possibly have known or intended certain things, it controverts it, that Parliament did.

WINKELMANN CJ:

But isn't that irrelevant? Parliament may intend that, but isn't the point of the Bill of Rights Act that it actually has to own it in the legislation. If Parliament is going to direct the courts that they must impose sentences, even when they are in breach of section 9, then they have to speak with incredible exactitude?

MS LARACY:

I agree, Ma'am.

WINKELMANN CJ:

So, to some extent, in the face of the Bill of Rights Act in section 9, Parliament's intent and their purpose even to some extent as extracted from

peripheral materials falls away. What we're left with is looking at the text of the legislation.

MS LARACY:
Yes.

WINKELMANN CJ:
And, with the Bill of Rights Act?

MS LARACY:
Yes. So, with that, if we can turn to the text of section 86D(2) itself, the words under contention here are the "if" in: "If on any occasion is convicted." Just to be clear what the Crown says and doesn't say: the Court of Appeal said that 86D(2) has no application unless and until a conviction is entered. We accept that. We also agree that section 86D(2) is not itself a direction to convict. But, and this is where the Crown submission departs from those of the appellant's and the learned intervener, the Crown's submission is that the words "if" do not create a mechanism to avoid entering a conviction. They do not create a discretion with the words "if".

It is not a, as my learned friend Mr Butler referred to it, it is not a proviso and those words "if is convicted", are not otiose and the reason for those set of propositions is that the words "if" in context and in its ordinary meaning reflects a precondition. This is a sentencing provision in a hierarchy of sentencing provisions focused on the sentence that must be imposed and the words "if convicted" mean "assuming or when" a person is convicted, they are reflecting that a conviction needs of necessity to be entered for sentencing to occur and assuming that has happened, this section 86D(2) direction is the next step. It is not creating a discretion.

GLAZEBROOK J:
It would be odd, even if they didn't have those words, you certainly wouldn't be entering or sentencing anybody who hadn't been convicted, would you?

MS LARACY:

No.

GLAZEBROOK J:

So, the words mean nothing in your submission then, they're just stating the obvious?

MS LARACY:

That's right and so the meaning of them is it's either obvious or it's by necessary implication. They assume a conviction and importantly there has been a history of case law around this and it has been consistent on this particular point in the leading and most recent case law to confirm this is the *Eteveneaux* case which I can come on to talk about.

WILLIAM YOUNG J:

I'm sorry, concerning what?

MS LARACY:

Eteveneaux. It's in our bundles.

O'REGAN J:

The old case about *Eteveneaux*.

MS LARACY:

Eteveneaux. Police v Eteveneaux.

O'REGAN J:

But do you make anything of the fact that the other strike 1 and strike 2 ones say "when" and this says "if"?

MS LARACY:

I don't, Sir. I hadn't picked up on that until the point was made and I won't forget but if I can come back to that.

O'REGAN J:
Sure.

MS LARACY:
My main point, and this is something which is not in my written submissions, it occurred to me as I was preparing for this, is that the law's – it's important to recognise that the law's general direction is to enter a conviction and the basis for that comes not from the Sentencing Act, which we are dealing with here, but from the Criminal Procedure Act 2011, and section 114 of the Criminal Procedure Act is, in my view, directly on point here and effectively reflects and codifies the position that the Courts have consistently got to in the case law ending with *Eteveneaux*.

WILLIAM YOUNG J:
Sorry, what section?

MS LARACY:
So that's 114 of the Criminal Procedure Act which says – it's dealing with the point where the person has been charged, the matter has been gone into: "Procedure after defendant pleads or is found guilty. If a defendant pleads guilty or is found guilty, the Court," and it gives two options, "may convict," second, "or deal with the defendant in any other manner authorised by law". This reinforces that the assumption of the law is that a conviction will follow unless there is another manner authorised by the law and it leaves –

GLAZEBROOK J:
Well, there's always been a discretion not to accept a jury verdict though. So I think that's why it says "may convict" because you don't have to accept a jury verdict.

MS LARACY:
But this is also in the summary jurisdiction and where the person has pleaded guilty. So this is a general provision.

GLAZEBROOK J:

No, no, I understand but I think the reason it says “may convict” is – yes, well, I know that because I’ve had to research it in the context of a jury verdict that would have been perverse on any basis and both the defence and the Crown actually asked that a conviction not be entered on the one count that the jury had found the person guilty of and there is a discretion, which I didn’t think there was but there is, not to enter a conviction. I mean obviously there has to be reasons for that and there there was a very good reason.

MS LARACY:

And I take your Honour’s point –

GLAZEBROOK J:

So I’m not sure that it helps you in terms of that because it doesn’t say you must convict, obviously couldn’t because there is a 106 power anyway but also there’s just that general discretion not to in certain circumstances.

MS LARACY:

My point really is that it perhaps fills for the sake of clarity a gap that was previously in the law. There wasn’t, so far as I know, an equivalent of –

WINKELMANN CJ:

Are we going a long way off point here? What is the real point of what you –

MS LARACY:

The real point is that section 106 is an exception, a broad and general exception, to the ordinary course of criminal procedure which is that someone at a certain point, if they’re not acquitted, they plead guilty or they are found guilty either by a Judge or a jury and at that point the Court may either convict, which is the first option and in my submission shows sort of the pre-eminence of that as the ordinary option, or may deal with the defendant in any other manner authorised by law, and that does call into question: is section 106 in this case any other manner authorised by law? And this is all too for the purposes of understanding whether the words “if” in section 86D(2) create a

discretion, and, as the Court's aware, my submission is that it doesn't. It instead reflects the assumption, the factual assumption –

WINKELMANN CJ:
I didn't think that Mr Butler had submitted that it did create a discretion.

MS LARACY:
That it?

WINKELMANN CJ:
Didn't.

MS LARACY:
It must create a discretion because –

WINKELMANN CJ:
No, I think he just submitted it acknowledged the existence of such a discretion as opposed to created it. It was the space that allowed the support of his argument, not that it created the discretion.

MS LARACY:
That would suggest that at common law there's a general discretion not to…

WINKELMANN CJ:
Well, on your argument about section 106, yes.

MS LARACY:
Not to convict. The policy rationale for section 106 is plain, in my submission. What it does is it creates a necessary administrative pause in the criminal process. Without that the Court would move to convict. In a great many cases that's not what the law is seeking to achieve, instead the Court should be given an opportunity in fairness, and for reasons of proportionality, to consider all the circumstances and work out if a discharge without conviction is required. So for that reason there is a necessary pause in the process, but again that shouldn't be seen as creating an opportunity for the Court to

exercise a discretion not to convict in a case where a minimum sentence must be imposed. If I can take the Court to the policy rationale for section 106, which in my submission is best described in…

GLAZEBROOK J:
So you're saying, let me just see if I get this right, you're saying even without the exclusion in 106, 106 wouldn't have been appropriate? And that comes out of section 86D and the Criminal Procedure Act in some manner?

MS LARACY:
Yes. I say, as Justice Simon France said, these are two sections that operate quite separately. They do not cover the same territory, and there is no route from section 86D(2) into section 106.

WINKELMANN CJ:
How's that, I'm sorry, you've lost me.

GLAZEBROOK J:
Yes, I don't follow, I'm sorry.

MS LARACY:
That was the way – there is no inconsistent –

GLAZEBROOK J:
Because there's a route to 106 and everything else. So how is it excluded in a third strike in this situation without the exclusion in 106 itself?

MS LARACY:
It's excluded because the words in section 86D(2) are premised on there being a conviction. The Court, that being the case the Court must move –

GLAZEBROOK J:
So you have to – so the argument must be then under section 86D(2) requires you to put a conviction even if it says "if", and actually in terms of (1) and (2) when it says "when".

MS LARACY:

It assumes that a conviction has been entered, and that's what I was trying to explain to the Court, where the foundation for that assumption is, and my suggestion was that in terms of a codified representation of it, it can be found in section 114 of the Criminal Procedure Act.

WINKELMANN CJ:

But Justice Simon France didn't see section 86D as precluding the application of section 106. He read the proviso to section 106 as precluding this application.

MS LARACY:

He said that there is no inconsistency between them because they operate quite separately.

WINKELMANN CJ:

Well, because section 86D only starts after you've entered a conviction.

MS LARACY:

Yes.

WINKELMANN CJ:

So he said you go to 106 first, can I use that, no because the proviso, not because of anything in section 86D.

MS LARACY:

Well section – my submission in terms of the steps, if that is helpful, if I could present it like this, is that there is first a finding of guilt or a guilty plea on a third strike. Second, the Court might, and your Honours may not be convinced by this, but the Court might look to section 114 for the proposition that the Court must then convict or dispose of the matter as otherwise authorised by law. The Court then turns to whether there is any other, if there is any method authorised by law which would take the Court for a preliminary analysis of section 106, which in the generality of cases does provide another

method of disposing of cases after someone has pleaded guilty or been found guilty. My submission is that section 106 does not apply because section 106 does not apply if there is any enactment applicable to the offence, in this case of indecent assault, and section 86D is indeed an enactment applicable to the offence of indecent assault, which requires the Court to impose a minimum sentence.

GLAZEBROOK J:

So you are relying on the proviso to 106, it's not section 86D(2) at all? And I can understand that argument, I just couldn't understand the other argument that I thought you were making.

MS LARACY:

My point is that there is no inconsistency between those two sections. That is not where the work of the Bill of Rights leads to under section 6, there is no inconsistency. They cover different areas, but there is certainly a route of analysis that takes you from, it is a bit elliptical, it takes you from 86D back into section 106 to work out whether that jurisdiction could apply. The final words in the proviso in section 106 indicate that section 86D dictates what must happen and the words of the proviso must be given effect rather than the general discretion in section 106 which is to impose a discharge without conviction. That being the case, the Court under section 86D can only do the one thing that Parliament has clearly told it to do which is to impose the maximum sentence, and when it does that unfortunately, particularly in cases like Mr Fitzgerald, it does that without having regard to all the normal things that influence a sentencing in order for the Court to reach a just outcome.

ARNOLD J:

Parliament has also told the Courts to apply the Bill of Rights and part of that is not to do severely disproportionate sentences. So which prevails? Well, I thought the answer to that that the Courts have generally given is that if you want to override an existing right you need absolutely explicit language. Parliament wears it. I mean where is the explicit language here in the sense of Parliament wearing it?

MS LARACY:

The explicit language is the language which clearly and unambiguously creates no room for judicial discretion in section 86D(2). It is not explicit language, I accept, that says: "And Parliament thereby directs the Court to override section 9 of the Bill of Rights." Instead it is a clear mandate to only do one thing and one of the implications of that in some cases, and we have accepted in this case, is that there may be a disproportionate outcome.

WINKELMANN CJ:

Although you could just solve it by reading in a proviso, "but don't breach section 9", and in fact you could say that's what the Bill of Rights Act does, read in that proviso, because you have to read them consistently because Parliament hasn't said: "We're directing you to disregard section 9 when you do this." So you can read them consistently and to read them consistently reads in that proviso.

MS LARACY:

My submission is that there is something in the fact that the Court in this case needs to reach for and explore section 106 which is not itself in these cases, in most cases it will not be an appropriate outcome. These are third strike offences, many of the offences are very serious. Even the ones that aren't so serious, we're dealing with a repeat offender.

ARNOLD J:

But we can put all these to one side. We are talking only, at least I am, about those cases right out at the boundary where the result would, as they said in *Taunoa*, shock the conscience of the people, the very extreme disproportionality. So I accept what you say, there's a range of things and people might take different views about how proportionate particular punishment is and it may be that in the ordinary course somebody would get four years but as a consequence of this they're going to get 10. Well, I for myself think the Court has no ability to interfere with that. But it's quite different when you say this is right out there at the margin. This is the sort of thing that the ICCPR is dealing with.

MS LARACY:

My submission is that there are, there will be a great many cases that fall into that disproportionately severe test if the Court were to read the proviso as incorporating section 9. It also creates – it also, in my submission, with respect, it is judicial legislation because it creates a test in section 106 that is in different terms to the test in section 107 which is –

ARNOLD J:

But you don't have to do it through 106. That's the whole point. You can do it through 86D(2), if you say that "despite any other enactment" does not include the Bill of Rights. So the Bill of Rights still bites on subsection (2) in these very extreme cases. Section 9 still plays a part. You don't have to rely on 106. I tend to agree with you that if you try and qualify what is in section 106 in some way you run real risks of creating unforeseen consequences because there is a general provision operating in a whole variety of circumstances that we haven't got before us. But, if you can do it through 86D(2) and say, well section 9 still does bite in there because it's not explicitly excluded, then you have a very targeted response and I wonder really whether there will be so many cases that would fall in it. But you seem to be saying that the effect of this regime is that New Zealand is regularly breaching its obligations because there are lots of, a number of cases falling within it.

MS LARACY:

There are a number of points there, but the first one, Sir, in my submission, the better reading of the words section 86D despite any other enactment should be read as meaning notwithstanding anything in any other enactment including say the Criminal Procedure Act, the New Zealand Bill of Rights Act, anything in this Sentencing Act. That is, notwithstanding any other enacted provision if on any occasion an offender is convicted the Court must. My submission is that that is certainly the natural, but I would go further and say the only available way of reading that provision.

WINKELMANN CJ:

So, that's the Sentencing Act?

MS LARACY:

That section 86D(2)?

WINKELMANN CJ:

No, notwithstanding any other enactment. You would read it to be anything else in the Sentencing Act?

MS LARACY:

I would include anything else in the Sentencing Act.

WINKELMANN CJ:

But would you include the New Zealand Bill of Rights Act though?

MS LARACY:

Yes.

WINKELMANN CJ:

It's just something we jib at, because I don't find it so hard to accept the submission about the Sentencing Act because I think there is something in that, but Parliament is conscious it is engrafting this thing onto the Sentencing Act and that it's in conflict with some of the underlying principles of that Sentencing Act. I can see that's what's intended. I just find it harder to accept. It is quite hard to accept the submission that Parliament intended to require the courts to breach section 9 of the Bill of Rights Act.

GLAZEBROOK J:

And its own obligations under the Bill of Rights given the courts are in fact subject to the Bill of Rights as well as Parliament.

MS LARACY:

But, the only way the breach could be read around, if I can put it that way, is by identifying an interpretation that allows the Court to impose a proportionate sentence, one that is not disproportionately select.

GLAZEBROOK J:

Well, no, sorry, I think what's being put to you is that the courts could not be forced to impose a section 9 non-compliant. It could be forced to impose a disproportionate sentence but not one that is so disproportionate that it breaches section 9 which is a very high standard. So, can we just make sure we get the terminology right because it is not being put to you that Parliament is doing, that it could be read in any other way apart from to stop a section 9 breach.

MS LARACY:

If I'm correct, your Honour, you're making a distinction between a proportionate sentence and a not disproportionately –

GLAZEBROOK J:

One that breaches section 9 and every other sentence whether proportionate or disproportionate, that's what's being put to you.

WINKELMANN CJ:

Because it's this point, you said it's not notwithstanding the Sentencing Act. The Sentencing Act is one of the underlying principles of it is proportionality. So it's saying forget about – I can read section 86D as saying: "Courts you are freed of that requirement of the Sentencing Act proportionality," but there is a gap there between that and the section 9 disproportionality, the level of disproportionality there and what we're putting to you is that there is a lack of clarity in that to say to the courts you must impose – this compels you not only to impose disproportionate sentences but sentences which are so disproportionate that they're in breach of section 9 of the New Zealand Bill of Rights Act.

MS LARACY:

One of the implications of what this interpretation is is that the Court, perhaps in this case but certainly in other compelling cases, will be required to impose a disproportionately light, a disproportionately unreasonable, a disproportionately unprotective sentence.

GLAZEBROOK J:

I don't think anybody is suggesting that, are they?

MS LARACY:

That is the impact of having this very, this extreme binary choice where the Court –

WILLIAM YOUNG J:

No, no, they're not putting binary choice to you.

GLAZEBROOK J:

No, no, sorry, I don't think it's being put to you – what is being put to you is not a binary choice.

WINKELMANN CJ:

We're putting the opposite of binary because – the opposite. So we're saying that whilst this may authorise disproportionate sentencing, the Sentencing Act says sentences should be proportionate, taking into account all these different things. This may authorise disproportionate sentencing but it does not go so far as to authorise disproportion at the section 9 level.

MS LARACY:

So essentially then what the Court is putting to me, it seems to me, is that section 86 –

WINKELMANN CJ:

Or mandated, I'm sorry. Not authorised. Mandated.

WILLIAM YOUNG J:

I think what's being put is that the Court is entitled to impose a sentence that is disproportionate on the basis of ordinary sentencing principles but stops a millimetre short of being seriously disproportionate treatment under section 9.

WINKELMANN CJ:

Is required to, not entitled. Is required to.

WILLIAM YOUNG J:
Yes, or is required to.

GLAZEBROOK J:
Yes, so that's exactly it.

WILLIAM YOUNG J:
So the requirement is to come up to the edge of but not go beyond serious disproportionality.

GLAZEBROOK J:
But then it's not the binary choice between discharge without conviction, which I can understand the issue with it, which as I think I put to Mr Butler, I can understand the issue between that binary choice between discharge without conviction, especially when you're first sentencing, and seven years. But this wouldn't provide a binary choice. It would just say that you have to stop a whisker short of a section 9, to use Justice Young's analogy.

MS LARACY:
So section 86D(2) would then read the Court must in these circumstances impose the maximum term of imprisonment prescribed for the offence or any appropriate sentence –

WILLIAM YOUNG J:
But not more than –

GLAZEBROOK J:
Provided it does not breach –

WILLIAM YOUNG J:
But not a penalty that is severely disproportionate.

GLAZEBROOK J:
Yes.

WINKELMANN CJ:

Yes, in terms of section 9 of the Bill of Rights Act.

MS LARACY:

And in my submission that is where the legislative history is telling in this case, that this was the very proposal and different iterations that was put up and rejected by the parliamentary majority, and the proposals that were put up were various and they were all designed to achieve a more proportionate sentence. So one of them was to add in the words of a safety valve of "manifest injustice" and that was rejected. Another –

GLAZEBROOK J:

Which, of course, is a much lower standard than a breach of section 9.

MS LARACY:

I take your Honour's point. The other proposal which is also there was that there be at the very least a discount for guilty pleas in these cases. So –

GLAZEBROOK J:

Sorry?

MS LARACY:

A discount for guilty pleas in these cases, so that the maximum sentence had to be imposed but, as is always the case and it's such a fundamental and useful and socially valuable purpose of sentencing to recognise the value of the guilty plea, to do that in this case to also slightly ameliorate the disproportionality. That –

WINKELMANN CJ:

None of that really addresses section 9, does it?

MS LARACY:

It goes to the point that less significant ways of ameliorating the lack of judicial discretion were put forward and were rejected.

WINKELMANN CJ:

Well, it goes to your first point that they were intending to authorise disproportion, to mandate disproportion.

MS LARACY:

Yes.

WINKELMANN CJ:

But not to mandate section 9 breach.

MS LARACY:

Yes.

WILLIAM YOUNG J:

It does involve quite a difficult exercise for a sentencing judge to come up with a sentence that's grossly disproportionate but not inhumane.

WINKELMANN CJ:

It's still the less appalling one.

GLAZEBROOK J:

Well, it's a usually fairly obvious case because in a case of this kind I don't think – the Crown is not saying this is not to breach of section 9.

MS LARACY:

No.

WILLIAM YOUNG J:

No. Well, what would be one that didn't breach section 9? Four years in prison? Three years in prison?

WINKELMANN CJ:

A CP(MIP) response.

MS LARACY:

I do suggest that there would be many more cases than perhaps my learned friends would be willing to recognise that would fall within this interpretation, so – and the sexual violation example has already been gone through but I think there are less, the less emotive and less extreme ones, that would also breach the section 9 test.

GLAZEBROOK J:

I wouldn't have thought so because most of the international jurisprudence on these maximum sentences would say, and even whole-of-life sentences would say in fact that if there is an inability to review they are fine. So if you look at all of the international human rights jurisprudence, I mean certainly some people mightn't agree with that and I know various people that argued against it but the international human rights jurisprudence is basically saying if there are review provisions and the offence is serious enough, you can have these maximum sentences, that the issue is the ability to review rather than –

WINKELMANN CJ:

But in any case volumes are not going to carry the day. If there are lots of breaches of section 9 it would not persuade me that we shouldn't be looking at this approach. It'd probably be compelling the other way.

GLAZEBROOK J:

No, but all I'm saying is I doubt there are because actually it's a very, very high standard, and the international jurisprudence is fairly clear on that.

MS LARACY:

My understanding, your Honour, and I may be wrong, but that the value of the review mechanism is that, well, the purpose of it is that it…

GLAZEBROOK J:

Well, parole counts as the review mechanism, so it's not – some of the ones that are indefinite sentences you have to have a review but otherwise parole deals with the issue in terms of those sentences.

MS LARACY:

And in this case the Court, the majority decision in the Court of Appeal, despite – it looked at that issue of the fact that the safety valve when it came to parole had been engaged in this particular case by Justice Simon France and he had declined under the manifest injustice test to impose mandatory – that the – Mr Fitzgerald serve his entire sentence. The Court doesn't – the Crown and the Court of Appeal do not rely on that as a way of saying that the lead sentence in this case is not manifestly unjust. We haven't resorted to that. So I…

GLAZEBROOK J:

In some cases it might be enough to stop it.

MS LARACY:

It might be.

WINKELMANN CJ:

Seriously disproportionate. Grossly disproportionate?

MS LARACY:

It will reduce the disproportionality.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Do we know why he hasn't got parole?

MS LARACY:

My understanding, and my learned friends will correct me obviously, that their client is, is that he has not been able to be treated in the most medically appropriate way given the prison environment and that is why the disposition under the Criminal Procedure (Mentally Impaired Persons) Act would have been preferable, and the problem there, of course –

WINKELMANN CJ:

So he's trapped in a horrible vortex? He's in prison and so he can't get treated, and because he can't get treated he can't get out of prison?

GLAZEBROOK J:

But surely he can be moved now into the sort of situation that we rejected as a sentencing option but is able, in terms of residential conditions, to be imposed now as a parole condition and I would have thought that somebody at least ought to be examining that rather than making him even iller than he is now and even more of a danger to the public.

MS LARACY:

Well, I'll let my learned friend address that. But he hasn't been granted parole obviously because the assessment of the Parole Board is that he continues to pose a risk, and the medication he's on as I understand it has been increasing his anxiety and no doubt that also adds to the risk. One of the problems with schizophrenia is, again as I understand it, is that it is untreatable and it just gets worse and it doesn't always get –

WINKELMANN CJ:

It isn't untreatable.

MS LARACY:

Yes.

WINKELMANN CJ:

It's treatable.

WILLIAM YOUNG J:

Uncurable.

MS LARACY:

It's not curable.

WINKELMANN CJ:
Incurable.

MS LARACY:
Yes, and sometimes the treatment exacerbates certain aspects of the condition itself.

My submission is that because Parliament has been clear in section 86D(2), the only possible route that has been left for the Court to explore is this invidious binary choice other than the matter we've just been discussing of the least restrictive outcome or the mandatory maximum sentence unless this Court is willing to read words into section 86D(2) as discussed.

WINKELMANN CJ:
In terms of reading words into 86D(2), do you have anything to say about that, about whether it's impinging upon legislative function?

MS LARACY:
Yes, that is –

WINKELMANN CJ:
Not that I really want to encourage you to make that submission but I just think I probably should give you an opportunity to be heard on it.

MS LARACY:
That is my submission and I think I said earlier –

GLAZEBROOK J:
You read – is the submission based on "any other enactment" includes the Bill of Rights? Is that the basis of that submission?

MS LARACY:
Yes, and that looking at the text of the Act and the context around it, it creates the very type of safety valve that is in surrounding provisions but is

deliberately not in this particular provision. Your Honour's point, Justice Glazebrook, is that the manifest injustice safety valve is a little different from this. I accept that, but in substance my submission is that it creates the very thing that has been deliberately left out of the section, and I don't – we can look to the parliamentary materials to show that this was deliberate but equally we can look simply at the text of this three-strikes regime and see that Parliament has chosen those words and that rider and certain aspects of the three-strikes regime but has not put it here, and that makes sense in terms of what we know which is from the words and also from the supporting materials this was meant to be mandatory with no room for discretion, and that part is clear.

One of the other difficulties, and this requires turning to section 106, my submission is that it would create significant difficulties with and distortion of the discharge without conviction provision itself in section 106. That provision is intended. According to section 10A it is the least restrictive outcome that the Court can impose in dealing with a case. Although it is not restricted by its own terms to minor offending, and I don't suggest that, and on occasion it captures more serious offending, it has its own test and it is designed for cases where the least restrictive option is indeed the appropriate one having regard to all of the purposes and principles of sentencing. And to read out cases that would otherwise be captured by the clear criteria in the three-strikes regime and allow those cases to be dealt with under section 106, in my submission, would severely distort the workability and the certainty of section 106 and would distort the test in section 107 which has its own express statutory formula.

Perhaps it's a minor point and the Court may not find it of much value, but in looking at sections 106, 107, 108 and 109 it occurs to me that there is something in the fact that in deciding what – it is important to recognise that section 106 is focused on the penalty inherent in the conviction per se. That's why it's the least restrictive option where the mere fact of the conviction per se is disproportionate to the gravity of the offending, and section 108 is the next step in the hierarchy, that's conviction and discharge, and section 109

provides guidance on conviction and discharge and it says: “The Court must not convict and discharge an offender unless it is satisfied that a conviction is sufficient penalty in itself.” In other words, if some other thing really is what the case requires then resort to this very unrestrictive outcome is not appropriate. By this, I suggest that given there’s a clear hierarchy of sentencing and sort of consistency of principle across the sections, the same thing needs to be factored into section 106 and whether it really is jurisdictionally available in any case where some other sentence or outcome ought to in fact be imposed, and in this case we have the perversity where the only reason that the “some other outcome” is not being imposed would be because the Court is concerned that by giving effect to that other outcome in section 86D it is going too far the other way but nonetheless some other outcome is appropriate and should be imposed but the Court doesn’t have the discretion because of the clear words of section 86D to find that outcome, so instead it is sought to reach for section 106 which is not the appropriate provision.

WINKELMANN CJ:

I asked Mr Butler about whether there were cases decided in other jurisdictions, most likely England, in relation to something like this where it’s not the problem provision which is sought to be interpreted to solve the breach convention. It’s a provision at its periphery. So in this case section 106. I think I would be assisted, I don’t know if my colleagues would but I would be assisted, if someone could look at that for me. So I was going to ask Mr Butler to carry through on that. Would you want to file submissions on the point because it’s the point you’re just addressing about the distorting effect on something which really sits at the side, serves lots of purposes, and we’re alighting on it for this purpose?

MS LARACY:

I’m happy for – yes.

MR BUTLER:

Your Honour, could I be maybe helpful unusually and I could indicate that I'd be more than happy, if I prepare such a memorandum, to run it past my learned friend for the Crown in the first instance so if it could be joint so much the better, something like that. Would that be acceptable?

MS LARACY:

We could, yes.

WINKELMANN CJ:

Thank you.

MS LARACY:

If we can agree. I'm not sure if I correctly –

MR BUTLER:

Mr Ewen as well. I just see him looking in my direction, so obviously Mr Ewen.

MS LARACY:

I'm not sure if I correctly understood your Honour but the conflict in this case arises, in my submission, between section 86D(2) and section 9 and the way that applies in Mr Fitzgerald's case, not section 106.

WINKELMANN CJ:

Yes, the point I was raising was the argument for the appellant uses a section which is not the problem section to solve the problem. So section 106, and section 106 does lots of things.

MS LARACY:

Yes.

WINKELMANN CJ:

It's not, for instance, like the section in the *Ghaidan* case.

MS LARACY:

Ghaidan Mendoza.

WINKELMANN CJ:

It's not like *Ghaidan*.

MS LARACY:

No.

WINKELMANN CJ:

It's not the problem section itself, and I'm interested to see how that's been done because Mr Butler was arguing that we could give it one meaning for one purpose and one meaning for another.

MS LARACY:

Yes.

WINKELMANN CJ:

Something that lawyers find hard to accept as a proposition, I think. So I was just interested to hear about that.

MS LARACY:

I've got a few other points. I feel in the course of the discussion most of what I needed to say has come out, albeit not necessarily in the order I intended. Section 11 was discussed earlier in the day. My submission on how this fits into the equation, if that's useful, is that the proposition that was put by the appellant was that because section 11 was left unamended by the Sentencing and Parole Reform Act 2010, that means it operates with the subsequent three-strikes regime. My submission is that the better view is that the new provision did not, the section 86A to I provisions did not impact. In light of the text and purpose, section 11 doesn't direct section 86D offending to be considered for discharge without conviction and Parliament didn't turn its mind or expressly talk about section 106 and section 11 when it was enacting the

three-strikes regime because it was inconceivable that a discharge might be an available option for a third strike.

GLAZEBROOK J:
Why was it available for the first and second then?

MS LARACY:
Because in those cases, and this is really the distinction between this case and, say, a case like *Barnes*. In those cases the Court still has its sentencing discretion. So the first strike, the Court sentences as per usual and issues a warning. So that's a normal sentencing exercise using all the standard provisions of the –

GLAZEBROOK J:
But rather against the idea of three strikes and being warned and if you carry on doing it you don't get a second or third chance, sorry, you don't get a third chance or a fourth chance. I mean it is against the spirit of section 86 which says you are warned twice and then the third time that's it.

MS LARACY:
Well, so my point is the first one is a normal sentencing exercise albeit it with a –

GLAZEBROOK J:
Well, it might be but it's still against the spirit of third strikes, isn't it, that you are able to actually get out of the third strike regime by using sentencing options that in fact are against the idea of having three strikes?

MS LARACY:
Potentially and that point has been made in the case law that it could subvert Parliament's purpose if decisions that were not otherwise appropriate in the course of the criminal process, particularly by the Court, were made in order to subvert the regime. The regime is intended to operate and it is the Court's duty on this line of authority to give effect to it. So yes, but section 106 is fully

available on the first and second strike, and that is because the first strike, as I say, is a normal sentencing exercise. The second strike requires the sentencing Court to impose the sentence that it otherwise would but the person has to serve it without parole, and that too is an exercise where the Court uses it's normal sentencing discretion to determine the lead sentence. So all of the principles and the provisions and potentially section 106 as well in some cases are available. It's only the third strike where the Court's discretion to determine the lead sentence has been overridden, and that's the distinction between this case and *Barnes*.

So in *Barnes* the Court sentenced Mr Barnes and on appeal what had become apparent is that he would end up in real time, because it was his second strike, spending considerably longer in prison than his co-offenders who had done much the same thing and that that was an affront to justice. What the Court did to get around that is recognise that although the Court usually does not, and there's established principle to this effect in New Zealand case law, does not look at parole implications when determining the lead sentence, in order to avoid the manifest injustice it would go against that traditional practice, which had never been a hard and fast rule but in that particular case it would look at the real-time implications and that could be factored into the lead sentence. Now some may think that that's an affront to standard sentencing practice but the point in terms of an interpretation exercise is that it wasn't contrary to anything in the Act. It didn't run up against any express or implied words.

WILLIAM YOUNG J:
Just the vibe.

MS LARACY:
That's right, potentially the vibe. But the Court did have the right to determine the lead sentence and it took into account in determining the lead sentence something it wouldn't normally in order to avoid a manifest injustice and the Court of Appeal did say that that itself is a proper application of all of the principles of the Sentencing Act, and all of those principles were available and

particularly the principle of treating like offenders alike and recognising in the outcome, well, I will leave it at that, treating like offenders alike. That's the problem with the third strike, that Parliament has taken away the discretion with respect to the lead sentence.

Just very briefly, in terms of the target of the legislation, it has been suggested by the appellant and certainly by Justice Collins in the minority that it's profoundly clear that the target of this legislation is people who commit serious violent offending. The only thing that I really want to say on that is that by the time the Act came to be enacted, its purpose statement was clear that in addition to the worst murders, the Act, the three-strikes regime, was designed to capture those who commit repeat serious violent offences and to ensure there was no ambiguity around who was captured by that purpose. It had a complete and contained and clear list of the offences and the only qualifying criteria was conviction for one of those offences.

ARNOLD J:
I accept that it ended up capturing people who couldn't really be described as repeat serious violent offenders.

MS LARACY:
No, but they had, they were people who had committed repeat serious violent offences.

WINKELMANN CJ:
As they were defined?

ARNOLD J:
According to the definition, that's right.

MS LARACY:
Yes, yes.

ARNOLD J:

The purpose or objective, it went way beyond what was necessary to achieve that purpose or objective which is the problem.

MS LARACY:

It is the problem and the backdrop to that problem is that on that particular interpretation issue my submission is that it's unarguably clear that what the qualifying criteria is and it is conviction for one of these and Mr Fitzgerald committed –

ARNOLD J:

It's pretty unattractive though when Parliament says we're going out to get this small group of serious violent offenders, but to do that we're actually going to capture a whole lot of other people who can't on any real basis be described as serious repeat violent offenders. So, you're effectively saying we're going to scoop up a whole lot of people who don't, aren't really the sort of people we're looking for. Quite why I'm not sure.

MS LARACY:

And that's where –

WILLIAM YOUNG J:

Doesn't it proceed on the basis, rightly or wrongly, that to get the deterrent and incapacitation effect hoped for a net has to be cast fairly wide?

MS LARACY:

It does and that's right and that is what lies behind in particular that change in the qualifying criteria which required conviction and then that the person would have been sentenced to a sentence of five years and the decision that was made to change that was based on judges might not sentence to five years. They might not like this, so we need to take that away. We need to take that discretion away and make it simply mandatory on conviction. That's the only qualifying criteria and it was recognised also that some of those convictions would relate to offending which would not even normally

result in a custodial sentence. That was expressly considered and clear. So, it is a very –

WINKELMANN CJ:
But when Parliament access, well we've been through this.

MS LARACY:
It was a decision to broaden the net of capture, lower the threshold and be totally rigid.

My learned friend has just pointed out to me that perhaps the one topic I haven't touched on is methodology. In terms of interpretation I'm not sure at this stage how necessary that is in this case.

WINKELMANN CJ:
Well, I think it would be helpful.

MS LARACY:
One of the things I do suggest worth noting is that the majority decision, let me put it this way.

WINKELMANN CJ:
In *Hansen*?

MS LARACY:
Yes. No, no, sorry, in the Court of Appeal, the one under appeal. The proposition has been put by my learned friends that what we've got here is an application of *Hansen* that has worked as an interpretation exercise, has worked to the disadvantage of the appellant. In my submission, it's just interesting to note that the majority decision in the case under appeal, so far as I could tell, and I did read it a number of times, didn't cite *Hansen* once.

WINKELMANN CJ:

Nevertheless, it did start with the purpose of the legislation divorced from section 6. It didn't place the interpretive task within the context of section 6 as the starting point.

MS LARACY:

It certainly, it started with section 5 and said that its job is to identify the – the Interpretation Act said that its job is to identify the meaning from the text and purpose of the Act. It then identified that what it called the natural or the best meaning looking solely at the surface of the words in section 106 was that the word "offence" was amenable to these different interpretations. The Court at that point immediately put aside that sort of best fit, or that initial interpretation that it had identified and said, and the approach it took was to say: "We need to work really hard, we need to strive to see if we can find a meaning for this that looks at both the text and the purpose and the scheme of the Act and that that is available, that is tenable." In my submission, it did strive in an extremely diligent way which of course the Court of Appeal would and only very reluctantly, and having looked at everything that was reasonably available to it, it only reluctantly reached that view that there was no other available meaning.

GLAZEBROOK J:

That is the flaw in the *Hansen* approach, isn't it, at least as criticised by the academics that in fact you can never have a different view of the first stage and the fifth stage because you're bound by text and purpose?

MS LARACY:

My submission is that that would be right if there is some sort of cleaving to the initial meaning and a reluctance to depart from it as opposed to an openminded enquiry as to –

GLAZEBROOK J:

Well, you might be openminded, but if you have to stick with text and purpose and you can't find a meaning that, even an available meaning which the Court

of Appeal, the majority of the Court of Appeal have found here, but they rejected the available meaning because they said it doesn't fit with text and purpose, so, one and five always remain the same.

MS LARACY:

Yes, well –

GLAZEBROOK J:

Which might be fine if you're looking at a section 5 justification because, well, probably it is fine when you're looking at a section 5 justification because in fact there's no reason to depart from the text and purpose if it's justified, or reasonably justified in a free and democratic society. In fact, Mr Butler actually acknowledged that in terms of it is reasonable rights not rights per se.

MS LARACY:

In my submission, the Court of Appeal majority was making a distinction in its methodology between its starting point which was to look at the words abstracted, but that wasn't what it was suggesting it was. In order to understand the meaning of the provision, it required obviously to go into what that meaning is in the whole context in which the words appear and it was at that point that the Court was reluctantly pushed to its conclusion that there was indeed no alternative meaning here. By the end of the majority's analysis, it wasn't suggested that there was a viable alternative meaning. It was only at the very start when it looked only at the text of the word "offence" abstracted from its statutory context that the Court thought well, on its face, this is something that does appear to be available. But where, I do suggest that your Honours suggestion in *D (SC 31/2019)* that perhaps in cases like that and this it doesn't matter whether section 6 comes in at the first step or the fifth step so long as section 6 is given a fully active role and doesn't have to play any subservience to step 1.

WINKELMANN CJ:

But it does naturally tend to and in fact, isn't it an artificial task to set out to find out what the purpose of the Act is if you're actually ignoring an ever

speaking purpose which is what the Bill of Rights Act says. It's an ever speaking purpose, so it's part, as Mr Butler quoted Justice Cooke saying: "Part of the fabric of our law." So, you can't actually set out on the task of identifying what the text and purpose means without using section 6 as one of your starting points and that's where –

MS LARACY:

Unless this Court is satisfied that the Court below was indeed willing to depart from step 1, from the interpretation at step 1, the what it called the natural or best meaning of only the word "offence" and if it didn't undertake a genuine exercise to work out whether having regard to the text and purpose and context of the statute as a whole, whether there was an available meaning and my submission is that it did do that.

WINKELMANN CJ:

So, your submission is really that it doesn't really matter what order they did it in, they were very careful to give section 6 its full effect?

MS LARACY:

Yes, and for other cases I would certainly take Justice Glazebrook's point in *D (SC 31/2019)* that it may be that the section 6 and step 5, section 6 Bill of Rights exercise and step 5 and step 1 really are just perhaps it doesn't matter as long as in the interpretation exercise there is genuine attempt to understand the purpose of it in light of the Bill of Rights.

GLAZEBROOK J:

Well, it may matter if there is a reasonable limitation which I think is possibly what *Hansen* was looking at in the first place, but there is a real issue about step 1 and step 5. It is step 5, isn't it, or is it? Yes, step 5.

WINKELMANN CJ:

Right, anything else?

MS LARACY:

Not unless I can be of any assistance to the Court.

WINKELMANN CJ:

Thank you. Is Mr Ewen handling a reply I gather from the body language?

MR EWEN:

I shall endeavour to be brief. Dealing with Justice Arnold's point that was raised last about what effectively in fishery terms we would call bycatch, it's my submission the Crown can't have it both ways in terms of a close analysis of 86D without a close analysis of the other relevant language in the statute. If we're looking at the term "serious violent offender", that cannot be divorced from its ordinary meaning in terms –

WILLIAM YOUNG J:

What term, sorry?

MR EWEN:

Serious violence offences, serious violent offender. Now, you can deal with it on a narrow base of statutory interpretation: "Oh, that's just a defined term, it doesn't mean more than what it says in the list." Well, that simply can't be right. A serious violent offender needs to be someone who commits serious violence offences and the entire point is if you're over-broadened in your terms of the definition, that definition really has to be given a common sense approach at some stage. When it comes to the parliamentary purpose enquiry, if they state it's to capture serious violence, serious violent offending, then that does not mean in terms of purpose that Parliament intends when it says: "Serious violent offending," to limit itself to the statutory, or rather, to say that if it's one of these things we call SVO, serious violent offending, then it is part of the purpose. The purpose enquiry is wider than that and must take some account of common sense.

Again, in terms of the point about what my friend the Deputy Solicitor described as effectively disproportionately lenient response at the other end of

the spectrum, well, a number of matters there. First of all, the Court has to ask the question which is worse, a disproportionately lenient result or a disproportionately harsh result because only one of the two is enjoined by the Bill of Rights Act and that's the latter of the two. However, and building on something that my learned friend Mr Butler raised in terms of ways to avoid ending up where we are at the moment where the process has followed its process and the only alternative appears to be a discharge without conviction. Again, there are matters of ameliorating that upstream I would say rather than apply to judicially review. The approach I probably would have taken would have been an application to stay the proceedings because of the consequences it would lead to.

WILLIAM YOUNG J:
Wasn't there something like that here?

MR EWEN:
Well, there was the –

WINKELMANN CJ:
To amend the charge.

MR EWEN:
Mr Preston did make the application. In effect, his closing address was an invitation to his Honour Justice Simon France.

WILLIAM YOUNG J:
I thought there might have been a judgment of Justice Dobson which I think I saw referred to but I don't think I ever saw.

MR EWEN:
That was the sentence indication. Yes, Justice Dobson's was the sentence indication in respect to the discharge. Your Honour the Chief Justice raised the point of have there been ways round this before? My learned friend Ms Ord, who is in the public gallery, had a case where a

client of hers was facing an indecent assault which would've triggered a strike and I suggested in that situation she put forward indecent act in a public place which covered the ground and the police accepted that so the entire problem was avoided. So there have been pragmatic responses to this in other prosecutions. For some reason it was not adopted here. I know not why.

WINKELMANN CJ:
So, here it was attempted in terms of amending the charge, the Crown opposed it and the amendment was not allowed.

MR EWEN:
Yes, and there is an interesting dichotomy between the test to be applied. Now, I realise this is a matter on which I didn't get leave so I probably shouldn't be talking about it, but there are other ways earlier in the trial phase, or before trial, where there can be ameliorating steps which would hopefully completely remove the possibility that the Court facing the stark choice it is faced with in this proceeding.

Again, my friend, in order to get to what she says is the purpose of section 84D, invites the Court to undertake a close analysis of the text of 84D. Well, section –

WINKELMANN CJ:
86D?

MR EWEN:
86D, sorry. In my submission, that's the antithesis of the approach required by the Bill of Rights Act when it comes to what meaning to ascribe to it. If you have to analyse the text that closely to get to the meaning, it's probably not the one that is consistent with the New Zealand Bill of Rights Act.

WILLIAM YOUNG J:

Is it fair to say this meaning that's been put forward hasn't occurred to anyone until I mentioned it briefly and Justice Arnold picked it up today, that section 86D(2) is subject to proportionality constraints?

MR EWEN:

I am not going to argue against any proposed solution that ameliorates the situation that Mr Fitzgerald faces by whatever means it is achieved.

WILLIAM YOUNG J:

No, no, that is fine. It is just that what I'm saying, it's a view of the section that it is insufficiently obvious to have occurred to anyone until today.

WINKELMANN CJ:

That's not really a view of the section, is it?

WILLIAM YOUNG J:

It's a view of section 86D(2), what it means.

WINKELMANN CJ:

Taken in the context of section 6 of the New Zealand Bill of Rights Act?

WILLIAM YOUNG J:

Yes.

WINKELMANN CJ:

So no lawyer has thought of that argument before until Justice Arnold identified it.

MR EWEN:

And that is common law work, you go with what you get until a better argument comes along and then you look at it.

WINKELMANN CJ:

Yes, exactly.

MR EWEN:

But in my submission, the Deputy Solicitor's point about inconsistent with purpose, inconsistent with purpose again on a section 6 basis is not enough. It must in effect, as per the House of Lords in *Sheldrake* effectively wreck a central point of the legislation in question and not just represent a small carveout on the side that is mandated by the Bill of Rights approach.

WILLIAM YOUNG J:

Lots of small carveouts on the side are likely to wreck the scheme, though, aren't they? They probably have I suspect.

MR EWEN:

Well, a thread in a jersey once pulled may unravel.

WILLIAM YOUNG J:

Sorry.

MR EWEN:

A thread of the jersey once pulled may unravel but there is no inevitability of a floodgates approach that the Crown basically suggests and with the greatest respect to the learned Deputy Solicitor-General, there was simply no proper argument put about the difference between when, when, if. First strike, it is when a conviction is entered. Second Strike it is when a conviction is entered. This is no argument put forward in my respectful submission that really comes up with why the legislature departed from the when, when, temporal formula to the conditional on 86D. If not that being Parliament's response to the section 7 report tendered by the Attorney that this is over-broad.

WINKELMANN CJ:

Or else it's just one of those things that happens in drafting. There are no explanations. We see it often enough.

MR EWEN:

Well, sometimes if we are in search of parliamentary intent, sometimes great weight gets put on a comma.

WINKELMANN CJ:

Well your account is hard to accept because obviously it was contemplated that discharge without conviction could occur in the earlier stages, so why would they say when?

MR EWEN:

Because again, on the first and second strikes there was no question about whether it was available. The entire premise of the Crown's argument is it wasn't available. Well, if it wasn't available, they again would've used the word "when". No one is saying that on a first and second strike you can't discharge. The question is what can you do on the third. So, the difference in language, in 86D(2) in my submission must achieve some significance. It's not a case of creating a discretion. It's a case of keeping that window open for the 106, 107 test.

In relation to Mr Fitzgerald's parole status and et cetera, really he is caught in the most vicious of circles. The Parole Board applies the test of undue risk which is effectively a burden that he is discharged with establishing. He must show before he is released that he is not an undue risk. Whilst he's in prison, he's not getting the treatment that is most designed to treat his symptoms. There is in theory, and I say in theory, the ability to transfer from prison to hospital for mental health treatment, but that is for acute treatment only. The only time that gets countenance is when they're really, really bad and require severe medication. It's not there for…

WILLIAM YOUNG J:

Is that provided in the statute that it's only for acute treatment?

MR EWEN:

It's not provided in the statute. It's just simply how it works. They don't have the beds to accommodate prison treatment.

WINKELMANN CJ:

Don't international conventions apply in the parole process too and the Correction's process? Just a thought anyway.

MR EWEN:

I stopped appearing in the Parole Board for a reason. But it basically means that he's –

WINKELMANN CJ:

So, it's a catch 20, he's in a very –

MR EWEN:

Catch 22.

WINKELMANN CJ:

Catch 22 situation?

MR EWEN:

Yes.

WILLIAM YOUNG J:

Have we got the parole decision? There must be written decisions.

MR EWEN:

Mr Preston can advise you in relation to parole statements. Mr Preston advises his last parole appearance no decision was issued. He's next up for parole in April.

WILLIAM YOUNG J:

So, there has never been a written decision?

MR EWEN:

Not that we have access to. Not that's been provided.

WINKELMANN CJ:

Was it simply deferred, adjourned or something?

MR EWEN:

I think it is probably best if Mr Preston addresses you with the –

MR PRESTON:

Still on that point very briefly, the position is with Mr Fitzgerald, I'm in contact with him but his mental health is such he's not consistent with instructions. He didn't notify me of the date. I made enquiries of the date. The Board went ahead and he was unrepresented, something I was very unhappy about, but this is the type of individual that we're trying to contend with and this is why he has difficulty in satisfying the Board in the first instance that he will not be a danger to the community. The Board on the last occasion, it's referred to in the judgment of the Court of Appeal, the Court indicated that the Parole Board had said they want him to continue with his psychological treatment prior to him being considered again for parole and they deferred it for a further year, so that's why he's coming up this April. Well that effectively summarises the position.

MR EWEN:

There was one last point that I wish to make. In the pleaded notice of application or leave, the remedy that's sought is the quashing of a conviction and the substitution of discharge of conviction raised in response to Mr Butler's response of other ways of dealing with the matter. It would appear that the Court's powers under section 234 of the Criminal Procedure Act are engaged which allows for the Court on allowing appeal and quashing a conviction substituting a conviction for a lesser offence if the Court is satisfied that the lesser offence effectively will be included with the offence for which he was found guilty. That would seem to leave open to this Court the ability to substitute a conviction for, say, indecent act in a public place, and that not

being a strike offence make a section 34 disposition order or remitting that to a lower Court for consideration of that as an option. I realise that the Crown hasn't had that as an option put to them but if – on appeal this Court has the powers in the first appeal Court, and section 234 appears to be one of them, which could be engaged.

WINKELMANN CJ:
Perhaps the best way of us dealing with that is for you to file a short note on disposition and with the Crown to have an opportunity to reply on that and say –

MR EWEN:
I'm happy to do so.

WINKELMANN CJ:
If you could do that within the next two days and the Crown's reply by – what's today? Tuesday? Could you have that by tomorrow evening?

MR EWEN:
I've got a very short notice appeal set down in the Court of Appeal on an interlocutory.

WINKELMANN CJ:
Thursday, do you think?

MR EWEN:
But Thursday, I can do that.

WINKELMANN CJ:
And the Crown respond on Friday by 5 pm.

MR EWEN:
Unless…

WILLIAM YOUNG J:

Did you ever get to find – it may be that section 65 of the Land Transport Act has toddled away.

MR EWEN:

Sorry, I was going to address your Honour on that because I did get the Bill as reported by the select committee. What the select committee did is they deleted a wholesale reference to minimum penalty, inserted what became 106(3)(c). Now what has happened is that clearly by way of supplementary order paper in the committee at the whole stage is minimum sentences come in but – and 106(3)(c) was retained, but it does mean that the minimum penalty part did come out as part of the select committee. It partially came back in again but it was transformed from penalty into sentence, and –

WILLIAM YOUNG J:

I find it a bit odd though. It would be quite a big assumption to assume that "minimum sentence" doesn't mean the same as "minimum penalty".

MR EWEN:

Well, the answer also lies in the provisions of the Land Transport Act itself because the Land Transport Act 1998 describes a disqualification as an order consequent on conviction, consequent on sentence. So again it's an order, not a sentence as described in the Act itself and that I can provide the Court with copies of Justice Nicholson's judgment –

WILLIAM YOUNG J:

No, okay, no I understand.

WINKELMANN CJ:

That's a short point. That's a very short point which we could have got to way back then, I think. Maybe you did say it.

MR EWEN:

If I'd had the legislative materials, but that, unless I can assist the Court further…

GLAZEBROOK J:

I think you were going to put in the legislative materials so maybe you could just do a short note on that.

WINKELMANN CJ:

On the Land Transport Act?

GLAZEBROOK J:

Yes. Sorry, on the Land Transport Act.

MR EWEN:

Certainly.

WINKELMANN CJ:

So by Thursday, 5 pm.

MR EWEN:

I will.

WINKELMANN CJ:

And Ms Laracy perhaps by Monday, 5 pm. I thought was possibly a bit harsh to give you only 24 hours.

MR EWEN:

As the Court pleases.

WINKELMANN CJ:

Did you want to say something in reply?

MR BUTLER:

Could I just assist you on this new argument, s 86D(2), just with reference to some materials for the bundle?

WINKELMANN CJ:

All right, well, come forward.

MR BUTLER:

And that's the only indulgence if it may assist. The thought had occurred to me so that's why when his Honour, Justice Young, put the proposition to me as to whether you could read a proviso into section 86D(2).

WINKELMANN CJ:

It was his Honour, Justice Arnold, who…

MR BUTLER:

And then his Honour, Justice Arnold. So that was before lunch but obviously it's developed since lunch and I just thought it would be helpful if I made some reference to some materials that build on that thought. So in my bundle, so Human Rights Commission bundle, tab 50, there's reference to a case called *R v Waya [2012] UKSC 51,* [2013] 1 AC 294 where you will see, if you go to that particular case, exactly to avoid a grossly disproportionate outcome, treatment or punishment in the context of the European Convention in relation to civil forfeiture orders the UK Supreme Court said that you must read the relevant provisions subject to a proviso to the effect that you can make a civil forfeiture order so long as the civil forfeiture order is not inconsistent with Article whichever it is, I've forgotten, 3, I think it is, of the European Convention on Human Rights. A similar approach has been affirmed and adopted by the Privy Council in a case not in the bundle but which I've brought along today just in case called *Williams v Supervisory Authority*. So the citation is [2020] UKPC 15, paragraph 97.

WINKELMANN CJ:

And it's *Williams*?

MR BUTLER:

Yes, in which the Privy Council said: “The making of the civil forfeiture order in the present case was a proportionate measure which did not violate the appellant’s constitutional rights,” the right being the one we’re talking about. “It is not necessary in this case for the Board to decide definitively whether in every possible case brought under the combined regime in the Act the award of a civil forfeiture order will proportionate. As presently advised, the Board thinks it unlikely that many, if any, cases would arise in which the due application of the combined regime in accordance with its terms would be disproportionate and in breach of constitutional rights … However,” here’s the important part, “However, the Board notes that if a situation arose in which it would be disproportionate to make a civil forfeiture order, it would be open to the Court, in applying,” the statutory provision, “to hold that although the statute says that the Authority may apply for such an order, it would be inconsistent with the defendant’s constitutional rights under,” the relevant provision of Antigua, “to permit it to do so. Further, it would be possible to read an appropriate qualification,” into the relevant cognate statutory provision, sorry, accompanying companion provision, “so that it required the making of a civil forfeiture order ‘except insofar as such order would be’” disproportionate forfeiture and thus breach the relevant provision of the Constitution. So that seems to me to be kind of along the lines of what your Honour, Justice Arnold, was talking about. So in my submission there is authority for that type of reading to just carve out to protect rights such as section 9 of the Bill of Rights.

Could I just make reference, I said earlier this morning that I had an article which I just mentioned but didn’t distribute which deals similarly with this sort of issue of how you can go about creating provisos and reading in to achieve statutory conformity. I have my learned junior I will ask to hand it up, if he may, through the registrar, and that’s an article of mine in the *Queen’s Law Journal* which talks about statutory conformity with the Charter of Rights, as it then was, but I think you may find the article useful in terms of its explanation as to the justification for presumptions of statutory conformity with fundamental norms. It deals with that sort of issue but also provides a number

of cases which I think may assist if this idea of the proviso really is one that is attractive to the Court as I would urge it to be attractive to the Court and, in particular, there's a decision referred to at page 230 of the article, a decision of the Supreme Court of Ireland in a case called *Fitzpatrick* (16:07:25) rather than *Fitzgerald* in which the sort of reading-in exercise that I would envisage occurring here, if your Honours are attracted to it, could occur. Here a different context, the meaning of a trade dispute for the purposes of the Trade Disputes Act (1906), but if I refer your Honours to pages 230 and 231 of the article it's a fair summary, I think, of the issue and also the approach and how it is that you go about inserting provisos to give effect to constitutional norms and how specific they can be in terms of a carve-out.

Your Honours, I've nothing else I wish to add. Thank you for allowing me just to draw your Honours' attention to those materials which I think in light of the discussion this afternoon may be of some material assistance.

WINKELMANN CJ:
So you're going to work with Ms Laracy to create this short memorandum on that issue?

MR BUTLER:
Yes, on what we call the peripheral provision coming to the rescue issue.

WINKELMANN CJ:
Yes. The Lone Ranger provision.

MR BUTLER:
The Lone Ranger, indeed. Quite, your Honour. As the Lone Ranger up here I'll take the opportunity to thank your Honours on behalf of all of us for your attention and engagement. It's been a very interesting day. Thank you.

WINKELMANN CJ:
Thank you, counsel, for your very helpful submissions.

COURT ADJOURNS: 4.08 PM