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IN THE SUPREME COURT OF NEW ZEALAND SC 26/2022

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 6

BETWEEN **ATTORNEY-GENERAL**

First Appellant

AND **THE CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS**

Second Appellant

AND **MARK DAVID CHISNALL**

Respondent

HUMAN RIGHTS COMMISSIONER

Intervener

Hearing: 3-4 April 2023

Court: Winkelmann CJ
Glazebrook J
O'Regan J
Williams J
Kós J

Counsel: U R Jagose KC, M McKillop and T Li for the First Appellant
No appearance by or for the Second Appellant
A J Ellis (via VMR), B J R Keith, G K Edgeler and A C Singleton for the Respondent
A S B Butler KC, R A Kirkness, M D N Harris and D T Haradasa for the Intervener

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CIVIL APPEAL AND CROSS-APPEAL HEARING

SOLICITOR-GENERAL:

E nga Kaiwhakawā, tēnā koutou. Kei kōnei māua ko McKillip ko Li, mō te Karauna.

WINKELMANN CJ:

Tēnā koutou.

MR ELLIS:

Yes, may it please Your Honours, mōrena. Ellis, Keith, Edgeler and Singleton for Mr Chisnall.

WINKELMANN CJ:

Tēnā koutou.

MR BUTLER KC:

Tēnā koutou katoa, e ngā Kaiwhakawā. Ko Andrew Butler tōku ingoa, me Robert Kirkness, me Taz Haradasa, tēnā mō Te Kāhui Tika Tangata

WINKELMANN CJ:

Tēnā koutou. Now Mr Ellis we understand your circumstances and you should just take breaks et cetera as you need to in the knowledge that your team are here.

MR ELLIS:

I appreciate it, Ma'am.

WINKELMANN CJ:

Ms Jagose?

SOLICITOR-GENERAL:

Thank you, your Honour. In this supplementary hearing I'm going to address the broader issues that the Court has sought supplementary submissions in respect of without, I hope, repeating the Crown's case on appeal but I will wind in a few of the reply responses from the last time. That will take us through parts A and B of the appellant's written outline.

Mr McKillop will lead through part C of the supplementary submissions. Those are the specific points that the parties raised and which the Court has permitted us to make further written submissions on. Your Honours will recall that Mr McKillop has already addressed you on part of the appeal. He'll also address the cross-appeal for the Crown and your Honours will have received a memorandum from my friend, Mr Keith, on Friday I think, suggesting the outline and I take it that your Honours – sorry the order.

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

I take it that your Honours are happy with that.

WINKELMANN CJ:

That order is fine. Mr Ellis?

MR ELLIS:

Sorry, me?

WINKELMANN CJ:

You need to mute it I think but I was just going to say to you anyway since we have you speaking that –

MR ELLIS:

I'm trying to turn myself off to mute so I wasn't listening. Did you ask me a question?

WINKELMANN CJ:

No, but since you are speaking now, I just will mention that we will accommodate you appearing first thing tomorrow morning as you've requested.

MR ELLIS:

Thank you.

WINKELMANN CJ:

All right, and you might want to mute yourself now.

MR ELLIS:

Right.

WINKELMANN CJ:

Carry on, Ms Jagose?

SOLICITOR-GENERAL:

What this case shows, in my submission, is that the very young remedy of declarations of inconsistency in this country –

MR ELLIS:

I can't hear anybody.

WINKELMANN CJ:

So we can hear you Mr Ellis.

MR ELLIS:

Can't hear what they're saying.

WILLIAMS J:

He can't hear us.

WINKELMANN CJ:

He's been able to hear us to date so somehow he's changed the setting I think.

SOLICITOR-GENERAL:

Shall I just check my microphone?

WINKELMANN CJ:

Can you hear us Mr Ellis?

MR ELLIS:

Look, you're completely wrong about this other thing. It just stays there. You'll need to do it again I think.

WINKELMANN CJ:

Perhaps, we'll just adjourn. We'll adjourn and Mr Keith, you can help Mr Ellis fix his situation.

COURT ADJOURNS: 10.07 AM

COURT RESUMES: 10.12 AM

WINKELMANN CJ:

Are you with us Dr Ellis?

MR ELLIS:

Yes, yes, thank you, Ma'am. I'm sorry, I lost the sound and half the picture but we're re-established now.

WINKELMANN CJ:

Right. Ms Jagose?

SOLICITOR-GENERAL:

Thank you, your Honour. So I'm going to address your Honours – I think I might have just said this – broadly on how the declaration of inconsistency remedy fits in our constitutional framework with reference to the relevant comparative jurisprudence.

I won't go through all of the cases that are in the written submission but highlight the points that I wish to make. I'll then address the roles of sections 4, 5 and 6 of the Bill of Rights Act 1990. I want to address the idea of penalty, there was considerable discussion about this in the first part of this hearing, and then I'll answer the question how we say the discretion is to be exercised here because, of course, as your Honours will know our case is that there is a discretion that must be exercised in a manner that shows justification for any limits on rights.

So my first point is to say that declarations of inconsistency are a remedy. They're a remedy for legislative breach of the New Zealand Bill of Rights Act. That is legislation that limits rights in a way that cannot be or has not been justified. It was the point that this Court made in *Attorney-General v Taylor* [2018] NZSC 104; [2019] 1 NZLR 214 rejecting the Crown's submission that the declaration of inconsistency was beyond the judicial function and confirming that the judicial function has always included the interpretation of legislation and the rights determination of that legislation. Of course now declarations of inconsistency have a legal consequence, as amended in the Bill of Rights Act section 7A and 7B, where there must be a reference to the House of any declaration made. My point being it's an interpretive exercise for the Court in relation to the legislation before it and as a remedy it should be a port of last resort where the interpretation consistent with the Bill of Rights is not available.

It's the corollary, I would submit, of the oft-cited injunction. In *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 (HL) the House of Lords tells us that Parliament must speak very clearly to legislate against

guaranteed rights clear and on terms that are contrary to the Bill of Rights Act. So here I say we're at the corollary point. It's a last resort where interpretation cannot get the applicant or the litigant to the protected right.

What the comparative jurisprudence shows us, in my submission, is that Courts have identified a risk of causing an incoherence and a degrading of the administrative law functions if declarations of inconsistency are reached for in an abstracted way as we have criticised this case to date. Therefore, in my submissions, declarations are to be avoided if the interpretive process can lead to a rights-consistent outcome.

So in the United Kingdom declarations of incompatibility, of course, have long been authorised by Parliament. They are routinely seen as the last resort remedy where it's impossible to provide a rights-consistent interpretive remedy. I refer to a couple of those cases. *R v A* (No. 2) [2001] UKHL 25, [2002] 1 AC 45, and I don't need to take your Honours to these unless you wish me to but for now I don't need you to go to them, where Lord Steyne points out that a declaration must be avoided unless it is plainly impossible to do so. "If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise." That's at paragraph 44. Again in that same case Lord Hutton at 162: "It is clearly desirable that a court should seek to avoid having to make a declaration of incompatibility … unless the clear and express wording of the provision makes this impossible."

In *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, [2015] 1 WLR 5055, Baroness Hale made the point –

KÓS J:

Can you just take me to where in your submissions you're referring to these cases so I can see the citations?

SOLICITOR-GENERAL:

Beg your pardon, yes. Paragraph 45 and following.

KÓS J:

Thank you. So *Ali* and *Bibi*?

SOLICITOR-GENERAL:

I was just onto *Ali* and *Bibi*, thank you, Sir, and that was the case where there was an English competence requirement for foreign spouses to obtain a visa to join their family in the UK and the question about whether the English competence requirement was an unreasonable imposition. And I think it's useful and interesting to my point that the Court was there saying it will not be an unjustified interference in all cases because it is capable of being operated in a manner which is compatible with Convention rights. Well it was the end of the story in that case but Baroness Hale made the point that quite a surgical declaration of incompatibility might have been available rather than striking down the rule because it was capable of being applied consistently.

She makes the point that quite a surgical declaration might have been available at paragraph 60. It's not made, it wasn't brought, the parties didn't seek it but her Honour made the point that it could have been possible to say – I can't even read my own writing, apologies, I'm going to have to go to the paragraph – so her Honour says at paragraph 60: "I would not strike down the rule or declare it invalid. It will not be an unjustified interference with Article 8 rights in all cases. It is capable of being operated in a manner which is compatible… is likely to be incompatible with the Convention rights of a significant number of sponsors. There may well be some benefit, therefore, both to individuals and to those administering the rule, in declaring that its application will be incompatible with the Convention rights… in cases where it is impracticable without incurring unreasonable expense for his or her partner to gain access to the necessary tuition or to take the test." So really quite a focused declaration pointing out, in my submission, would have pointed out usefully to the makers of the rule precisely what was the thing that was objected to.

WINKELMANN CJ:

I don't think we struggle to understand your submission on this point but I think what the Court would like to hear from you is how you say either the relevant

provisions can be interpreted in a way which is consistent or, if you say the answer lies in the exercise of discretion, just exactly what fetter you would say we should read into the exercise of discretion to make it compliant.
1020

SOLICITOR-GENERAL:
Yes, thank you your Honour, I and I do come to that. I will come to that at the point where I ask and answer the question, so how is the discretion to be exercised.

GLAZEBROOK J:
Can I just check the quote that you've got at 45, because that seems slightly inconsistent with your submission that it always has to operate. It has to be totally incompatible. We might have lost Mr Ellis.

WINKELMANN CJ:
We've lost Mr Ellis I think.

WINKELMANN CJ ADDRESSES REGISTRAR (10:20:48)

GLAZEBROOK J:
I mean in some ways that quote would suggest that you have to show that it could never act incompatibility with convention rights in the British context.

WINKELMANN CJ:
I think we should just pause.

GLAZEBROOK J:
Yes, if we are going to, I was just finishing the point.

WINKELMANN CJ:
Yes.

GLAZEBROOK J:
Not expecting a reply.

WINKELMANN CJ:

Yes, we're back. We've got you Mr Ellis.

GLAZEBROOK J:

In case you missed it, I was just asking the Solicitor-General to explain the quote in paragraph 45, which would suggest that what has to be shown is it would never operate incompatibly with convention rights in the British context.

MR ELLIS:

Yes, thank you, I did miss that.

WINKELMANN CJ:

Go ahead Ms Jagose.

GLAZEBROOK J:

But just when it is suitable, which might be when you're suggesting how it can always operate consistently with the Bill of Rights. Unless you say that isn't the test.

SOLICITOR-GENERAL:

Well in my submission that's not what the Court is saying there. That citation might be too small for the point to be made. But if we go, and perhaps my friend Ms Li might bring up paragraph 51 and 52 of the case. Because there the Court is – so this was a case in which the clean slate provisions, which didn't operate in certain – in relation to certain jobs that people were applying for, meant that a person who, as a child, an 11 year old, that he'd stolen a bike, had to be revealed to his prospective employer as a stain on his character. So that was the broad issue, or there was a second applicant too. What I understand the Court to be saying there is that, well just if we start just above 52, just where making a point that Baroness Hale said in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 that she says it seems to me the Courts of this country should adopt that sensible practice when considering the application of various remedies. Sorry, the sensible practice being to say precisely in what way Mr Hirst's rights had been violated by the law in question. She went on to say:

"The Court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision is not incompatible." Then the Court goes on, and this is the point your Honour has raised with me: "As Baroness Hale's last statement makes clear, a declaration of incompatibility is not a declaration that the legislation always operates incompatibly. It is a declaration only that it is capable of operating incompatibly and almost always that it has operated incompatibly."

So then the next case, *Ballinger*, a statutory provision in a marriage is void if the parties weren't male and female was declared incompatible, even though clearly that wasn't incompatible for everybody to whom it applied.

GLAZEBROOK J:

I don't see that's different from what I just put to you. That you would have to show, in the UK context, that it is never incompatible, wouldn't you, and leaving aside the other aspect of that, which is that you have to have an applicant, that's a standing issue, which I'm not sure – well I'm not sure our approach on standing, especially in Bill of Rights context, would actually be compatible at all with that.

SOLICITOR-GENERAL:

I agree entirely with the point on standing. But I'm sorry, your Honour, I don't understand your question then, because as I understand, well in the submissions –

GLAZEBROOK J:

I think what they're saying is, just because it's compatible the legislation can be applied compatibly in relation to some. If it cannot be complied – if it cannot be applied to certain people without it being incompatible then a declaration can arise. So you have to show not that it would never be applied incompatibly – is that a word – well it would never be incompatible with the Bill of Rights to apply it as the legislation says.

SOLICITOR-GENERAL:

But that in relation to a particular applicant or in our case, reasonable hypothetical applicant or set of applicants there is an incompatibility, or an inconsistency, yes, that's right.

GLAZEBROOK J:

So you accept it has to be compatible for everybody in order not to get a declaration of inconsistency?

WINKELMANN CJ:

That might be confusing with your double negatives there.

GLAZEBROOK J:

I know sorry. Well it has to be compatible to everyone before you don't give a declaration of inconsistency.

SOLICITOR-GENERAL:

Sorry your Honour, may I put it a different way and see if we're in agreement.

GLAZEBROOK J:

You certainly can.

SOLICITOR-GENERAL:

A declaration maybe given even though the statute operates compatibly in some instances.

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

And the Court is calling, they're saying two things. The declaration should indicate in precisely which way the litigants rights are being violated by the law on question. But also, in *Hirst* it was, the Court should be very slow to make a declaration at an instance of an individual with whom – sorry, with whose own rights there has been no incompatibly.

GLAZEBROOK J:

Well that's standing, to a degree, and the first one is form, but I'm just interested – so you do accept that – well I think you have to accept, coming from that, that if it does operate incompatibly then a declaration can issue even though it might be for one person in a hundred. Incompatible. Otherwise it has to be –

SOLICITOR-GENERAL:

Yes, I'd have to accept that.

GLAZEBROOK J:

Yes.

SOLICITOR-GENERAL:

And I would say, as a matter of form, then the declaration would be very clear as to that impact.

GLAZEBROOK J:

Yes, yes, understand.

O'REGAN J:

So it would say it's incompatible in respect of this class of people?

SOLICITOR-GENERAL:

Yes.

O'REGAN J:

So it's a declaration of incompatibly that applies to the situations in which a compatible interpretation is not available?

SOLICITOR-GENERAL:

Yes.

KÓS J:

That's difficult in the context of a discretion because in the context of a discretion it may or may not end up being rights-infringing, depending on the

particular exercise. But it's clear that this statutory architecture has the capacity to infringe 362.

SOLICITOR-GENERAL:

Well I would agree with the first part of your Honour's proposition, that because it is a discretion that is where the examination is done to only permit justified limits.

GLAZEBROOK J:

But if nothing is justified. Because at the moment we don't have a justification for the legislation itself, do we? Because you say you don't need to.

SOLICITOR-GENERAL:

Yes, and I do –

GLAZEBROOK J:

Which is unfortunate.

SOLICITOR-GENERAL:

– trammel that ground again today.

WINKELMANN CJ:

I'm finding the submissions hard to follow in a way because they're so abstract and I think there's something in the point just made for the Human Rights Commission which is that the Crown, the Attorney-General needs to give us an interpretation, or a structural exercise for discretion so that we can measure it.

SOLICITOR-GENERAL:

I will come to this.

WINKELMANN CJ:

Okay.

SOLICITOR-GENERAL:

About how should the discretion be exercised because that is the case. That unless there is something in the statute that says that there can be no justified second penalty, I need to also address your Honours on penalty, why we say it's not punishment, but it is part of the penal framework.

WILLIAMS J:

Your argument here though is that I think what you've been submitting in response to questions is that here it is inherent that some classes of people can never have the discretion exercised in their favour, or exercised in a rights-consistent manner, as a class that's, there is an entitlement to a declaration, in those circumstances.

SOLICITOR-GENERAL:

That's right, your Honour, yes.

WINKELMANN CJ:

The difficulty with your argument, even if we get away from the lack of specificity at the moment, which you say is going to be addressed later, is that there are aspects to this architecture which is said against you to mean that it's inevitably and always inconsistent.

1030

So the architecture of the provisions are penal in nature, for instance contemplating – they're not therapeutic, they don't emphasise treatment, they don't place, they don't take an *Ilnseher v Germany* ECHR 10211/12, 27505/14, 4th December 2018 (Grand Chamber) or pre-*Ilnseher* approach to responding to the risk of offending. So it's not sufficiently, in terms of architecture, a sufficiently therapeutic approach and, therefore, you can try and add as many fetters, which might be, wrongful in themselves, on the discretion to try and address it but you can't fix that fundamental architecture point.

SOLICITOR-GENERAL:

I'll take your Honours also to the architecture because your Honour is, of course, right, that is what is said against the Crown's argument. But it is wrong that the architecture of the legislation is, for one thing in relation to PPOs [Public Protection Orders], almost indistinguishable from that which the German Court in *Bergmann v Germany* found wasn't improperly punitive but rather was therapeutic and treatment-based and I have to come to it, and I can perhaps move more swiftly through these propositions about –

WINKELMANN CJ:

Yes.

O'REGAN J:

We should let you do that.

GLAZEBROOK J:

For me you would have to show that the therapeutic would always trump in these situations, in any event, and I'm still having difficulty with the fact that there hasn't been any justification put forward for the primary legislation, which would have to be justifications in terms, for me anyway, in terms of the risk people pose just as a group of re-offending, and the consequences for victims in respect of that, and none of that seems to have been put forward as a justification.

SOLICITOR-GENERAL:

I'll also come into all that.

WINKELMANN CJ:

Okay.

GLAZEBROOK J:

I'm sorry?

SOLICITOR-GENERAL:

I will also come to that.

WINKELMANN CJ:

Yes, we'll let you come to it.

GLAZEBROOK J:

Oh, you are coming to that? It wasn't clear from your submissions that you were coming to that.

KÓS J:

I appreciate it but I have one question I would like you to address, which really goes back to the heart of your argument about abstraction, and that is, if this is all said at such an abstract level that a declaration should not be granted, help me to understand how I reconcile that then with the Attorney-General's certificate under section 7 in relation to ESOs [Extended Supervision Orders]. That is also set at a similarly abstract level. It said this legislation is incompatible and one would have thought in that context a declaration of inconsistency would not be a surprising outcome were someone to take the issue to court.

SOLICITOR-GENERAL:

Well, your Honour, that can go both ways. Where the Attorney says it isn't an inconsistency, does the Crown just rest on that? I mean is that the Attorney's advice to the Parliament. I don't think that it is the determinative answer of law which is for the Court. The Attorney's position in relation to – that was the Attorney – Margaret Wilson's main complaint was about the retrospectivity aspect of the ESOs which we have already addressed your Honours on but we can come back to it if we need to. The Attorney's section 7, certainly in relation to PPOs, was to say a civil regime doesn't have the infringing aspects and we know from the development of the law that that wasn't right. So perhaps I would accept your Honour's point that might not be a surprise if there's a declaration because certainly one other person thought that that was the case at some point.

KÓS J:

No, you just seem to be imposing a rather different standard on the applicant here. You're requiring a very detailed response going down to the depths of the discretion which didn't seem to attract the Attorney's approach that many years ago.

SOLICITOR-GENERAL:

No, it didn't, and I will come to that point but that is the point, I suppose, here is that what Parliament has given is a suite of options, PPOs and SOs being one or two, which allow for Courts to determine what is the justified imposition on a person who, having offended in this violent and/or sexually violent fashion, despite being imprisoned and despite having the treatment and rehabilitation services of that imprisonment term, continues to offer too high a risk to the public. So a suite of options continues to be given to the Courts and that is why we say that is the place at which the real test of comes, and we've seen the Court go through that in respect of Mr Chisnall's case. In, I think it was 2022 when the Court of Appeal set aside his PPO and in place imposed an intensive monitoring ESO. You could see there the Court grappling with exactly the level of risk and the treatment, and the treatment gains, and the rehabilitation services – sorry, the rehabilitative services that were provided, and agreeing that some measure was still required on Mr Chisnall. It was justified. Not the PPO they agreed with Mr Chisnall.

WINKELMANN CJ:

We'll let you get back to your submissions.

SOLICITOR-GENERAL:

Am I right to gather that I can move more swiftly through the propositions as to, your Honours will have read the written submissions, but I'm happy to rest on them in terms of –

WINKELMANN CJ:

Yes, although did you want to respond to the Human Rights Commission's submissions that there is a little bit more to this jurisprudence than meets the

eye, and that the Courts in England have been quite particular in preserving the ability to make abstract-type declarations, and citing the *Miranda* cases in them which has occurred.

SOLICITOR-GENERAL:

Yes, okay, and I will come to that. I'll just briefly address the point that I'm making about the potential for a too swift reference to the remedy of the DOI [Declaration of Inconsistency] does risk downgrading our administrative law, is a rich source of power to uphold human rights, and *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 in the Canadian Supreme Court, and I won't go through it in detail, but it's there the Court saying, and we used to think that administrative law couldn't properly accommodate Charter rights in order that they are real and substantive handbrake on administrative decision-makers, but we've got to this point, the Court referring at 34 to deciding to start from ground zero, building coherence in public law. In fact if we do – actually I will go to paragraphs 3 and 5, because that's where the Supreme Court makes the points about how do we kind of work between declarations and convention rights and administrative law.

WINKELMANN CJ:

Do you have the number of the authority that is in the volume?

SOLICITOR-GENERAL:

I can hear someone answering it, it's 21. Paragraphs 3 and 5. So it squarely raises the issue of how to protect Charter guarantees and the values they reflect in the context of adjudicated administrative decisions –

GLAZEBROOK J:

Which bundle are we in?

WINKELMANN CJ:

The appellant's authorities.

SOLICITOR-GENERAL:

It's on the screen, it should be on the screen is it Ma'am?

WILLIAMS J:

It is.

GLAZEBROOK J:

I was just trying to get it up.

WINKELMANN CJ:

It's in the appellant's authorities, their tab 21. Carry on.

SOLICITOR-GENERAL:

So the Court asks itself at 4: "How then do we ensure that this rigorous *Charter* protection while at the same time recognising that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?"

Sorry, I've just managed to jump ahead myself in my screen. At 5: "We do it be recognising that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision," a discretionary decision, "distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection – meaning its guarantees and values – we expect from an *Oakes* analysis. The notion of defence in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s 1 analysis."

So my submission really is to be, with respect, be cautious of taking an approach to this remedy that kind of brings it forward from an interpretation of the statute because of that richer conception of administrative law being required to deliver rights-consistent outcomes where they are effected or limited by the statute. So that's why we say that the better remedy is one that actually protects and promotes human rights which is to set aside or to not require or

allow administrative decisions to be taken that cannot be justified as limits on rights. And I come to the point that your Honours have raised already that that will enable the Court –
1040

GLAZEBROOK J:
But these aren't administrative decisions though, are they?

SOLICITOR-GENERAL:
Well they are in that context they –

GLAZEBROOK J:
Well that's a judicial decision.

SOLICITOR-GENERAL:
With a discretion and a framework from the legislation.

GLAZEBROOK J:
Which is quite different from an administrative decision, isn't it?

WINKELMANN CJ:
You'd say that you're just applying it by analogy are you so –

SOLICITOR-GENERAL:
I'm saying it's relating to a discretionary – administrative in that sense that it's a discretion application of a statute so the statute –

GLAZEBROOK J:
I'm just not sure how you do anything to administrative law when you're looking at a judicial rather than an administrative context. So it is just an analogy, is it?

SOLICITOR-GENERAL:
To a discretionary –

WINKELMANN CJ:

It's public law.

SOLICITOR-GENERAL:

To a discretionary based decision. So, yes, a public law challenge would be brought to the – even to the judicial determination of an ESO on appeal to say that wasn't a reasonable or proportionate impact on my right or rights.

WILLIAMS J:

You could see why they might do that in Canada given they do have a strike down power. They'd be much more cautious and justifiably so. Less impact here.

SOLICITOR-GENERAL:

Well, with respect, Sir, I disagree. I think that the Court, with respect, needs to be very cautious about this point because we – well it's not about constitutionality. If an Act can be applied consistently with the Bill of Rights Act, then that is what should happen but it seems to me that the questions that I've been faced some –

GLAZEBROOK J:

Well I think what you have to show, and I know you're coming to that, is that it would always be applied consistently with the Bill of Rights because if that's the case then of course there's no declaration of inconsistency. That just goes without saying. It's nothing to do with being – worrying about administrative law or anything to do with that. It's the fact that it is compatible with the Bill of Rights.

WINKELMANN CJ:

However, I was going to say I take your point and I think we all have the point that if you rush too quickly to a DOI it will stop the development of a jurisprudence in relation to imbuing administrative and judicial decisions with consistent rights promoting interpretations.

SOLICITOR-GENERAL:

Thank you, your Honour, precisely. The legislative history of the Bill of Rights Act shows us that that caution was also made well back in its development, and if Ms Li could bring up the *White Paper* for me to make this point, was that even when the proposal was to give, this is a point I was about to make to your Honour Justice Williams' comment, even when the proposal was that the Bill of Rights would be a supreme law under which judges could declare non-compliant legislation invalid and/or unconstitutional, this paper, and I have discovered, and I'm sorry about this, that the note in the record here starts just a little bit earlier than I would want so I'll just go back to a page which you don't have here but in the *White Paper*, Sir Geoffrey, as he is now of course, was making the point that there might be criticism of this proposal and that, you know, some will suggest that the Courts will be overwhelmed and he refers to all of the ways in which the Court has power to control that, which I don't need to go through obviously with your Honours, but also making the point that there might be concern that there'll be too many attacks on government proposals that are in litigation. You see there on the screen at 6.30: "The discussion so far relates to the courts' general powers to control proceedings before them. Courts have also developed powers and practices relevant to constitutional litigation. These practices are among the reasons why the number of cases in which governmental action has been invalidated for breach of guaranteed rights is low."

Your point, your Honour, Justice Williams that where they do have the power of course they are quite restrained about that, and in 6.31 the famous statement there from *Ashwander v Tennessee Valley Authority* 297 US 288 (1936) where the caution that courts develop won't pass upon the constitutionality of legislation in a friendly non-adversary proceeding declining to – because you need a real contest. The second point, not anticipating a question of constitutional law in advance of the necessity of deciding it. The breadth of the rule – so the Court shouldn't formulate a too board a rule than is required by the facts. The Court won't pass upon a constitutional question although presented by the record if there is some other ground on which the case may be disposed of.

Anyway your Honours can read through those others, I don't need to emphasise them. Most, if not all, of these propositions are explicitly recognised in the Bill of Rights Act but especially Articles 23, which of course is section 6, and 25 which was, as in the Bill, a provision that allowed for people to approach the Court for remedy for breaches of rights, which I don't think has an analogue in the Bill of Rights Act, but is uncontroversial nonetheless. In my submission this is really relevant to here because, in fact, the remedy, the DOI remedy doesn't change this Court's function into a constitutional review of legislation. It continues to be a remedy in the interpretive approach, Bill of Rights Act not questioning its constitutional significance and importance, but it doesn't provide that constitutional function that we see in other jurisdictions, the examination of the statute, and I know from the questioning today, and last time, that some of your Honours doubt this. The Crown's view is that what the Court of Appeal did wrong was to say because there is a right that will be limited in the application of the Act, we need to see justification of Parliament's choices, and in my submission that was taking the declaration and using it as a constitutional court to review the statute – sorry. To review Parliament's actions that themselves –

KÓS J:

But that's the product of not offering justification. I mean it's not a high bar that's set for the Attorney, and it's your choice whether to pierce that or not, and you haven't.

SOLICITOR-GENERAL:

Well Sir I disagree, with respect, because what the Court of Appeal said they wanted, not submissions about how the statute works, and how in our case that the justification is in the construction of the statutes, but rather they said, we wanted to see, by showing of evidence, why Parliament took that path and not a different one. That is, in my submission, wrong. That does not deal with –

GLAZEBROOK J:

It's nothing to do – I mean took a path at all that justifies, because it further abstracted than that, isn't it? You have to justify a second penalty in the

particular circumstances that Parliament has decided, then you have to show that it's the least restrictive measure. So there's actually two steps to it, neither of which, it seems to me, have actually been done here. By the Attorney.

SOLICITOR-GENERAL:

Well the Attorney has set out for the Courts the legislative fact and the construction of the statute that we take to say that where the interpretation of the statute leads to the position that, the imposition of either type of order would not be proportionate, would not be justified, then it can't be made. It seems to be the point my friends from –

GLAZEBROOK J:

Well I'm just not sure – well I think that's probably right, if it can't be justified it can't be made in a compatible fashion. If it has to be made in accordance with the legislation then the legislation is incompatible, and a declaration of inconsistency would ensue, wouldn't it?

SOLICITOR-GENERAL:

If the legislation led inexorably to an order being made that did not justify – that was not capable of being justified, then a DOI might follow. But our case is that that is not what the statute is properly understood your Honour.

1050

WINKELMANN CJ:

So this is Heartland difficulty for us with this new jurisdiction so it's something we are very interested in hearing about. So if you say that it's not for the Court to look at what Parliament had in its mind, and I was going to ask you to respond to the Human Rights Commission submissions on this, I'm not 100% clear that I have in my mind what they're saying but you might be clearer about that. But before we get to that, how do you say then the Courts go about their task of deciding if something is justified in a free and democratic society? What do we look at if the Attorney-General says: "Well look you can't look at what Parliament was thinking about, you can't really look at what the Attorney-General was thinking about?" What's the Attorney-General's role in defending

a provision, a limitation as justified and what is the evidence that the Court should be entitled to have regard to?

SOLICITOR-GENERAL:

So I start to answer that question by saying the cause of action that implicates Parliament, or the legislative act in our constitutional system, is the application of the legislation in practice. Now if that legislation leads, and this is a word that we've used before, inexorably to the limit so it must be applied –

GLAZEBROOK J:

But you've accepted it doesn't have to lead to that in every case, it's only in certain cases?

SOLICITOR-GENERAL:

No, yes, quite, yes, although the cases I was going to mention, you know, prisoner voting. No question, the statute says that, said that people in prison for these periods couldn't vote. There was no further application that could be taken. So that's my first point. That is where the –

WINKELMANN CJ:

So can we go back to your first point because I think you didn't finished it. If it leads inexorably to the limit so it must be applied in every or in many cases, then what do you say because I'm asking you about what the Attorney-General's role is in justifying that limit?

SOLICITOR-GENERAL:

Then the Attorney-General is required to justify or to bring material to the Court to justify it. Now what that might be, I don't want to be unhelpful to say that it will depend, but it is likely to be the legislative facts material, how this –

GLAZEBROOK J:

I don't quite understand what that means. You mean the legislation itself?

SOLICITOR-GENERAL:

The narrative and the history of where – perhaps the Cabinet papers explaining possibly the description of in the House about what is being achieved by this legislation. So that's one aspect that the Attorney will bring but the Attorney might also bring updating material and updating evidence or perhaps the raw material, if I can call it that, behind some of the policy advice to the Cabinet. So I'm not shying away from the Attorney having an obligation to bring that material to the Court where there is a limit that can be justified, also that is required to be justified in the statute.

Now I disagree with my friends from the Human Rights Commission's analogy or analysis that this is akin to a duty of candour in administrative law, as I understood them to be saying, because the duty of candour really just requires administrative law decision makers to put all the material before the Court on which the Court can then judge in that context reasonableness. So while I don't really agree with that analogy, I am happy enough with the suggestion that the Attorney does, the Attorney is the one who holds that obligation to come to this Court with justification and the Court should expect that.

KÓS J:

So why does an extra ability, why is it the pivot point here? Why isn't it enough that every person who meets the threshold requirements is in jeopardy of the second penalty, second punishment or re-punishment?

SOLICITOR-GENERAL:

Because that doesn't allow the law to operate to assess, in your case is that a justified limit, and in your case is it a justified limit, because the statute is unlikely to be – well statutes generally are not written in that sort of micromanaging fashion –

GLAZEBROOK J:

But if it is an unjustified one is there an ability to say I'm not going to apply it, even though you meet the criteria?

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

Okay so you're going to have to show us where that is in the statute I think.

SOLICITOR-GENERAL:

I'll show you where it is in the statute. It's not –

GLAZEBROOK J:

Because as I understand it you're reading words – well maybe we need to just let you go through because you say you're coming to that.

SOLICITOR-GENERAL:

Mhm.

GLAZEBROOK J:

But that's the nub – I think that's where we're having the difficulty, because we don't understand –

WINKELMANN CJ:

Mmm.

GLAZEBROOK J:

– where those limits arise from.

WINKELMANN CJ:

Can I ask you one more question about the evidence?

SOLICITOR-GENERAL:

Yes.

WINKELMANN CJ:

Where one of the challenges is that it's arbitrary, what do you say in those circumstances?

SOLICITOR-GENERAL:

Well again I would say that the answer to that question is in the construction of the statute. That the purpose of the legislation is quite clear, focusing its attention on people who have offended in a particular violent or sexually violent way. Who have come to – anyway, your Honours know it, who've come to the end of their period of sentence in which time they will have had treatment and rehabilitation services made available to them through that Corrections process, Corrections period, and who continue to show that they are of this high risk threshold to the public –

WINKELMANN CJ:

And –

SOLICITOR-GENERAL:

And – sorry?

WINKELMANN CJ:

I was going to say what's said about you is that it's an under-inclusive group and it's kind of, it's not a rational way of approaching the challenge and therefore it's arbitrary.

SOLICITOR-GENERAL:

Well it isn't arbitrary in that it is clear who is to be targeted. There are clear processes about how that, how to assess whether the person meets the threshold. It is in the hands of a judicial officer in the ordinary hierarchy for which appeals might be taken. It has all of the features of what this – where our legal system says are not arbitrary, it's available to be reviewed, it's available to be tested –

WINKELMANN CJ:

Formalistic rule of law type things you're saying.

SOLICITOR-GENERAL:

And as I understood my friend's argument, it was that there will be people who are about in the community who have the same…

WINKELMANN CJ:

Risk profile.

SOLICITOR-GENERAL:

Mental capacity, or incapacity perhaps, behavioural conditions and risk profile, but that is not who the statute focuses on. The statute was quite deliberately focused on people who have already offended to that extent.

WINKELMANN CJ:

Yes, and that's what's said against you as to what is arbitrary because there's not a rational basis to select out one bunch of people unless it's a second penalty. So…

SOLICITOR-GENERAL:

And I disagree with that proposition, your Honour. I find it remarkable, the suggestion from my friends that that is an arbitrary distinction, when it's actually really quite a close and carefully constructed – this is where we will provide for what will be a second penalty in this narrow field.

GLAZEBROOK J:

Well, of course, it wouldn't be a second penalty in any other field I suppose is what the point is.

WINKELMANN CJ:

So you're saying there's no need for evidence, it's simply it's got compliance with legal form requirements, rule of law type requirements, and therefore you don't need to go beyond that?

SOLICITOR-GENERAL:

I do say it's in the construction of the statute, yes.

WINKELMANN CJ:

Mmm.

SOLICITOR-GENERAL:

I'm conscious of time. I do, I might go to the point about where is the discretion. How is the discretion to be exercised. I fully anticipate still being standing here at 11.30 and I might just then regroup with what else I need to address because –

WINKELMANN CJ:

We'll try and stop asking you so many questions.

SOLICITOR-GENERAL:

No, it's very useful to know where the contest lies.

KÓS J:

Pretty much everywhere I think.

SOLICITOR-GENERAL:

So the other thing I need to talk, and I think I will start, as I said, with how is the discretion to be exercised, but I also want to come back to penalty. There was some discussion really starting in the last session that I think can usefully be drawn on further. So how is the discretion to be exercised. I found an extraordinary submission from the Human Rights Commission to say there is no discretion when in an absolute beginner form the statute says if the Court is satisfied of a test being met, then it may make an order, and our sophistication of human rights analysis of legislation must only lead to the answer that that does not require the Court to impose an order that it considers not justified in the circumstances of that individual.

1100

The analogy, or the case that I understand my friends from the Commission to rely on, *Parker v Ministry of Transport* [1982] 1 NZLR 209 in the Court of Appeal, is really quite inapt. Well it predates the Bill of Rights Act for one thing but,

more importantly, the challenge there was whether a traffic officer had to do something further in an administrative law sense once they had good cause to suspect alcohol had been consumed by the driver before taking the breath test, requiring him to take the breath test, even though the word that was used was "may." And the Court said we really do expect that the officer would move to the next step but as Justice McMillan said: "May allows the traffic officer to proceed to the breath test without more and "may" is facultative. It allows the officer to stop there for reasons that are practical, urgent or humane" so the Court itself recognising that "may" did not require but permitted the traffic officer to move on. So, in my submission, there really is no more magic in that. It is in the imposition or the giving to judicial officers the authority to make an order once satisfied that the threshold has been met that also means they don't have to make it. In this Court –

GLAZEBROOK J:

Okay, so when wouldn't they make it?

SOLICITOR-GENERAL:

Well can I come to that because I will take you, your Honour, through cases where the Courts have for themselves thought: "Can I make this ESO or this PPO in light of this person in front of me?" But I do just want to remind your Honours of the decision that your Honours came to, to the same effect, in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 where the minority of the Court thought there was no discretion as to the registering the person who meets the threshold on the Sex Offenders Register, the majority pointing out at paragraphs 106 to 108, no there are two stages here. Has the threshold been met and then is it proportionate in this context to impose the order? Quite clearly making the same point, with respect, that we adopt here that there are two steps. I have already taken your Honours to the part in *Doré* where the Court was saying something very similar about that same justificatory muscle of proportionality being needed in the administrative law context.

WILLIAMS J:

So you're really saying once you're into discretion territory, that is once you get to the point of accepting that exercise in discretion will not always be in breach, need not always be in breach, then public law principles, judicial decision making can contribute to the description prescribed by law?

SOLICITOR-GENERAL:

Sorry, your Honour, can you – I don't want you to say it again because I heard you but I just didn't quite understand the question.

WILLIAMS J:

You're saying that judges can put a gloss on this statute so that even though it's possible for it to be rights breaching it needn't be. In other words, you occlude a part of the power in the statute to make it rights consistent?

SOLICITOR-GENERAL:

Well I wouldn't quite put it that way, Sir. Thank you for clarifying because, and this is one of the criticisms from the Human Rights Commission to say, accepting as I think they do, that the Court has powers to, in fact is required to put the least limiting restrictions on that they can, that just makes a less worse second penalty say my friends. So there isn't a gloss that can be adopted that the Court can pick up and do something quite different when it gets to the point of thinking that this is not consistent. It –

WILLIAMS J:

No, no, you say that it's within the four corners of the statute, you can read the statute oppressively and in breach of BORA, I think you've accepted that –

SOLICITOR-GENERAL:

Mmm.

WILLIAMS J:

– or you can read it non-oppressively you say, or at least reasonably so as to be consistent with BORA, and that it's that reading which must be applied and that reading is still prescribed by law. That's what I'm testing you about.

SOLICITOR-GENERAL:

Yes, sorry, yes, I accept that. I agree with that.

WILLIAMS J:

So the courts can be part of the prescription by law. We're not stuck with the statute alone.

SOLICITOR-GENERAL:

Yes, that's right, that the Court might say – well the Court, in fact the Court could do a number a of things in the consideration of the ESO and the PPO. I mean the way in which the application is brought, again, it's part of a criticism that we have, and by a slight aside I have to accept that the Crown is responsible for this position. My friend Mr Keith – sorry, my friends for Mr Chisnall make the point in their written submissions that it was the Crown's proposal that these matters get separated, and I have to accept that it was. It was a terrible idea because here we are in the apex court with nothing for you to grasp to as to how the application has been brought in Mr Chisnall's case, or reasonably other groups of people, to show that what the Court sees when it makes, when it considers the application is not necessarily fixed because the Court sees psychiatrist and health professionals. It will see the Chief Executive's application with which Ms Leota's evidence, now rather aged and itself quite a high level, makes the point that there will have been a review to think about how will we manage this person under the order that we are seeking.

So the Court is actually able to quite literally engage with the expert about these things for the person, not just as to the threshold but, in my submission, also as to whether or not, for example, in a PPO the Court knowing that the person is entitled to treatment, if that treatment is likely to assist, and I haven't got the

right words there, but if that treatment is likely to, has a reasonable prospect of reducing the risk of safety – sorry, the risk to public safety, the Court will have those experts in front of them to ask some of these questions.

So picking up your Honour's point, Justice Williams' point, the itself has the procedural tools, I suppose is where I'm getting to, to ensure that what it is imposing is justified. It isn't a rubberstamp situation. You meet this threshold, you're on this order. The Courts themselves have said that they see themselves exercising a power where there is room left to refuse the order if they can't get to a point of justification. In some ways, sorry to go backwards, I got back to your Honour Justice Williams' point about Parliament should be assumed to be providing this set of tools, understanding that these decision-maker must operate in a Bill of Rights consistent fashion. Again, in my submission, the Courts are, and rightly so, slow to impute to Parliament a rights-inconsistent outcome, without that being very clear.

WILLIAMS J:

The Commission says that the problem with that analysis is that it lacks the essential transparency that core human rights regulation ought to have because it's too retail and not enough wholesale. What do you say to that?

SOLICITOR-GENERAL:

And the statute doesn't say when and how the Judge is expected to…

WILLIAMS J:

The Judges are having to make this up.

SOLICITOR-GENERAL:

Mmm.

WINKELMANN CJ:

It's inconsistent with rule of law requirements too.

SOLICITOR-GENERAL:

Well I mean to the extent that to say that judges are having to make it up without –

WILLIAMS J:

Well with a bit of background and some history.

SOLICITOR-GENERAL:

Without taking that phrase on as my own Sir. The fact that this is a decision in judicial decision-making frame is part of the statutory construction that supports the Crown's argument, in my submission, because courts are forever having to determine within a frame of the statute is this a proportionate response to this person in this circumstance.

GLAZEBROOK J:

You've skipped to the last stage, proportionality, rather than justification at the top.

SOLICITOR-GENERAL:

Yes, true, I have stepped to proportionality, but that is, in my submission, the same point.

1110

GLAZEBROOK J:

And proportionately assumes that these are justifiable per se in certain circumstances, which is where I'm still wanting the justification.

SOLICITOR-GENERAL:

I trust that it's clear to the Court that the Crown's argument would be different if this was a right without limit, that this is not, that this right, second penalty, right against a second penalty is capable of limitation and the Crown's argument –

WINKELMANN CJ:

In exceptional circumstances?

SOLICITOR-GENERAL:

Because of the importance of the right?

WINKELMANN CJ:

That's what's said against you. I think the international jurisprudence backs that up.

SOLICITOR-GENERAL:

Well actually the international jurisprudence tends to find that these types of orders are not second penalties, and I said before I need to come back to that concept of penalty, and I will, but the idea that this is a, in a penal frame, is actually one of the things that really sets us apart from the comparative jurisprudence, and as – it was the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) I think that made the point that I want to make, which is that the broadening of the idea of penalty it's not punitive, it's not retributive, it is preventive and – it's preventive, and involves a good measure of a rehabilitation and treatment focus. It wouldn't be seen as a penalty in other jurisdictions, but actually *Belcher* says it's more in line with our tradition to give that a wide conception and let section 5 do the work. I'm summarising wildly there from the Court of Appeal, but that, they said, was more in line with our legal tradition to give the right –

GLAZEBROOK J:

Or don't pretend something is what it isn't. If you're locking somebody up, it looks like a penalty, it smells like a penalty, and let's treat it as such.

WINKELMANN CJ:

Just because you call it silver doesn't – can I just take you back. I'm trying hard to follow the Attorney-General's logic here, because as a concession this is a penalty, the regime's a penalty, and then what do you say the Judge does in exercise their discretion? Do they make it not a penalty?

SOLICITOR-GENERAL:

No.

WINKELMANN CJ:

Or do they ensure that the imposition of a second penalty is justified before they impose it?

KÓS J:

That's the conflict in your argument at the moment. I mean you're relying very much on the discretion argument and saying that judges can fix this problem.

SOLICITOR-GENERAL:

Mmm, get it right, yes.

KÓS J:

But if you look at section 107I the threshold is set at such a high level, a person has "a pervasive pattern of serious sexual or violent offending" and, let's take violence, "a very high risk that… in future commit a relevant violent offence." It would be a very brave judge that would not then exercise their discretion, would exercise their discretion to not make an order, it seems to me. So in a way your argument is actually not so much cast at the importance of discretion, but rather the very height of the threshold is the least necessary intrusion on the section 26(2) right, because you set the threshold so high.

SOLICITOR-GENERAL:

Well as, I mean the Crown –

KÓS J:

But without much of a discretion.

SOLICITOR-GENERAL:

The Crown has already made the submission to the Court, that that is also, the construction of the statute also can form part of the justification, and that setting it at that very high threshold in itself is part of the justification for why an order that is a second penalty is permitted.

KÓS J:

It seems a better argument to me. It's focused on step 3 of *R v Oakes* [1986] 1 SCR 103.

GLAZEBROOK J:

Although there are issues in relation to how you look at individual risk because risk is measured by way of groups rather than individuals. There I think you would say, well, the fact there has been offending in the past is actually a rational aspect to the assessment of risk because – which would set it away from other people in the community who might come within that, although of course they probably wouldn't come within high risk on any of those measures because a lot of the measures are based on statistical probability of re-offending from particular groups.

SOLICITOR-GENERAL:

So to answer, or to comment on Justice Kós' point, precisely. Is that is the Crown, and has been the Crown's case, that the construction of the statute provides for a great deal of the justification for why an enactment might allow for a second penalty.

WINKELMANN CJ:

And what's said against you in respect of that is that the international jurisprudence only allows that as a justification where the purpose of the scheme is therapeutic, and not penal, and that this appears penal, punitive.

SOLICITOR-GENERAL:

Yes. Can I just answer Justice Glazebrook, which is to say your point about risk, your Honour, that is something that the Court, the PPO and the ESO Court will be testing with the –

GLAZEBROOK J:

But that's a conceptual problem in respect of the assessment of risk. It may not matter quite so much when you're looking at an offenders register or what could be seen as perhaps helpful supportive measures that you might have under

ESOs to help people not re-offend when most people don't want to re-offend. They want to avoid those positions that put them into re-offending in the first place. In circumstances where people might have a concurrence of factors that led them to re-offend in the first place, they want to avoid that concurrence of factors as much as the victims want them to and the State wants them to.

SOLICITOR-GENERAL:

Yes. I'm not sure that that needs an answer from me, your Honour, except to say that that may well be so and that will be something that the treatment and the rehabilitation service, sorry, the management plan for the individual on these orders will be focused at.

And to come to your Honour, the Chief Justice's question, it isn't right that the, I think your Honour is referring to the European cases, so unless there is an express and explicit focus on treatment in the statute, it is seen as arbitrary or, yes, I think that is the point that's being put to me.

WINKELMANN CJ:

It's really seen as penal and therefore not justified so it's quite a, it's excluding penal really. It's saying it's only justified if it's therapeutic and not penal.

SOLICITOR-GENERAL:

In the latest case that the parties have addressed your Honour on in this point is *Bergmann*, which comes after *Ilnseher* and after *M v Germany* or after *M* and after *Ilnseher*, and the thing that leads that Court to conclude that the way in which Mr Bergmann is detained falls more to the preventive treatment stage than continuing his detention for the crime that he committed is worth going through in some detail because, in my submission, it is virtually indistinguishable from our PPO regime where the Court, and I'll ask Ms Li to bring up *Bergmann* at 120 I think is probably the place to start, emphasising that there's been a change in the mode of detention. It's no longer within the prison, which was the criticism in *M*. It starts there at 20. I won't read it out but the –

GLAZEBROOK J:

Paragraph 120 did you say?

SOLICITOR-GENERAL:

120, sorry, I mean. Emphasising the change and the mode of detention. It's a civil detention on prison grounds and purpose built units. There is considerable liberty within that for the individual. There is treatment. It's an individualised approach to that individual's mental disorder as referred to there. Finding no breach of Article 5 lawful detention, nor of 7 because the preventive detention extended because of and with a view to the need to treat the mental disorder. I might just read that again because it's significant. The reason that it wasn't a breach of Article 7 was because the preventive detention was extended because of and with a view to the need to treat the mental order because of the mental disorder.

1120

That is precisely what we see here where the person has the characteristics and behavioural condition that requires their detention to be extended, and using Bergmann's terms, that is not a breach, they say, of Articles 5 and 7 because of the change in the way that person is to be treated. And, yes, it continues to have, as our PPOs do, some aspects that look penal and that they are in units inside the wire, if I can use the expression, on prison grounds but a highly individualised method of detention for that person. Another –

KÓS J:

Is there a parallel process for persons who are not currently detained in the penal system but who exhibit the same threat profile, or are these people simply picked out for the special treatment because, as it happens, they are convicts for these particular offences?

SOLICITOR-GENERAL:

That's right. This applies to people who are imprisoned and coming to the end of their finite term.

KÓS J:

So what – I mean there are other people in the community who have the same risk profile, what's the therapeutic mechanism to deal with those people that means that prisoners are not being singled out?

SOLICITOR-GENERAL:

I don't precisely know the answer to your Honour's question. It might be, no it won't be, I was going to say it might be that the mental health stream assists but it actually doesn't because if it did it would assist these people –

KÓS J:

No, exactly.

SOLICITOR-GENERAL:

It would be available to these people. The distinction I would draw is that here, this is the risk that is being attended to here is of a sexual or sexually violent, violent or sexually violent offender re-offending. That is the distinction being drawn.

WILLIAMS J:

The practical reason is probably the State doesn't have the reach to be able to find such people unless they've come to the authorities via the criminal justice system. How else would it know?

GLAZEBROOK J:

And they probably wouldn't show up on the risk profiles anyway because they rely so heavily on previous offending.

KÓS J:

Yes, but I mean some of the people in the community are previous offenders. This process –

GLAZEBROOK J:

In terms of finding other people, yes.

KÓS J:

Yes, this process gathers in people who are currently detained but there's another category of past offenders who are in the community, and then there's a third category altogether of people who are not past offenders who have the same risk profile. There are three groups in society who might exhibit these behavioural trends.

SOLICITOR-GENERAL:

And all I can say to that is that this is focused on those ones at the end of their term of imprisonment, and remembering that your Honours will have been taken to, and I can take you there, or at least give you the reference, to the speeches in the House that made the point that there are some violent and sexually violent offenders for whom their period in a fixed term imprisonment has not adequately attended to, despite having treatment available to them, does not, has not adequately reduced their risk profile and that is a risk that, that is the risk Parliament is attending to and not prepared to too lightly let that risk be visited back into society.

WILLIAMS J:

Perhaps the answer to the former prisoners now in the community, how come they're not corralled back, is that that would be even worse.

SOLICITOR-GENERAL:

Well quite, Sir. They'll be corralled back probably into preventive detention terms most likely. Well I shouldn't, I probably can't put that quite so determinedly but very likely the sort of re-offending of that nature with that offending history is likely to lead to a PD term.

KÓS J:

Well it might. It just seems to me it would be an awful lot easier to justify as the least intrusive option for persons who have already been punished once and face a second punishment as a result of this mechanism if, in fact, their treatment was indistinguishable from other people in the community who exhibited precisely the same risk. But we don't have a mechanism for them,

we just single out these people because they're easy to spot. That's basically it.

SOLICITOR-GENERAL:

And I don't know whether an individual in the community who has the behavioural condition, well no I do – as a matter of logic, a person in the community who has the behavioural condition, and the risk profile here, that without further management or detention they are likely to, or at imminent risk of re-offending, they are likely to be drawn to it, the attention. As Justice Williams says, they're likely to come to the attention of the criminal justice system, perhaps for a first penalty, is your point.

KÓS J:

Well possibly, but there are people who are detained under the Mental Health Act because of their propensity for violence who have not offended.

SOLICITOR-GENERAL:

Yes, yes.

WINKELMANN CJ:

So just going back to the point. So there are two challenges here to you. One is, at least two challenges, there are others as well, which Mr Ellis will address us on tomorrow morning. It's penal and some of the international jurisprudence suggests that the way that you can uphold such a regime is if you create a sufficient therapeutic…

SOLICITOR-GENERAL:

Mmm.

WINKELMANN CJ:

On the threshold at the start, so you're only catching people who with a therapeutic justification for detaining them, or subjecting them to certain conditions, but then there's the second challenge against you which is that it's arbitrary because it's picking on people who are a subset of the people you

should, whose risks you should be managing, so do you, can you tell us what the jurisprudence said on that in relation to the schemes?

SOLICITOR-GENERAL:

So in the first hearing, the first part of this hearing, your Honour might recall that Mr McKillop took you through – it really comes up in the cross-appeal really, but Mr McKillop took you through section 22 and why the, my friends reaching for the European jurisprudence is not applicable here.

WINKELMANN CJ:

Ah, right.

SOLICITOR-GENERAL:

We can go back through that.

WINKELMANN CJ:

That's all right.

SOLICITOR-GENERAL:

I'm just a bit anxious about readdressing our whole appeal.

WINKELMANN CJ:

No, that's all right. So you stand on that point?

SOLICITOR-GENERAL:

Yes.

WINKELMANN CJ:

It's ringing some bells with me so…

SOLICITOR-GENERAL:

I was just going to – can I just finish one point before we have the break. My friends for Mr Chisnall put up a new case, *Chief Executive of Corrections v Pori* [2022] NZHC 3581 which is about a prison detention order, which is part of the PPO Acts orders, and I don't think your Honours need to go

to it, but my point that I hadn't finished making, which was that we see here virtually indistinguishable matters from what the Court said in *Bergmann* took the matter beyond an unacceptable penal regime into a preventive regime. You'll see the evidence there which I'll bring to your attention, just because it's more up-to-date than what we have. It's 69 to 71 where the Matawhāiti unit is described, which is the detention or the special built unit within the prison grounds for PPO. If your Honours want to see it now, we'll see it now.

WINKELMANN CJ:

Yes. What is the name of the case sorry?

SOLICITOR-GENERAL:

Pori, P-O-R-I, and this needs to be seen alongside the points that I was emphasising from *Bergmann*. Yes, Matawhāiti civil detention centre is different from a prison unit, doesn't have a high perimeter fence – sorry. Does have a high perimeter fence, residents can go into the community when accompanied by one or two staff. Designed to replicate a more homely environment. Five residents in total. They have their own units which Ms Brussov described as being like a little motel unit. Encouraged to be independent, they have their own key, their own unit, they're not locked in those units, they're encouraged to partake in daily life, volunteers come and go, and so on.

WINKELMANN CJ:

So are you asking us to take this into account as evidence to the conditions?

SOLICITOR-GENERAL:

My point being that in *Bergmann* the things that the Court there were saying, these are the differences in the detention of the person under their civil order, like our PPO, which drew it away from being punished again for the original crime to something different, individualised, treatment oriented.

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

I'm just pointing out what we now have as evidence of the physical conditions in which PPO –

WINKELMANN CJ:

I suppose for future hearings it would be useful for us to have the evidence direct as opposed to having to look to other cases which might not be – I mean as you say, there was this issue about the splitting of the two procedures.

SOLICITOR-GENERAL:

Mmm.

1130

WINKELMANN CJ:

But all the same, it would be useful.

SOLICITOR-GENERAL:

Well I can't help myself but make the submission, your Honour, that if this case had been brought the way the Crown now envisages it should be brought, you would have had all this information as to Mr Chisnall's detention in this unit being described here, and you've got some of it in front of you in the Court of Appeal judgment setting aside the PPO, but there we see evidence of his management plan. We see evidence that he refuses to allow anyone to see the treatment that he has had, or its effect on him. We see that he –

KÓS J:

Sorry, what does that mean, he refuses to let people see his treatment?

SOLICITOR-GENERAL:

The Court makes the comment that they are inhibited in understanding the effect that treatment is having on him because he stands on his rights to not let that material be seen by the review panel. We see evidence of Mr Chisnall's rehabilitative trips to town with fewer supervisory controls. All of the things, in

my submission, that the Court imposing the orders will want to know about, is this a justified limit. Yes, it's a second penalty, is that justified.

KÓS J:

Over the break would you mind just checking with your colleagues and identifying whether there are any cases where the threshold requirements in section 107I(2) have been met, but an order has not been made. In other words, has the discretionary exercise despite the threshold been met. I'm just not aware of such a case.

SOLICITOR-GENERAL:

Mmm.

KÓS J:

Thank you.

WINKELMANN CJ:

We'll take the adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:

Ms Jagose?

SOLICITOR-GENERAL:

Your Honour, sorry for keeping you standing out there.

WINKELMANN CJ:

That's all right.

SOLICITOR-GENERAL:

Just before the break Justice Kós asked is there any case that we're aware of where a judge has found a threshold to be met and not imposed an order and

the plain answer is no I'm not aware of such a case, I doubt that there is one. There are some cases though I would like to draw your Honours' attention to where the PPO and ESO Courts do see themselves as exercising a discretion and do see their power as bounded by the justification that is required to make the order. In *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171 the Court of Appeal, now this is in tab 15 of the cross-appeal authorities, and I don't know that I need to take your Honours to it, the Court of Appeal there making the comment that whether, so discretion, whether and for how long to make an order requires an assessment of the impact on the individual's rights, paragraph 26 noting at 27 there's a discretion to refuse the order and also making reference to the highly individualised assessment that go into that assessment of justification at 24.

WILLIAMS J:
This is for ESOs?

SOLICITOR-GENERAL:
Yes.

WINKELMANN CJ:
So can you tell me what bundle that is in?

SOLICITOR-GENERAL:
In the cross –

GLAZEBROOK J:
Do we have a cross-appeal bundle as well?

WINKELMANN CJ:
I didn't know we did.

GLAZEBROOK J:
Because I actually haven't found that.

WINKELMANN CJ:

No, neither have I.

SOLICITOR-GENERAL:

I beg your pardon.

WINKELMANN CJ:

We've got appellant's supplementary authorities.

GLAZEBROOK J:

Additional authorities and appellant's authorities.

SOLICITOR-GENERAL:

I might have to come back to your Honours with where that is.

WINKELMANN CJ:

What letter does that start with? K?

SOLICITOR-GENERAL:

K, K-I-D-D-E-L-L. It looks to me like Ms Li might be bringing that up.

WINKELMANN CJ:

If we could find out where it is, it'd be helpful.

SOLICITOR-GENERAL:

Let me come back to your Honours with where that is precisely.

KÓS J:

It's in the main authorities group.

SOLICITOR-GENERAL:

Thank you, Sir.

KÓS J:

Which is in the second set of alphabetical cases of –

GLAZEBROOK J:

Sorry, what's it called again?

SOLICITOR-GENERAL:

Kiddell.

WINKELMANN CJ:

And it's *Kiddell* and something, it's not R versus.

GLAZEBROOK J:

Oh, I see.

WINKELMANN CJ:

Well where is it?

KÓS J:

Kiddell v CEDOC.

GLAZEBROOK J:

It's in the additional authorities.

WINKELMANN CJ:

It's not in the main authorities.

GLAZEBROOK J:

Additional authorities, tab 15.

WINKELMANN CJ:

Thank you.

KÓS J:

I don't think I've got that.

WINKELMANN CJ:

It would be quite good if counsel could co-operate and get one bundle of authorities but…

O'REGAN J:

Well we have had two hearings, yes, so we've got two, yes.

WINKELMANN CJ:

I know but there are so many bundles it's – yes, all right. There must be a system we could set up that is easy for everybody to do on every case.

SOLICITOR-GENERAL:

There it is in front of your Honours now in any event. So I was referring to paragraph 24 which is at the top of the screen. Just making the point about a highly individualised assessment of whether the offender does in fact present the high risk. So I accept that that's whether you get to the threshold but, of course, being satisfied of that isn't, in itself, a matter that the Judge must come to themselves. 26 referencing that word "may", the Court may make an order, it has a discretion to refuse it and, finally, making the point that when deciding whether to make an ESO, and for how long, the Courts must recognise that the order, as I say over the page, may impact on rights.

WINKELMANN CJ:

I must say I'm finding this all very difficult to follow without understanding what it is the Crown accepts is the non-compliance that must be avoided, and how it is that the imposition, that judicial discretion can avoid that non-compliance. I suppose the critical question is what are we trying to avoid through the exercise of judicial discretion?

SOLICITOR-GENERAL:

We're trying to avoid an unjustified limit on the right against second penalty.

WINKELMANN CJ:

Yes, so what is an unjustified limit that could be imposed by a judge under this if the original threshold is met?

SOLICITOR-GENERAL:

What's the question? What is an unjustified limit?

WINKELMANN CJ:

Yes, well you say this is not a scheme which is inevitably inconsistent. It can be fixed by the exercise of judicial discretion. So what is it that a judge has to bear in mind when they're trying not to act inconsistently with the Bill of Rights under the scheme? What are they trying to avoid?

SOLICITOR-GENERAL:

Well they're trying to avoid, and it doesn't help your Honour's question, they're trying to avoid an order that is a second penalty for which there is not a justified limit but I'm just answering your question in a different way but –

WINKELMANN CJ:

Yes, so what I'm wondering is what do you say the threshold for that is I suppose?

SOLICITOR-GENERAL:

Well can I answer a different way by pointing out the case called *Department of Corrections v Gray* [2021] NZHC 3558.

WILLIAMS J:

A-Y or E-Y?

SOLICITOR-GENERAL:

A-Y, according at least to my note, and I also see it's at tab 29 but that might not be particularly –

GLAZEBROOK J:

Yes, it is and that's of the ordinary authorities. I've now got the indexes out so that's why I'm being smug on this.

SOLICITOR-GENERAL:

Justice Cooke, now admittedly he found here that the threshold hadn't been met so it's not entirely consistent with your Honour's question, but in any event he goes on at 56 and 60 to make the assessment of whether there was a justification if he had found the threshold to be met and he finds that the types of conditions that would have been imposed under the ESO on Mr Gray would simply not have made any difference to the risk he posed. He asks further questions about that of the psychologists. Perhaps that's touching on the question that your Honour Justice Williams asked me about the judicial kind of method of exercising a discretion so here we see the Judge asking the psychologists about that.

Going on to noting the special condition being sought. If you can get to paragraph 60 and here his Honour is finding that this would have been a case where an ESO is not an order that involves restrictions that would involve justified limit and go no further than is required. In fact, they are poorly directed as effective risk mitigation measures. His point was that the risk here, the risk of intimate partner violence being one that isn't attended to by the conditions of "tell us where you live and don't leave that home until you have the authorisation of a probation officer," those sorts of standard conditions. So it's not entirely on point, I recognise, but there is a judge thinking those conditions are not going to be justified because they don't do what the order is supposed to do and therefore they are unjustified.

WINKELMANN CJ:

So is it a justified second penalty then if it is tailored closely on your submission, because this is the critical thing, I think the Attorney-General does have to take a position on what limitation is justified and that's what I'm struggling to understand. But I think you're saying it's a justified limitation on that right if it

responds in a tailored and narrow way to managing the risk or is that not what you're saying?

SOLICITOR-GENERAL:

Sorry, your Honour, I just was going to – could I start just behind that question. I would say this, that it is a justified limit on a second penalty where the risk and the likelihood of that risk being met – sorry, so that's the first point, that's the threshold point. It's the part of the justification. There are some people for whom they are so imminently dangerous and at risk of re-offending, unable to stop themselves, that is a justification for providing for a second penalty. But the second penalty itself needs to be one that allows a highly individualised management of the person and we see in these statutes a significant rehabilitation and treatment focus which distinguishes it from cases like *Fardon v Attorney-General* (Queensland) [2004] HCA 46, (2004) 223 CLR 575 where there is virtually no change to the way in which Mr Fardon was held in detention at the end of that fixed term.

Much more like the European Courts being satisfied with the changed law in Germany as we see in *Bergmann* and the reason – can I unpick that point further, your Honour – it's the point that the order itself is an individualised one. So we have the Sentencing Act 2002, of course, so the person themselves already has had the rehabilitation treatment as from the purpose of the Sentencing Act, the Corrections Act 2004 too, of course, has a principle of focusing on rehabilitation and reintegration, but despite that they meet this threshold test.

1200

The PPO Act entitles the subject of the order to treatment, if there is a treatment – we went through these words just earlier, didn't we, if there is a treatment that is likely to attend to their – there is a reasonable prospect of reducing the risk to the public, which is quite a low threshold in my submission.

WINKELMANN CJ:

So what section is that?

SOLICITOR-GENERAL:

36.

GLAZEBROOK J:

Can I just ask, what it seems the Crown is saying, because – that the justification is the very, very high risk threshold that's in the Act, and if that is met then there is no rights limitation as long as the detention is individualised to addressing the risk and providing treatment to the extent that is available and of use.

SOLICITOR-GENERAL:

I would put that slightly differently if I may which is to say that the Crown's view is this: 26(2) in our approach to it catches more than the punitive function of criminal justice system, more than penalty – sorry, more than punishment, retribution, deterrence. It includes a preventive – it includes preventive orders or preventive conditions. I've already said I think today that the Court of Appeal in *Belcher* was saying, you know, this is this third type of order. It's neither strictly within the penal nature of the criminal justice system and it's not the health, mental health and intellectual disability kind of stream. It is this third type of thing, this third type of order. Though its purpose isn't to punish, I've already said it your Honours, it's more properly representative of our legal tradition to take a broad view of that right. So the Crown's case has to be understood as starting there. That this isn't to say that we can literally punish the person again for the crime they committed for which they have nearly finished their sentence.

Then I would pick up your Honour Justice Glazebrook's summary, which is to say then, the statute itself imposes such a high threshold for where despite having been in a criminal justice process for which treatment and rehabilitation is a part, the person gets to the end of that sentence and continues to pose, if I shorthand it, an unacceptably high risk of re-offending. That is a further justification for framework that includes a second penalty. Then I would come on to say and then the statues themselves anticipate.

GLAZEBROOK J:

Can I just –

SOLICITOR-GENERAL:

Mmm.

GLAZEBROOK J:

Just stopping you there. Do you put emphasis there on the human rights of the victims, especially given the very undesirable and lifelong consequences that offending can have on victims.

SOLICITOR-GENERAL:

Well that's certainly in the balancing that we see evident in this statute, that there are some people for whom the risk is so high that this power to the Court to further manage or detain them is provided. So that is balancing victim's interests.

GLAZEBROOK J:

I'm not sure balancing is quite the right word.

SOLICITOR-GENERAL:

Yes, no that's not the right word, but has some aspect of that in it, yes.

GLAZEBROOK J:

It certainly has in mind the – yes.

SOLICITOR-GENERAL:

The statute does require a notification to victims when orders are made.

WINKELMANN CJ:

Well it's prospective victims whose human rights would be engaged, wouldn't it, not past I think. Notional.

SOLICITOR-GENERAL:

Well they might be both of course, your Honour.

GLAZEBROOK J:

Well could be both, could be both.

WINKELMANN CJ:

Mmm. Well, it would be hard to justify, to see the rights of past victims weighing in a prospective order.

SOLICITOR-GENERAL:

I just mean they might be both in that, you know –

GLAZEBROOK J:

Both past and possibly prospective.

SOLICITOR-GENERAL:

Forgive me for making up a facts scenario, but a person might be presenting saying, when I'm out of here I'm going back to that house and committing a violent crime against person X, my last victim.

WILLIAMS J:

I, sorry, I wonder whether the individualised management, which is clearly factually correct, quite get you where you need to get you. Basically your thesis is as long as you have highly individualised management of high risk former sexual violence offenders, or very high risk former violent offenders, it will comply. I wonder whether you need another phrase at the end of that which is and the control, is the absolute minimum necessarily?

1205

SOLICITOR-GENERAL:

Well that is, that is also –

WILLIAMS J:

It's not necessarily in the individualised that you get across that idea, because all exercises of discretion must be individualised. You can't have cookie cutter

conditions as *Kiddell* or whichever case it was, *Department of Corrections v Gray* –

KÓS J:

Gray.

WILLIAMS J:

– covers that, it has to be just ordinary principles of public law require focus on the particular case. Really all that test says it you respond to the individual needs of those covered by the orders where they meet the test in section 107I(2). That's just straight public law principles. You don't need BORA for that. It's got to be something more.

SOLICITOR-GENERAL:

So the PPO Act requires some attention to that. One of the principles can: "Only be imposed if the magnitude of the risk… justifies the imposition of the order." So I think there is the assessment of the PPO's harder because it is a – because the order is –

WILLIAMS J:

Greater imposition.

SOLICITOR-GENERAL:

– detained in this special unit. So I agree with your Honour that that is part of the discretion is to say what is the, what is the set of conditions that meet the risk profile, and I haven't –

GLAZEBROOK J:

But if there's another regime, that could actually meet –

SOLICITOR-GENERAL:

Mmm, yes.

GLAZEBROOK J:

– the minimum necessary then that should be the one that's imposed.

SOLICITOR-GENERAL:

Also in the principles in the Public Safety Act, section 5, the PPO shouldn't be –

GLAZEBROOK J:

But there's been some restriction on the conditions that are available, isn't there? I know you say it's a new argument that hadn't been brought up before.

SOLICITOR-GENERAL:

Meaning what, sorry, your Honour? I don't –

GLAZEBROOK J:

In terms of the cutting off of the, where is it, the 12 month limit on intensive monitoring.

SOLICITOR-GENERAL:

Yes, that is a new point that we'll come to. But the principles also require that if the person is better managed, if that's the right word, an order can't be: "On a person who is eligible to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003", so again it's quite that there are, if there are different regimes that should be applied that are less imposing, rights limiting, then they should be used.

I wanted to, I've made the point about section 36 but I also want to draw your attention to sections 41 and 42 of the Public Safety Act: "As soon as practicable after a resident first commences to stay in a residence", so as soon as they're subject to the order, as soon as practicable, there must be an assessment of them. Here's the section in front of you, identifying a variety of things. But, identifying at (e): "Steps to be taken to facilitate the resident's rehabilitation and reintegration into the community." So the

requirement is to start from the very beginning looking at the exits. What steps can be taken to facilitate this person's rehabilitation and reintegration?

Also, that management plan sets out the next section, similar: "A personalised management programme", 42(3)(c), that will contribute to their eventual release. Also, at (f): "Any treatment and programmes that may be offered to the resident in accordance with section 36, and that the resident elects to receive or participate in."

In the first hearing of this matter towards the end of last year, my friends encouraged your Honours to see this regime as warehousing of difficult people. In my submission that is, cannot be sustained when the statute is examined and I would further say it cannot be sustained when, or if, this Court had before it how Mr Chisnall's management has been progressed in the PPO, now under the ESO. So that's the PPO –

1210

WINKELMANN CJ:

Well, one thing that is said against you in relation to the PPO is that the threshold, that section 36 is problematic, because you only have a right to rehabilitative treatment if it has a reasonable prospect of reducing the risk of offending, which suggests that it is actually warehousing because if it's no reasonable prospect of meaning a risk of re-offending, you can just hold the person there and that's what's said against you.

SOLICITOR-GENERAL:

Well Mr Chisnall doesn't say that about himself. That has just been, again to the Crown's criticism, said in a rather factual vacuum that that might be the case.

WINKELMANN CJ:

Well no this is about the statutory scheme.

SOLICITOR-GENERAL:

Yes, and to that I say that's a reasonable prospect of reducing the risk, is quite a low bar, but I would also say in addition to that, aside from treatment, the needs assessment also has to have a personalised management programme that contributes to their eventual release so the focus is on that person's release. It might be, I have to accept, that there will be an individual for whom the expert assessment is that there is no treatment that has a reasonable prospect of changing the risk profile. That's not actually the case, of course, here. Mr Chisnall's case is that there is nobody for whom an ESO or a PPO is a lawful order – sorry not lawful – is an order that is justified.

KÓS J:

But in any case your argument might be that a person who had no reasonable prospect of altering their behaviour in the interests of public safety would be the very person for whom an exception might exist in terms of section 26(2).

SOLICITOR-GENERAL:

Well the justification would be very high. Can I touch on the statutory scheme in relation to ESOs which, of course, are different, of course, and seen to be less rights limiting, although for the purpose of this appeal, they are also section 26(2) limiting. The standard conditions, we've been through this, I'm cautious or anxious not to spend too much time on it, but the standard conditions that are imposed when the order is made they are, in my submission, reasonably modest standard conditions. In fact they are, I think, entirely the same as the first year of release conditions. But they really put things into the hands of the probation officer in terms of the offender, as they are called, must report to the probation officer within 72 hours –

WINKELMANN CJ:

Are we going to have that section up?

SOLICITOR-GENERAL:

Section 107JA of the Parole Act 2002.

WILLIAMS J:
This might all count against you because these are cookie cutter –

SOLICITOR-GENERAL:
Well I'll come to that, Sir, yes.

WILLIAMS J:
Okay, good.

SOLICITOR-GENERAL:
I'll come to that right now. I'll say two things about them. First of all, they are relatively – they limit rights but in quite a modest way, in my submission, in that the person has to report to their probation officer. If they're going to change address, they must get permission to do so. All of these decisions themselves have to be made reasonably and in a rights-consistent manner.

WILLIAMS J:
What does that mean?

SOLICITOR-GENERAL:
Well those are further administrative decisions that have to be made and could be challenged if the probation officer unreasonably withholds the permission to move address say.

WILLIAMS J:
I see, right, yes.

SOLICITOR-GENERAL:
Well the second point, to answer your question directly Justice Williams, is that the Court does have the authority to impose special conditions and to change those standard conditions if they don't, section 107IA. Now it's where the Court makes an ESO and the Chief Executive has applied for special conditions because, on an interim basis, because there's not enough time between the ESO coming into force and for the Parole Board to consider special conditions.

There the Court can suspend all or any of the standard extended supervision conditions that would otherwise apply and cancel or vary any special conditions.

WINKELMANN CJ:
Where is the special condition about treatment?

SOLICITOR-GENERAL:
Well there's a standard condition about treatment in that the section that you just had on the screen, which was to say at (h), there's a standard condition that the offender must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.

GLAZEBROOK J:
Sorry…

WINKELMANN CJ:
Is it IH?

GLAZEBROOK J:
Oh, I see, yes.

WINKELMANN CJ:
What section are we in?

SOLICITOR-GENERAL:
Section 107JA.

WINKELMANN CJ:
Section 107JA.

SOLICITOR-GENERAL:
(1)(h).

WILLIAMS J:

I'm just not following whether a Court can displace the standard conditions, you say they could?

SOLICITOR-GENERAL:

In section 1071A *[sic]* is where they can on an interim basis.

WILLIAMS J:

1A?

O'REGAN J:

Section 107IA I think it is, yes.

SOLICITOR-GENERAL:

I beg your pardon, section 107IA, yes, I'm being corrected all around the room on that one. And that's only where the Chief Executive has sought –

GLAZEBROOK J:

But that doesn't displace the standard conditions, does it?

SOLICITOR-GENERAL:

Say that again, sorry, your Honour?

GLAZEBROOK J:

Well I thought the standard conditions were the standard conditions. I don't see that as displacing standard conditions but have I misunderstood?

SOLICITOR-GENERAL:

See subsection 3: "An order under subsection (1) may do either or both of the following: (a) suspend any or all of the standard extended supervision conditions that would otherwise apply…". So in that circumstance the Court making the ESO may displace the standard conditions on an interim basis until the Parole Board gets to think about what special conditions –

GLAZEBROOK J:

No, well that's what I didn't – I'm not sure about the – how does the interim basis help you?

SOLICITOR-GENERAL:

I was answering Justice Williams' question about the standard conditions of cookie cutter and they do apply to orders made, although there is a particular situation, section 107IA, where the Court could displace them.

WILLIAMS J:

On an interim basis?

SOLICITOR-GENERAL:

Until the Parole Board gets to do its work of thinking, then (2) –

WILLIAMS J:

Can the Parole Board displace the standard conditions –

SOLICITOR-GENERAL:

Yes, with special conditions.

WILLIAMS J:

– in favour of special conditions? Or are they cumulative? Well they wouldn't work really, would they, if the special conditions involve detention?

SOLICITOR-GENERAL:

The standard conditions don't involve a detention.

WILLIAMS J:

No, I know but if the special conditions do.

SOLICITOR-GENERAL:

Sorry.

WILLIAMS J:

The 12 month…

SOLICITOR-GENERAL:

They might, yes. As I understand the answer to your question, if I'm understanding it correctly, special conditions, when they are imposed they may displace the standard conditions.

GLAZEBROOK J:

We're probably getting into too much detail here.

SOLICITOR-GENERAL:

I'll just finish the point that Mr McKillop is just making to me which is that section 107O(1), that the person subject of the order may apply to the Board for variation or discharge of any of those standard conditions. Again, this goes to the Crown's point that this is a highly individualised regime which is part of, I think, three points that your Honours have summarised at various points that the Crown's case, what the Crown's case is here, the first being about penalty, the second about being the high threshold, third being about the discretion and the way in which –

WINKELMANN CJ:

What is the first about penalties?

SOLICITOR-GENERAL:

The first point, this is – yes, this is section 26(2) but this is not the imposition of a punishment on account of a past crime for which you have done your time, to speak colloquially if I may.

WINKELMANN CJ:

Because it's therapeutic?

SOLICITOR-GENERAL:

Because it's preventive and it has a large measure of individualised attention focusing on, not entirely, it's not it's absolute focus, but focusing on the person's rehabilitation, re-entry to society and what treatment they might require.

1220

WINKELMANN CJ:

So can I just clarify? Are you saying it's not a penalty or it is a penalty?

GLAZEBROOK J:

Accepting it's a penalty –

SOLICITOR-GENERAL:

Well I accept that it's caught by –

GLAZEBROOK J:

– but is the penalty that comes within that preventive, rather than punishment, I think, if I've understood that?

WINKELMANN CJ:

Can I just have it from Ms Jagose thanks?

SOLICITOR-GENERAL:

Well it is a penalty in the way that section 26(2) refers to the right of that second penalty but that right is cast broadly in this country, catching things that are not only punitive or retributive, but catching things that are protective and preventive. And the thing that hooks it in is the existence of the conviction, the existing conviction, you know the index crime by which the person can become, this is your point Justice Kós, that is the way in which the person enters this regime, or can have this regime imposed on them, that is really the key feature here which makes it section 26(2) related which makes it penal. The person is in the custody of the Chief Executive of Corrections on a PPO. I mean, I know the Crown argued otherwise in the Court of Appeal and now accepts the Court of Appeal's analysis that PPOs, like ESOs, are penal, not punishment, not

retributive and to that point your Honour the Chief Justice raised, I think, what is the Crown's answer to this has to be an exceptional circumstance and, in my submission, exceptionality isn't required. It might be –

WINKELMANN CJ:

No, no, I think it was said against you, and I can't remember the exact formulation of it, but that's a very narrow gateway through that second penalty is one of the – it may be a limitable right but it's only limitable in very narrow circumstances.

SOLICITOR-GENERAL:

Well I would submit that it might be, it might actually be illimitable in some exceptional circumstances. For example, if a statute was enacted that said that the Court could, before a person was ready to finish their fixed term, decide that that hadn't been a long enough term and give them longer that would be –

GLAZEBROOK J:

Well isn't your real answer to it the high threshold that it is exceptional that you have somebody going through the rehabilitation, going through the punishment aspect of it and still indicating such a high risk of re-offending after that?

SOLICITOR-GENERAL:

My first answer though is that section 26(2) is cast broad. It doesn't just pick up, as the comparative jurisprudence does, orders imposed to punish for something you have done. It is deliberatively cast broad. As *Belcher* says that's a good thing. Let section 5 do the hard work of working out if that's justified. Then the second point is one that you've just articulated, Justice Glazebrook, then we have the high threshold judicial officers with a discretion, an individualised regime with management plans that are about the person's eventual release, rehabilitation and release. May I shift to a different point?

WINKELMANN CJ:

Well did you have the three points I thought or was it only two?

SOLICITOR-GENERAL:

I said three. The breadth of the idea of penalty, the high threshold, the judicial officer with the discretion –

WINKELMANN CJ:

Right, judicial officer.

SOLICITOR-GENERAL:

– to impose individual, sorry, to impose an order which has an individualised aspect to it.

KÓS J:

This argument has really evolved today, hasn't it? I mean your argument 4 was really point 3 only and perhaps a bit of point 1 but point 2 the high threshold has seen much greater importance in their old argument than it does in the written, am I wrong in that?

SOLICITOR-GENERAL:

You might well be right that it's more emphasised in the oral. It has, as I understand the case from the start of this case, we have emphasised the high threshold. I stand to be corrected by others who have been here longer.

KÓS J:

Well it's a much clearer argument.

GLAZEBROOK J:

Is there a – and then we do have to, which I think you're going to deal with, the Justice Williams, the least restrictive side of it, which of course to a degree can be dealt with in conditions, but it might – well there probably this intensive monitoring becomes important in the – which I think you're going to deal with later, is that right?

SOLICITOR-GENERAL:

Yes, I thought I had, that's right, the intensive monitoring point, yes indeed. We haven't really touched on sections 4, 5 and 6 of the Bill of Rights Act and that was one of your Honour's questions, the formulation of the supplementary submissions.

WINKELMANN CJ:

Well we sort of did at the outset, didn't we, in terms of the constitutional architecture and where the…

SOLICITOR-GENERAL:

Mmm, and I'm content to leave written submissions where they are, with the point that, because we say this is a remedy that comes at the end of a statutory interpretation process. That all of the methodologies that work, whether the matter is a facial limit or a discretionary limit, we put a table into the written submissions that touch on a number of the recent cases that shows us a different methodology. So I don't really need to go through that in much detail except to emphasise our point, which is that that doesn't have the Court asking, why didn't Parliament do something else which is, in my submission, where the Court of Appeal has gone wrong.

So we are here with a new remedy, the DOI, and a submission that the Crown makes by way of an offering as to how this might kind of sit in our framing of remedies, because in fact, in my submission, real remedies for real people is actually what the Bill of Rights should be about, and the supervision that that Act imposes on discretionary decisions – sorry, take discretionary out. On impacts on individuals, which is why we point up what we say is the unusual situation where Mr Chisnall consents to an order being made, by which he must consent that it is – no, he consents to the order being made, and he seeks a declaration that it's inconsistent and can't be justified.

WINKELMANN CJ:

I don't think you can take this argument any further than your argument about abstraction because as it's said against you that, well, this is legislation, it's a

tactical decision on his part to do this in that other capacity, which has been split off at Crown suggestion.

SOLICITOR-GENERAL:

And my submission was to say that if he is right about that, if this isn't unjustified limit on his rights, then he should be freed from the order.

GLAZEBROOK J:

Well not really because legislation requires an order.

SOLICITOR-GENERAL:

Not it doesn't.

GLAZEBROOK J:

Well I know you say that.

SOLICITOR-GENERAL:

That is our case.

WINKELMANN CJ:

Well that's your argument, yes, this is, it's your argument.

SOLICITOR-GENERAL:

Well I find it a remarkable thought that Parliament, giving a judge a power, a discretion to impose an order would say, we expect that judge to do exactly what we, or haven't said, we expect them to, why would –

WINKELMANN CJ:

Their argument is that this is inconsistent and a declaration should issue, but they recognise that it's, because of parliamentary supremacy, it's the law of the land and so therefore Mr Chisnall consented to the order being made against him. So I don't myself see something –

SOLICITOR-GENERAL:

I find that a really rights-degrading approach, which I find the unusual position to be submitting against perhaps the Human Rights Commission, because if –

WINKELMANN CJ:

Well it's only one litigant's position so I think the system will survive it.

SOLICITOR-GENERAL:

Well I think the Commission takes the same view, that there's no discretion here. I find that remarkable because where it is shown that this is an unjustified limit on rights, don't make the order.

GLAZEBROOK J:

But you say it's justified because of the high threshold.

SOLICITOR-GENERAL:

It must be justified, yes.

GLAZEBROOK J:

So if it's justified because of the high threshold –

SOLICITOR-GENERAL:

Not alone.

GLAZEBROOK J:

– then you're never going to have anything that is not justified, are you?

SOLICITOR-GENERAL:

I repeat myself only to be sure that you understand –

GLAZEBROOK J:

And so if you met that high threshold he would be required to have that –

SOLICITOR-GENERAL:

That's not our case.

GLAZEBROOK J:

– and so tactically it's much better to consent to something less.

SOLICITOR-GENERAL:

That's not our case your Honour.

GLAZEBROOK J:

Well –

SOLICITOR-GENERAL:

If he meets the high threshold the Judge has a discretion, and this is what I understand this Court to have said in *D* there is two steps, do you meet the threshold. If so, then there is a balancing to be done to assess whether or not, indeed, putting a person on the register is a justified limit and is a proportionate response to that person…

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KÓS J:

Well I think we've already established that it is very unlikely the discretion won't be exercised not to make an order. The order will follow. The real discretion lies, because of the height of the threshold, the real discretion lies in the conditions.

SOLICITOR-GENERAL:

Well there is some –

WINKELMANN CJ:

Many of which are standard.

SOLICITOR-GENERAL:

I think I have also just said today that there is something about discretion in the threshold being met. The Judge has to be satisfied that it's met.

KÓS J:

Well that's a valuative. We wouldn't normally call that a discretion.

SOLICITOR-GENERAL:

A valuative, judicial, a valuative, yes, fair. So you understand the Crown's case and I – is that there is a discretion after that threshold. It might be that it is a very rare –

WINKELMANN CJ:

And then there is a – so you say judicial discretion is in play in two ways. Firstly, in deciding whether to make the order once the threshold is crossed and then, secondly, in terms of the form of the order?

SOLICITOR-GENERAL:

In some circumstances interim orders can be made which would allow the Judge to impose special conditions.

WINKELMANN CJ:

So the standard will attach and perhaps special might tailor it further?

SOLICITOR-GENERAL:

It is so that if the order is simply made then the order, sorry the conditions, do attach so there has to be an active – I took you to that section which requires an application for special conditions in the interim before those orders can be –

WINKELMANN CJ:

So there's no discretion to impose special conditions on top of the standard conditions?

SOLICITOR-GENERAL:

Where the Chief Executive has brought an interim application there is.

WINKELMANN CJ:

Okay, but only in the interim?

SOLICITOR-GENERAL:

Until the Parole Board gets it and then can make special conditions that take out the standard conditions.

GLAZEBROOK J:

The discretion to make the order or not doesn't help you though, does it, because if you can't justify it because of the high threshold, then some people will be having an order made against them because of that high threshold and, in fact, history shows that everybody who meets the high threshold will have that order made against them and it would be incredibly surprising if that wasn't the case. I mean it might be the case if somebody has a terminal illness of some kind or has had an accident and is no longer capable but then it would be unlikely they'd meet the high threshold in that case.

SOLICITOR-GENERAL:

That's right, yes, I agree with that but I don't –

GLAZEBROOK J:

Because you accept that it will be incompatible if one person out of 100 or 10 out of an 100 can have an incompatible order made against them so the discretion to make or not make the order is really neither here nor there, unless the discretion to make the, not to make the order has to have some – there has to be some additional requirement over and above meeting the high threshold to make an order, which I don't think you're arguing for as far as I can make out.

SOLICITOR-GENERAL:

I'm making the argument that having met the high threshold there might still be circumstances in which the Court says I'm not imposing an order, it's not a justified limit, and we can – we'd have to make one up in order to point to it, but –

GLAZEBROOK J:

But it will be a justified limit in every other case, is what the Crown must be saying.

SOLICITOR-GENERAL:

That it must be justified. But it will likely be if it's met the threshold.

GLAZEBROOK J:

Well if there has to be something more to justify it then it's incompatible, isn't it? But I think you're saying there doesn't have to be anything more to justify it than meeting that high threshold.

SOLICITOR-GENERAL:

I accept that that is likely in many cases to date – I think to date all of them, given that we can't find a case otherwise, where the Judge is satisfied that that is a justified limit, and it is a second penalty, and it is justified to be imposed on the person for these reasons, for those reasons. Yes, I accept that.

Just on the discretion. So the discretion is whether to make it, we say, how long to make the order for, and in relation to ESOs, this harks right back to the question Justice Williams asked me on the first day of the earlier hearing, the Judge also has to make an assessment of the likely duration of the risk, so that will go into the discretion likely, into the discretion about length of order.

So might I come to a different, related obviously, point but where we are here now with a fresh, relatively fresh remedy in the form of a DOI in the arsenal of remedies that the Court can deploy, can I make the submission that it might be worth thinking about it, as in fact the Court of Appeal did, like this. Where a case is brought that there is a discretion and a statute that is quite detailed as to how the order should be applied, and how the Court should think about the risk. It's not just a broad you may make further orders, and the applicant only brings the statute to the Court to say this is inconsistent with rights, so it's an analytical challenge, our submission is that the Court does need some measure by which to say is this DOI application in the right place or right state for us to adjudicate it? But it might be that the Court says, as I say the Court of Appeal did, takes the sort of first two *Oakes* steps and asks, does this Act pursue a pressing important social objective? Is it legitimate for that? I know the Court is not questioning legitimacy, but is the purpose a legitimate one?

KÓS J:

Well, important, that's the way it's put in *Oakes*.

SOLICITOR-GENERAL:

Important, thank you Sir, yes. Pressing or important social objective. So we knock out the death to blue-eyed babies act that Justice Williams put to us on the first day.

WILLIAMS J:

Did I really?

SOLICITOR-GENERAL:

Yes Sir, you did.

GLAZEBROOK J:

You usually use red-headed. But maybe we decided that was not a good one.

SOLICITOR-GENERAL:

So that first step in *Oakes*, that's the first question. Second question, does the Act provide and prescribe measures that are rationally connected to that objective? So in that question, the Court might wish to examine whether the statute provides off ramps, reviews, appeals, who the decision-maker is.

GLAZEBROOK J:

Is that – I'm not sure that's the second question, is it?

SOLICITOR-GENERAL:

Well –

GLAZEBROOK J:

It's an important one but I'm not sure it comes within the second one.

SOLICITOR-GENERAL:

Well I'm just trying to offer a framework for the Court to think about when in a case like this a DOI comes to you, to the Court. *Oakes* isn't entirely unhelpful because it allows –

GLAZEBROOK J:

No, no, I think it's fine.

SOLICITOR-GENERAL:

Mmm.

GLAZEBROOK J:

I'm just not sure it's the second question, which is relatively rationally connected, is whether there is sufficient safeguards involved with it.

SOLICITOR-GENERAL:

Thank you, your Honour, yes. So the second question is whether the measures provided for are rationally connected to that objective. Third, the Court may want to examine some of those points. One of the things that bothered the Supreme Court in the United Kingdom in a case *R (F (A Child) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331 – I actually haven't written my own reference for it. It is in the authorities and we'll get it for you, which was a mandatory registration on the sex offenders register. The objection there was that there was no method to remove that registration even when the risk could be shown to be no longer present, it was seen to be a disproportionate limit on Article 8.

So if those steps in *Oakes* can be satisfied, then what I would say is the much harder task of assessing limits and justification should be left to the Court in this case, considering the PPO and the ESO. A DOI might be declined or adjourned until the applicant can bring sufficiently detailed factual material to support their challenge. I find authority for that approach in *D v New Zealand Police*. Also, in the House of Lords case *R v A (No. 2)* which was a case about –

GLAZEBROOK J:

Can you tell us where that is please?

1240

SOLICITOR-GENERAL:

Yes, Crown supplementary bundle, tab 58. So that was the case of the rape shield rule, evidential rule in sexual violation case about prior sexual relationships between the offender and the complainant. In the discussion there in the Court that I want to draw your attention to in support of this approaoch that the Crown suggest might be a useful one to think about DOIs in this constitutional setting, is at 103 and following, to the effect – so Lord Hope in the earlier paragraphs reviews how different jurisdictions have attended to this pressing social objective, and goes on to say, two important factors: "It is reasonably clear from this brief review that there is no one single answer… as to how best to serve the legitimate aim. There are choices to be made… indication from the wording… that close attention was paid to the… Canadian and Scottish models. But… it has departed from both of them. The element of judicial discretion has been reduced to the minimum. There are risks… in that choice."

I go on to 104: "But two important factors seem to me to indicate that prima facie the solution… chosen was a proportionate one." It goes to the reasons for that. "While section 41(3) imposes very considerable restrictions, it needs to be seen in its context. I would hold that the required level of unfairness to show that in *every case* where previous sexual behaviour between the complainant and the accused is alleged the solution adopted is not proportionate has not been demonstrated." But Lord Hope, I think this is, yes, goes on to say in the middle of 106: "I would hold that the question whether they are incompatible cannot be finally determined at this stage, as no attempt has been made to investigate the facts to the required level of detail to show that section 41 has made excessive inroads into the Convention right."

So I draw that to your attention in support of this idea that perhaps those first two, or perhaps the third stage in *Oakes* might be, the first two stages of *Oakes* might be useful to the DOI court to the extent that, as the Court of Appeal did, no issue in the Court of Appeal as to whether this was a pressing and important social objective being pursued, and that the way in which it was done was rationally connected to that. Then I think the Court of Appeal should have said,

how does that apply here. Where do we see the justification for Mr Chisnall's orders, rather than saying we need to look underneath what Parliament was doing. We need to question why Parliament took that approach and not a different one. It comes back to my first opening submissions.

WINKELMANN CJ:

There's some difficulty with the Court in this case though, isn't there, because of how it's been run procedurally, and also because the Crown hasn't really provided us with any evidence about the rationality of the whole response.

SOLICITOR-GENERAL:

Well the first point I agree with, and accepting the Crown's role in getting to this point with no facts in front of your Honours. Our criticism is that the case has been brought int this abstracted way, intentionally so. That is, Mr Chisnall says there can never be an ESO or a PPO that can be justified. We say that must be wrong.

GLAZEBROOK J:

That might be wrong but you've agreed that all they need to show that in some circumstance there could be a non-justifiable PPO or ESO.

SOLICITOR-GENERAL:

And that would tell the Court how to craft any declaration. No, I have to accept that if the Court can identify such a conclusion, then the declaration, with respect, should be brief, very specifically focused.

GLAZEBROOK J:

But I suppose my point is that unless you say the justification is the high threshold and that's all, then I don't think you get there because if there is a circumstance where the high threshold is met and an order can be made that isn't compatible, so unless there's something more that has to be done, read into the statute, in terms of whether you exercise the discretion to impose it or not impose it.

SOLICITOR-GENERAL:

Well I don't think there's anything more that I can say. I think that I have already made the submission that the Crown says is that it continues to impose or give the judicial officer the discretion not to impose the order.

WINKELMANN CJ:

One thing I don't understand is, flowing from that procedural decision which was taken reasonably early on, was why we weren't given proper evidence about how these schemes operate. I'm asking you that, not to be difficult, because we're considering in this case how we deal with future cases and so the type of evidence, the approach that the Attorney-General takes, is very much in play in this hearing and you'll see that the Human Rights Commission has helpfully made suggestions about that.

SOLICITOR-GENERAL:

Well I suppose it might sound more like a complaint than a submission, your Honour, but the way the case has been brought was to say that the declaration, in fact, has issued from the Court of Appeal because the regime permits a second penalty. That's been the way in which the case has been brought, or to be fair, in the cross-appeal some other rights limited. So the question hasn't really been clearly – I suppose we've put in our written submissions in relation to what should the applicant put in its application in order for the response to be correctly focused, and I'm content that we might describe this as having misfired early, which means that what's before your Honours is not the evidence you would now say: "Well let's have a look at how those regimes operate." It does make we wonder though, sorry just having said that out loud, whether that also suggests it's the PPO and the ESO Court that needs that evidence to say Mr Chisnall will be held here, what will it look like for him, what's the management plan for him, how will he be managed and treated and so on.

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

But I do have to accept your Honour's criticism that you've been left with very little.

KÓS J:

Well that was also the criticism of the Court of Appeal, paragraphs 219 to 226, and their complaint was that the Crown here had failed to provide what are called a minimum and necessary, sorry, a substantial showing by appropriate affidavit evidence that the regimes were justified as a minimum and necessary response.

SOLICITOR-GENERAL:

But if your Honour – that is my criticism of the Court of Appeal which is that not that they say we would want to see whether these were justified but rather why did you choose this regime instead of a different one that didn't touch on section 26(2) and –

KÓS J:

I'm not sure that's at all what they're saying.

WINKELMANN CJ:

They do just seem to be criticising the lack of evidence about the regime in that passage I think.

SOLICITOR-GENERAL:

Sorry what – could I have a look at that paragraph too then?

KÓS J:

Yes, 219.

SOLICITOR-GENERAL:

I maintain my criticism, with respect, of the Court of Appeal there because what I understand them to be saying is, as they go on to say, it's not enough to say that this legislation, to say that the Acts may be applied in a rights compliant

way doesn't answer the central question. In my submission that is the central question, is it capable of being applied in a rights compliant way because as you go onto 226 I think that's where

the Court concludes that point saying what we expected was a substantial showing of evidence about the legislative choices that were made.

1250

KÓS J:

Yes, but *Oakes* three focusing on the minimum necessary incursion on the protected right is always going to be about comparative architecture. How could it not be?

SOLICITOR-GENERAL:

And how it applies in the instant case.

WINKELMANN CJ:

Because there are standard conditions.

SOLICITOR-GENERAL:

And your Honour Justice Kós might be right that we're arguing in this Court for the first time because in that Court we're arguing this isn't a penalty –

KÓS J:

Yes.

SOLICITOR-GENERAL:

– in its treatment and it's protective – sorry preventive and so on.

WINKELMANN CJ:

Well that was argued in the Court of Appeal, wasn't it?

SOLICITOR-GENERAL:

Yes, so that we might be more sharply making that point that you raised with me earlier. The Attorney will be greatly assisted by this Court's determination

of this question, and I don't mean that entirely cynically as you might be taking me to be, because –

KÓS J:

No, not at all.

SOLICITOR-GENERAL:

– on the one hand the Human Rights Commission says this is the Attorney's duty, it's like a duty of candour in a sort of judicial administrative law sense to which I think well it's not quite that. I mean, I totally and completely can accept that the Attorney must put in front of the Court the material that has led to the legislative regime or, indeed, depending on what was at issue, it might bring evidence to say that is a justified policy choice but –

WINKELMANN CJ:

Well it would have been a simple thing to have evidence about how the regimes at least operate would have been a good thing for us to have.

SOLICITOR-GENERAL:

Well I can see why we say that today, your Honour, but that wasn't the challenge. The challenge wasn't how they operated but that it was illegitimate or at least it was inconsistent in the statute.

GLAZEBROOK J:

But part of the answer must be "no it's not" because the way it's operated may –

SOLICITOR-GENERAL:

Yes, yes.

WINKELMANN CJ:

And we know that's part of your answer because you took us to a case to try and show us how the regime operated and I'm thinking…

SOLICITOR-GENERAL:

And when we –

KÓS J:

Well it's also the trust in Ms Leota's very high level evidence.

SOLICITOR-GENERAL:

Yes, her – thank you, your Honour, I was just going to make that point. But just on the Attorney-General's obligation I think there is a risk, is that the right word, no there is a potential for declarations if they are allowed to be brought in this, what I would say, and the Crown has argued on this matter, brought in this loose framing –

WINKELMANN CJ:

Do you mean abstract?

SOLICITOR-GENERAL:

Abstract, thank you, your Honour. We can't really have an expectation or, in my submission, the Court can't have an expectation that the Attorney will, or that the Executive, will have to run a policy process in order to answer the question when the policy process that was already conducted is before the Court. My point being that if there is a counterfactual that my friend says, for Mr Chisnall, has said well that Parliament should have chosen a treatment-oriented regime, not stepping away from your Honour's criticism that we didn't even bring evidence of the regime, that we say does do that –

WINKELMANN CJ:

It's not really a criticism, it's really trying to learn for the next case, yes.

SOLICITOR-GENERAL:

Thank you. We also can't – I don't think it should be allowed that people are able to kind of trigger a policy process to be conducted by the Executive in order for the Attorney to meet a broad target about –

GLAZEBROOK J:

But surely the policy process would already have been made and the decisions made. It wouldn't take much to even summarise –

WINKELMANN CJ:

And that's what the Human Rights Commission says against you I think.

SOLICITOR-GENERAL:

Yes, although to the –

WINKELMANN CJ:

Well not against you, says.

SOLICITOR-GENERAL:

There is a lot of – there is considerable legislative fact material in the evidence here about the Cabinet papers and the Attorney's record and all those things are before the Court. I'm conscious of time. I am happy to rest on the written submissions and the exchange here.

WINKELMANN CJ:

Was there anything in relation to the process that the Human Rights Commission has set out, and I'm just trying to wonder where, because it seems to me they summarise it somewhere but I had thought there was – which Mr Butler might tell us what paragraph it is. You wanted to say because my note was first step is the Attorney-General propounds a meaning. Second step, evidence of legislative process that shows, I'm not quite sure but Mr Butler will explain that to us. He summarises it somewhere but he's not popping up his head to tell us where it is.

MR BUTLER KC:

Unusually for me, your Honour.

WINKELMANN CJ:

Is it 45?

MR BUTLER KC:

45, yes, that's right.

SOLICITOR-GENERAL:

Sorry, I unhelpfully don't have them in front of me here.

WINKELMANN CJ:

I had noted those two things down because they seem to me to come before 45 but firstly, it seemed to me, implicit at least in the HRC submissions that the Attorney-General should propound an interpretation. Secondly, that they should lead evidence of what you call legislative fact. I think that's what Mr Butler is submitting but he can correct me if I'm wrong, and perhaps associated with that, this is at paragraph 45: "Lead sufficient evidence to meet the onus of proof."

SOLICITOR-GENERAL:

Mmm.

WINKELMANN CJ:

Noting that in *Make it 16 Incorporated v Attorney-General* [2022] NZSC 134 this Court accepted that there might be cases where there's a well-recognised limitation, so evidence might not be necessary, and then finally: "Be transparent about the basis for any concessions in those rare cases where the Attorney concedes there is a BORA-inconsistency and/or that a DOI should be granted." It's really the evidence one that we struggle with most, isn't it.

SOLICITOR-GENERAL:

Mmm, in some measure, I mean I don't – I accept that the Attorney has the obligation to, you know, the burden shifts to the Attorney to say this is why this is a justified limit. How that's done, I'm not particularly inclined to form a submission that is determinative of that question because it will depend, but if can use *Make It 16* as my example.

WINKELMANN CJ:

Mmm.

SOLICITOR-GENERAL:

What might there – sorry, I shouldn't ask my own questions, but the Attorney might have thought, let us bring evidence to say something useful, because Parliament hadn't. There was no legislative fact, you know, because the age had come –

WINKELMANN CJ:

No, and that comes in with your point about running another policy-making process where there hadn't been.

SOLICITOR-GENERAL:

What would the Attorney have done – sorry, asking a question again, because the Attorney's obligation wasn't to say, wasn't to uphold 18 as the only legitimate age that could be chosen, and I'm very conscious not to drift back into the *Make It 16* argument.

WINKELMANN CJ:

Please not.

SOLICITOR-GENERAL:

But I think that raises the question for the Attorney about what –

WINKELMANN CJ:

Yes.

SOLICITOR-GENERAL:

What evidence might that have required them to bring other than there was nothing in the material for the Court and we say, as we did in that case, that it was one of the – it was a legitimate, it doesn't matter what we said because you've had the last word on it, but I think that does raise a good question about what – how does the Attorney fulfil their obligation. The Human Rights Commission makes, I think, a footnoted point that if the Crown considers the DOI has been sought at too high a level of abstraction that should be made clear and I accept that point, in the way we have, put in our written submissions

about the applicant's case needing to be brought clearly with evidence for the – with their evidence that says either always, or in these types of cases, there is an inconsistency, then the Attorney will be greatly assisted in understanding what is the challenge here to bring any evidence on – I would want to make sure that the Attorney's evidence wasn't just entirely self-serving. It needs to be –

WINKELMANN CJ:

For instance, you might respond to evidence which says it's not logically – this response is not logically connected because there's external facts that show it's wrong-headed.

SOLICITOR-GENERAL:

Mmm. This question does raise a point that, and I see the time and it's ready for my friend Mr Keith to address your Honours on, but he's taken issue with me in the break about a reference I made to the statement in the house about the purpose of the legislation and whether or not that material can be brought to the Court in a declaration of inconsistency.

WINKELMANN CJ:

Mmm, yes.

SOLICITOR-GENERAL:

On my submission the formulation of a declaration of inconsistency as a remedy following a legislative process tells us that the existing rule that allows for reference to what went on in the house by way of working it, what was – what the end statute means is a legitimate thing for the Court to have.

WINKELMANN CJ:

Mightn't it fall foul of the new Parliamentary Privilege Act 2014? Because –

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SOLICITOR-GENERAL:

No, because that accepts the exception or provides the exception that in the determination of the meaning of an enactment the parliamentary record can be brought to the Court.

WINKELMANN CJ:

This is not a meaning of the enactment though.

SOLICITOR-GENERAL:

Well, in my submission, it must be.

GLAZEBROOK J:

You say the first step is to look at the meaning of the enactment –

SOLICITOR-GENERAL:

Yes, no because this is a remedy for when –

GLAZEBROOK J:

Because you can only –

WINKELMANN CJ:

No, in terms of justification –

SOLICITOR-GENERAL:

This is a remedy for when in interpreting the enactment there is no available justification. That's when a DOI would issue we say.

WINKELMANN CJ:

So you say it would capture the question – the Court could look at that material in determining whether it was justified or logically connected?

SOLICITOR-GENERAL:

And those interpretive steps that it would need to take but there would be a question and this, I think, is where I take issue with, again with the Court of Appeal, with respect, to say we question why Parliament didn't do something

else. Now let's look at the record to see if they thought about doing something else. I think that would take the parties and the Court into privileged territory.

GLAZEBROOK J:

Well I mean say, for instance, the legislation said anyone who has offended in a sexual manner will be detained for – there'll be a possibility of an order for five years extra detention, you can't possibly be saying that the Courts can't say: "Look there were a myriad of other things you could have done" so they've just – they're a myriad of other things you could have done to contain risk. You mightn't have thought of them but there are a myriad of other ways so this isn't the minimum necessary. Agree there's a social objective here, agree that locking them up is logically or rationally connected but there are a million other ways you could have done this whether you thought of them or not. You're not suggesting the Courts couldn't reason like that, are you?

SOLICITOR-GENERAL:

I don't know the answer, your Honour, because I don't – I'm just cautious about answering that question because I want to see what the statute says.

GLAZEBROOK J:

Well but, I mean, I'm giving something that's obviously a double punishment, that's obviously far above the minimum necessary but you lock everybody up for an extra five years.

KÓS J:

I mean the point is that Justice Glazebrook's example is not one which is an inquiry into the adequacy of the parliamentary process, it's an inquiry into whether there is a less restrictive alternative extant. It doesn't depend whether Parliament thought about it or not, it just depends on whether it exists, and that's going to be a matter of evidence probably.

WINKELMANN CJ:

And perhaps you could look at the legislation over lunch time because I would have thought that if what you've said about the rationality connection and

justification is part of the interpretive exercise, the purposes of the new legislation when we're with, when we're saying it's consistent, then it must also be fair game when we're going to say well that wasn't consistent in that sense, deep waters given that legislation.

SOLICITOR-GENERAL:

Well I think the statute – sorry but we've got to the break – the statute that your Honour is putting to me would likely have other problems with it such as not prescribed by law, you know, if it just said you can make an order that does X, you can lock people up for an extra five years but in any event…

GLAZEBROOK J:

No, it's passed by Parliament. My legislation is passed by Parliament.

SOLICITOR-GENERAL:

I'm certainly not saying, if your Honour, if this is helping your Honour answer the question, that the Court can –

GLAZEBROOK J:

Not that Parliament would pass legislation like that but let's just assume that it did.

SOLICITOR-GENERAL:

No, and I'm not saying that the Court can never inquire into the facts as to why Parliament got to where it got to. That should be in the evidence from the Attorney. But my quibble with the Court of Appeal, it's not a quibble, it's a direct criticism, is to say they have taken this regime with a really clear objective about what it is about, re-offending of sexual and violent offenders, and providing a judicial officer with a range of tools. In that context the DOI is a remedy for when you get to the end of interpreting that statute and saying there is a point at which it's not justified, that is the right approach and the Court, I say, submit went wrong to say we wanted evidence for why Parliament didn't take a different approach.

WILLIAMS J:

You'll always get a little bit of that. I mean, I think your principle is deference to policy and institutional competence and I don't think you'd find a judge on this Court that would disagree with that but we are constantly, when we're talking about what's the minimum necessary, is it consistent, we're constantly dealing with counterfactuals. We have to be. It's just how far you go.

SOLICITOR-GENERAL:

Yes, and –

WILLIAMS J:

And you say the Court of Appeal went too far?

SOLICITOR-GENERAL:

Mmm.

WINKELMANN CJ:

Right, well we'll take the lunch break now but I am interested in the Parliamentary Privileges Act point.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.17 PM

SOLICITOR-GENERAL:

Your Honours, we left the morning sessions with a question about from Justice Glazebrook about, let's just say the enactment said, this is what I understood your Honour to have asked, let's just say the enactment said at this high threshold, the Court may impose a further five years' detention on any fixed term sentence. The question put to me at the end there was surely this Court can say, well, what about the hundreds of other ways you might have gone about meeting your objective? Actually, in my submission, that isn't what the Court's role is. In its interpretive function, all of the analysis has to remain grounded in Parliament's objective and not in some other imagined or thought

of either by parties or by the Court alternative. That has been the position, that was of course the *Oakes* position, that's the position this Court confirmed in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1. So if as in my submission the DOI is a remedy that comes when there is no interpretive solution that can be found for a rights-consistent –

GLAZEBROOK J:

Well it's difficult to find an interpretive solution that would say that's rights-consistent.

SOLICITOR-GENERAL:

Well so that, my point being, this is an interpretive solution where you are grounded with Parliament's objective. Not, in my submission, the Court in –

GLAZEBROOK J:

Well that's grounded in Parliament's objective, isn't it, to look at what alternative measures might be available?

SOLICITOR-GENERAL:

Not in my submission, not in the way that your Honour is putting to me. So if we go –

GLAZEBROOK J:

I just can't, I can't understand the submission, I'm sorry.

SOLICITOR-GENERAL:

I'll put it this way. If we go through the *Oakes* steps, the first one being we've already touched on, is there a pressing or important social objective being met by the legislation, and is there a rational connection to that. In some ways, those are the easy steps of the *Oakes* test. Actually, it's set out in our main submissions on appeal in writing from last year, but that rational connection question being more of a matter of logic than of evidential proof.

But in any event, the next question being, are those measures minimally impairing? Not as opposed to another set of policy options that might have been taken, but does the regime, or do the mechanisms in the regime, impair individuals' rights to, in the minimum way necessary –

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KÓS J:

How can that be other than a comparative exercise?

SOLICITOR-GENERAL:

My point is that you have to come down into the detail of the challenge to the statute. So in Justice Glazebrook's example somebody might say, well, the statute requires that I have a five year term added to my sentence to meet the important objective of risk. But in fact, I don't need that. I could – my risk, accepting my risk, accepting the risk profile I can be on the methadone programme or I can be given some other form of psychiatric treatment or I can be on a curfew that keeps me home – for whatever the reasons are.

WINKELMANN CJ:

You're not saying that the Court is bound by the paradigm of Parliament's policy choice to have come to the least restrictive outcome are you? Or are you saying that when we're looking at what's minimally impairing, we're looking within the paradigm, the policy paradigm Parliament's chosen, or are you accepting what Justice Kós has just said, that that must allow a comparative exercise?

GLAZEBROOK J:

Which was all I was saying.

SOLICITOR-GENERAL:

Well I misunderstood your Honour Justice Glazebrook in that case, because if the applicant comes to the Court and says this could have been met for me in a different way and there's no other way through it but this is what the statute requires, then I accept we get to section 4.

WINKELMANN CJ:

So an applicant could never come and say this model is flawed? This could be meant for others, this risk generally, the societal risk, which is after all where we start with the *Oakes* test, the societal issue could be met in another way. They could never approach in that way on your analysis.

SOLICITOR-GENERAL:

That's right. The question is not, can't be that the way in which this – yes, exactly right. There were three other ways that I can think of that Parliament could have enacted something and it didn't, and that is the objection with the Court of Appeal's analysis and conclusion. But actually also draws me to the way in which this declaration of inconsistency was sought.

GLAZEBROOK J:

But if those three other ways were all – all met the objective and were less intrusive than the one chosen by Parliament, what's wrong with that analysis under the *Oakes* analysis?

KÓS J:

I would have thought that Parliament might have rather appreciated the analysis at a reasonably high level after considerable effort in the three levels of courts of what alternatives they might consider in the new process under sections 7A and B. It provides some potentialities for Parliament to seize upon.

SOLICITOR-GENERAL:

Well I don't agree with that approach that's being put to me because it is this. Mr Chisnall says the statute is capable of being declared inconsistent because it's inconsistent with the right against second penalty. He puts to this Court, or he's put to the Court, that a treatment focused regime was a better one. It's at the wrong point that the question is –

GLAZEBROOK J:

Well I think he says it can only be justifiable if it has a treatment focus.

SOLICITOR-GENERAL:

I understood him to accept that if Parliament had taken a different choice, this is my criticism of the Court of Appeal, the Court of Appeal says, I just need to go to it because I don't want to misquote what they said, we wanted: "Evidence about the basis on which legislative choices were made."

MR BUTLER KC:

Can I be rude? I'd just, I'd quite like the reference so I just –

SOLICITOR-GENERAL:

I beg your pardon.

MR BUTLER KC:

What paragraph are you in, in the document –

SOLICITOR-GENERAL:

Paragraph 226 of the Court of Appeal in this appeal.

MR BUTLER KC:

Thank you.

SOLICITOR-GENERAL:

"To establish that required evidence about the basis on which legislative choices were made." So that is, in my submission, a pre the examination of the statute question. What's the evidence that tells us about, that legislative choices were made so that we can look to justify the measures.

WINKELMANN CJ:

I thought you'd accepted that we could get legislative fact evidence?

SOLICITOR-GENERAL:

Yes, about what, yes, and that brings me to – I might just come to that because that's the question that you asked me to answer about privilege.

WINKELMANN CJ:

So can I just say it doesn't seem to me that any of the authorities you've referred to us from overseas take this profoundly individualised approach to the jurisdiction, the DOI jurisdiction, because it is a jurisdiction after all to declare provisions or legislation inconsistent with the New Zealand Bill of Rights Act. Legislation does speak to everyone. Surely the Court is best to direct itself to the framework of the legislation rather than simply to the individual facts of the – when they're exercising this, isn't that what's contemplated, because your approach seems to be reading words into the Bill of Rights Act to limit it in this way?

SOLICITOR-GENERAL:

I don't agree it's reading words in. It's using the Bill of Rights Act as an interpretive instrument and if the submission is overtly that it doesn't – the declaration of inconsistency remedy doesn't change that into a constitutional review of the parliamentary choices.

WINKELMANN CJ:

But when we interpret it under section 6 and section 5 we're interpreting it for all purposes, we're not interpreting it just for the individual, but you're saying when we come to the DOI jurisdiction, we can only say it's inconsistent for this one individual.

SOLICITOR-GENERAL:

Well I'd say two things about that. I don't see it being a fresh jurisdiction in DOIs. It's a remedy. It's what this Court told us in *Taylor*. It's a remedy to say this statute has been enacted in a way that for one or more than one person there is an inconsistency, there's a limit on rights that can't be or hasn't been justified. It isn't a fresh jurisdiction.

WINKELMANN CJ:

I wasn't suggesting it was. Did I suggest it was?

SOLICITOR-GENERAL:

Just the way you referred to it as a DOI jurisdiction, your Honour, I thought you might have been seeing it in a different way but anyway.

WINKELMANN CJ:

Oh, well, yes, no.

SOLICITOR-GENERAL:

But also the cases that we have referred to do take this approach. So in *R (Chester) v Secretary of State for the Home Department* [2013] UKSC 63, [2014] AC 271 I've already, I think, addressed Baroness Hale's comment to say: "The Court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible."

Also in the *R (T) v Secretary of State*, which we've also covered today, in which an 11 year old stole a bike in a clean slate challenge, that statute was capable of interpretation consistent with rights except in the case where individual assessment wasn't capable in the statute and so it was disproportionate, and so to go back to *Oakes*, if you say what's the pressing objective, is there a rational connection, are the measures the least that can be put in these circumstances, it doesn't have to be one person but in these circumstances that we can identify. And, as we know, from the Canadian case in particular heavy lifting is done and is that proportionate to the individual or the individuals before us.

KÓS J:

Yes, but that's rushing through *Oakes* three which is an important step and how are we to find –

SOLICITOR-GENERAL:

The minimal impairment, yes.

KÓS J:

How are we to find what is the most minimal impairment unless we look at the impairment and say is there another impairment that will be less intrusive? It's inherently comparative.

WINKELMANN CJ:

Can I just add a question to what Justice Kós said, which is something I should not do but I'm going to, which is wouldn't it be valid for a Court to say well this, as it's framed, the statute is saying this and we think that's – we can't interpret it in a narrow way. If it included this proviso then we could, then it would be consistent so and that is a general reading of the statute.

KÓS J:

Feel free to answer either or both of those questions.

SOLICITOR-GENERAL:

I think I'm answering your question Justice Kós to say that Parliament's objective though, if you go back to the top of *Oakes*, what is the pressing objective? It is not to impose a second penalty. We accept that what is, in fact, done is a second penalty but the question that has to be asked is are these measures, the PPO and the ESO and the ESO, with a bit more ability to change the conditions in some circumstances as we've been through, with the length of time and the evaluation of the risk in the hands of the Judge that's the question. Is what I'm imposing here the minimum necessary?

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KÓS J:

Yes. How do I do that without considering the options?

WINKELMANN CJ:

Comparatively.

SOLICITOR-GENERAL:

Because you're interpreting the statute. If it doesn't give you options, if it doesn't say you could have put this person in a not yet imagined or built or understood different regime –

GLAZEBROOK J:

But this seems worse for the Crown because you say, is this the minimum necessary? No it's not per se, therefore it goes.

SOLICITOR-GENERAL:

It goes where?

GLAZEBROOK J:

Well, there's a declaration of inconsistency because it just –

SOLICITOR-GENERAL:

Yes, that's right, and it would be quite clear about why there was a declaration.

GLAZEBROOK J:

But how can we say it's –

KÓS J:

Well I don't know how you do a per se minimalism assessment.

GLAZEBROOK J:

Well you might have done with my example.

KÓS J:

Yes.

GLAZEBROOK J:

It might be per se. It's clearly not the minimum necessary, but…

WINKELMANN CJ:

Anyway.

SOLICITOR-GENERAL:

The Crown's case is that this, what this Court is doing must always be grounded in the reality of the law as enacted and interpreting the law.

WINKELMANN CJ:

Mhm.

SOLICITOR-GENERAL:

That will bring great clarity to DOIs if they are made.

WILLIAMS J:

What if your objective is inherently BORA inconsistent? Say, the introduction of the death penalty.

SOLICITOR-GENERAL:

Well you might not reach the first hurdle then, is this oppressing an important social objective.

WILLIAMS J:

That analysis requires you to assess the legislative objective. It has to.

SOLICITOR-GENERAL:

The objective, yes.

WILLIAMS J:

You were saying earlier that it's not appropriate to assess the objective, the policy that underlines all of this, you just – your job is purely interpretive.

SOLICITOR-GENERAL:

That is what I'm saying that this – that where we have the statute, that the Court interprets it, and the DOI is something that happens at the end when there is nothing available for a consistent interpretation.

WILLIAMS J:

Yes, but you were saying policy is for Parliament, interpretation is for the Court.

SOLICITOR-GENERAL:

Mmm.

WILLIAMS J:

What if the policy is the problem?

SOLICITOR-GENERAL:

Well there might be a number of ways into that. It might be that the statute itself imposes an outcome or a limit that can't be justified – is incapable, sorry of being justified, illimitable.

WILLIAMS J:

Mmm.

SOLICITOR-GENERAL:

That's one way that the interpretive solution would work.

WILLIAMS J:

So there are at least some overlap between these spheres.

SOLICITOR-GENERAL:

Yes, and I suppose what I'm objecting to, perhaps not as clearly as I need to, is Mr Chisnall's apparent position which is to say that there's a different regime that could have been chosen that would have a treatment focused one that wasn't a second penalty. What is that? There isn't such a thing.

GLAZEBROOK J:

Or that it would be just – only justifiable if it was a treatment based regime and it's not justifiable if it's not.

SOLICITOR-GENERAL:

Well I don't understand how that avoids the elements of our broad conception of penalty, might be –

KÓS J:

Well it doesn't, no.

GLAZEBROOK J:

Well it doesn't avoid it, it just says that it's justifiable.

KÓS J:

Yes.

SOLICITOR-GENERAL:

Then we seem to be on the same page because we say this is justifiable on the basis that it must be justified. The tools are all there. It must be justified in its application. There is nothing in the statute itself that says, or should be interpreted as saying, you keep going even when you reach that unjustified limit on rights point.

GLAZEBROOK J:

But they just say it is justified.

SOLICITOR-GENERAL:

Well I know.

GLAZEBROOK J:

You might say it's justified. I mean, that's where I've been having trouble with the Crown submissions all along. It seems to me the best argument for the Crown is to say yes, it's a penalty, yes, it's a double penalty because that's already been accepted.

SOLICITOR-GENERAL:

Mmm, mmm.

GLAZEBROOK J:

But it's justifiable. In fact, once you've accepted it's a penalty then it has to be justified, and it's for the Crown to justify. I mean that's as simple as that, isn't it?

SOLICITOR-GENERAL:

Isn't that – yes, and that is our case. It must be justified and any imposition of it, and my objection, which I accept the Court doesn't appear to agree with me on, is that –

GLAZEBROOK J:

I'm having trouble understanding it is my problem.

SOLICITOR-GENERAL:

Yes, is the suggestion that the Court can go behind what was done and say we want evidence of why Parliament made that choice. We are fixed, in my submission, with what Parliament did and that might be criticised, and that might be criticised as unjustified or incapable of being justified in this set of cases.

KÓS J:

I don't think we're – this is not a judicial review of parliamentary process, that doesn't exist.

SOLICITOR-GENERAL:

Mmm.

KÓS J:

It is an assessment of whether there is an alternative that is less penal because if there is, then you will not meet the *Oakes* three requirement and an option that might be less penal is one that is inherently more therapeutic. It might be more therapeutic, for instance, because it encompasses potential offenders as well as those who have offended, in other words, has a wider Mental Health Act type catchment. It might be more therapeutic because it is simply inherently more therapeutic. It has more a focus on treatment. If it is more therapeutic, it will be less penal and, therefore, you would have difficulty meeting the *Oakes* three requirement with the model you have now.

SOLICITOR-GENERAL:

With respect, Sir, I don't agree. I don't agree that the process that the Court does, which isn't a judicial review of Parliament's process, I entirely make that submission and agree, doesn't allow the Court to say what if there was something else that was less, that wasn't going to be a second penalty because –

KÓS J:

No, it's not that. It's less penal. I mean, it is –

O'REGAN J:

Less rights infringing.

KÓS J:

Exactly, which for these purposes are less penal.

SOLICITOR-GENERAL:

But because it isn't, it doesn't hit section 26(2).

KÓS J:

The justification doesn't take you back out of inconsistency. You're stuck with inconsistency. The question is, have you got a justified inconsistency, and that requires you to meet the *Oakes* three step which is that this is the least intrusive model.

SOLICITOR-GENERAL:

Is that minimally impairing, yes.

KÓS J:

Yes.

WINKELMANN CJ:

What's your problem with this analysis, Ms Jagose? I'm not quite understanding it because is it the notion that we should suggest to Parliament they could have

had other ways? I mean what – because it seems consistent with *Oakes* what's being put to you.

SOLICITOR-GENERAL:

My problem with it is that in the Court of Appeal the criticism was not that the Act was capable of being applied in a rights-consistent manner, the Court didn't think that was the issue, we say that is the issue, but rather the Court wanted to know – again at 226 – we want evidence about why Parliament took those choices. That is a pre-legislative step that the Court is not, in my submission, entitled to examine in this way.

WINKELMANN CJ:

And is that, I mean, because are you saying that because it's irrelevant, because actually really all the Court has to do, it could come up with its own less rights intrusive model, for instance, in the case of a particular person they could say parole conditions, or is it because you're saying it's questioning proceedings of Parliament or what is it? Why do you say that we shouldn't be looking at that?

SOLICITOR-GENERAL:

So I've said, as we've set out in our written submissions, it touches on the privilege question as a matter of comity, that it does – it's not in a freedom of speech sense questioning what was said or done in Parliament but it is stepping into the…

GLAZEBROOK J:

But you're going to look at the policy when you're interpreting it, aren't you? I mean leaving aside the privileges issue, which is obviously something that it's concerning the Court, but when you interpret anything to look at purpose you have to look at policy, don't you, and then you have to know what that policy is because and policy choices can be useful there because you can infer from the particular choice that might have been made what the purpose was. I mean that happens in interpretation all the time, doesn't it?

SOLICITOR-GENERAL:

Yes, and there is no privilege question –

GLAZEBROOK J:

So I don't know that it's – so the only thing that might be comity here is that you are criticising the choices in some way but you're not. You're just saying whether they're Bill of Rights consistent or not, and it's up to Parliament whether it wants to pass a law that's Bill of Rights consistent or not, it is entitled to pass a Bill of Rights inconsistent law.

SOLICITOR-GENERAL:

And I would agree entirely with that proposition if we had in front of us a statutory regime that required on its face, and I know we're back into a territory that we've covered, that required on its face the imposition of those orders and it doesn't, we say.

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WINKELMANN CJ:

We better let you move on I think.

SOLICITOR-GENERAL:

One more point to make, and it's probably a similar point, it's about – can I just point out paragraph 221 of the Court of Appeal. "What is required is that the legislative choice be demonstrably justified." No, we say what is required is that, as we've just been through, what is required in the justification is this objective, the connection, is it minimally impairing and, the heavy lifting done, is it proportional, that's the second part of that test. That is what the Court does, not what I say is a sort of pre-look under the legislation and criticise Parliament for not taking different roads.

WILLIAMS J:

So your concern is really that it turns us into quasi-legislators ourselves.

SOLICITOR-GENERAL:

Well there is, yes, there is an aspect of the competence question here, in terms of the relative spheres of the branches, yes.

GLAZEBROOK J:

But in terms of minimally impairing if you say in my example you absolutely do not need a five-year term, and the choice is a five-year term or nothing, you don't need a five-year term to meet this risk, you could have done something that was much less impairing, maybe you have an appeal right or review right or whatever it happens to be, and therefore it's inconsistent.

SOLICITOR-GENERAL:

I find it very hard to answer that question in the abstract because you might be right, your Honour, that there is a statutory regime that's just so bald that –

GLAZEBROOK J:

It doesn't matter how bald it is.

SOLICITOR-GENERAL:

Well really, I mean –

GLAZEBROOK J:

If you land up with one inconsistency there, you then look at whether it can be justified. If it can be justified in 90% of cases but not in 10%, then it's still inconsistent with the Bill of Rights, and if it can't be justified in that 10% that something – only because it's not the minimal impairment.

SOLICITOR-GENERAL:

And we would expect that declaration to be precise about that.

GLAZEBROOK J:

Yes, well it could be.

SOLICITOR-GENERAL:

Well it would have, in my submission, would have to be.

GLAZEBROOK J:

And it might say, well, it's not minimally impairing, here are about five other alternatives that could have been decided upon, that would be minimally impairing.

SOLICITOR-GENERAL:

I strongly submit that that is the wrong approach for a court to be taking, to say there are five other policy choices that you could have taken. That is taking –

GLAZEBROOK J:

But how do you know it's not minimally impairing if you don't compare it to something?

SOLICITOR-GENERAL:

What, well, again I think it depends, what is the "something".

WINKELMANN CJ:

Yes, I think, if I, I recorded you, this is your submission I think. It's always an alternative treatment to the individual, or approach to the individual. It's not an alternative model of statute, an alternative policy choice –

SOLICITOR-GENERAL:

Mmm.

WINKELMANN CJ:

– that the Court is looking for. Right.

SOLICITOR-GENERAL:

Thank you.

KÓS J:

Of course the real option is for Parliament to do this itself. To consider, in the parliamentary process, the options that are, and rank them accordingly from less intrusiveness and workability and proportionality. If they do that job then

we won't be drawn into that except to say, well, we can't see anything wrong with that evaluation.

WINKELMANN CJ:

Although then we would be marking Parliament's homework.

KÓS J:

Well –

WILLIAMS J:

I think we're stuck with that job now.

KÓS J:

I think that's what section 5 gave us.

WINKELMANN CJ:

Anyway, so…

GLAZEBROOK J:

Did you want to say anything more about this 12-month limit on intensive monitoring?

SOLICITOR-GENERAL:

Mr McKillop will cover that.

GLAZEBROOK J:

Okay.

SOLICITOR-GENERAL:

Because it's part of our reply we actually anticipate dealing with the cross-appeal and the final bits of the supplementary submissions after my friends have spoken to that. It just made more sense.

GLAZEBROOK J:

No, that's fine.

SOLICITOR-GENERAL:

I'll cut to one point, which is the Parliamentary Privilege Act, which I think is quite a straightforward and I hope uncontroversial, to the Court, proposition, which is that, it's in section 13 which confirms that where proceedings in a court or tribunal – here it comes. "This section applies to proceedings in a court or tribunal so far as those proceedings are for the purpose of ascertaining the meaning of, or the meaning that can be given to, an enactment." Nothing in the Bill of Rights 1688 or a subpart restricts evidence of "a document relating to proceedings in Parliament… allowing the making of statements, submissions, or comments based on that document."

I mean it is understood that the Court is entitled to look at the parliamentary record when interpreting the meaning of statutes.

WINKELMANN CJ:

So your submission is that once we've got past interpretation and decided it can't be interpreted in a rights consistent way and we proceed to the *Oakes* test we're still within that?

SOLICITOR-GENERAL:

Yes, and my objection, potential objection to it is arising if the Attorney is fixed with an obligation to put evidence as to why Parliament made the choice it made prior to the statute itself being examined.

I'll just draw your attention to section 4 which is just a, what is it, an interpretation of the Act: "Must be interpreted in a way that promotes its main and subsidiary purposes…promotes the principle of comity", and this is what Justice Williams your Honour was addressing just before, "that requires the separate and independent legislative and judicial branches of government…to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship", to recognise "the other's proper sphere of influence and privileges." So the –

GLAZEBROOK J:

But wouldn't it be evidence to show why it's not inconsistent, not evidence as to why Parliament did or did not do something? Because Parliament sometimes will pass things inadvertently that turn out to be inconsistent, and that usually happens post with supplementary order papers et cetera, or it has in the past happened with that. But any evidence wouldn't be why Parliament did what they have because we have the parliamentary record.

SOLICITOR-GENERAL:

That is my objection to what the Court of Appeal appears, at least in my approach, to say.

GLAZEBROOK J:

Well no it might be the Court of Appeal put it wrongly, but I would see it as evidence to show that it was justified to the extent that that doesn't come from the parliamentary record which it may or may not do. In fact, probably won't in many circumstances if you're looking at, for instance, what these – what this detention actually looks like.

SOLICITOR-GENERAL:

Yes, quite, that wouldn't have from the parliamentary record. I mean I take the points that –

GLAZEBROOK J:

Well it wouldn't because it's proceeding the – I mean it may be the Court of Appeal put it wrongly, but that's the way that I'd interpreted the evidence to show that it was justified.

SOLICITOR-GENERAL:

I don't have anything else to say in this part. Or in fact, in any part, because Mr McKillop is next, unless your Honours have any further questions for me.

WINKELMANN CJ:

No, thank you very much Ms Jagose.

MR KEITH:

Tēnā koutou and may it please your Honours. As the Court has kindly allowed, Mr Ellis will speak in the morning on both any remaining parts of the appeal and the cross-appeal. I will speak to the broad questions put by the Court in its minute last year, our submissions on those and some of the matters arising from the Crown and my learned friends for the Commission's submissions and also a number of matters arising today. I should say on the last of those, the argument has I think, without wanting to be critical, has been somewhat different today from the argument that we had had before and indeed from the argument that was in the written submissions, so I may have to be a little bit ambulatory and I hope the Court will bear with me or tell me to move on when it doesn't want to.

So, but before I come to those questions posed in the minute I think the Court turned them fundamental and I do agree, including in light of the submissions that your Honours have just heard that some of those questions do – have been raised in this case. I did want to come back to our two starting points from last October and that is to say, and this is not pointing out the obvious, this is both an important but simple case.

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My reason for saying that it is not pointing out the obvious to say it is important is because it is useful, in my submission, to look at the reasons why it is important and there are really three that I can see.

First, and I'll come to this and your Honours have already heard a lot about it, we are dealing with some elementary and, in some respects, longstanding rights. Double jeopardy, non-retrospectivity of penalty, detention that is arbitrary are ancient. There's an authority about some of them perhaps being a little less ancient than people say but they are ancient principles of common law. It's certainly long predating the Bill of Rights Act or the ICCPR. Others are more modern. The basic principle that people who suffer from mental disorders should not simply be contained but should be treated, come from newer principles particularly, and we've mentioned this in the respondent's

submissions, conventional in the rights of persons with disabilities and the Court is already aware of much of that from, for example, *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

So that is one reason it's important. The second reason is this case does, as I say, raise questions or questions have been raised anyway as to doctrine and your Honours' exchange with my learned friend the Solicitor-General has just rather underlined that for us. I will come to what we have to say about the declaration of inconsistency jurisdiction and the – I was going to say preponderance – but the comprehensive authority that is against the Crown's narrow view here. There is no jurisdiction that interprets rights justification in the way that is being put to you and no jurisdiction that sees that as improper to scrutinise whether another alternative, rights compliant or less rights restricting, could have been taken but I'll come to that from our supplementary written submissions.

The third way in which it's important, and this is partly picking up on my learned friends from the Commission, and I'm very grateful I should say for the very thorough submissions they were able to provide across a range of issues, whether one views it as they do as an extension of the duty of candour or whether, to use another term or phrase that is used by human rights standards, is part of a culture of justification.

The simple point, and I'll come to authority again on this, is it is not enough to simply say: "Well we didn't have evidence and that was bad" or: "It can't be expected of the Crown to seek to justify a legislative choice by some sort of policy work." That is exactly at the core of this jurisdiction that whether in the policy process leading to an Act, and we actually had quite a lot of this, it just didn't end up with a rights compliant result. Despite the effort of some of the officials involved, we did have that consideration of rights compliant or less rights restrictive alternatives but then we've also had, and I do want to resist the criticism that's been made of the plaintiff and I suppose me in this case, the way in which we have conducted this case, I think the term abstract has been used, and that is right.

We are saying that these two Acts on their face are inconsistent with fundamental rights and because there is a rights compliant alternative, and I will come to why we say it's rights compliant not nearly less limiting of rights or more justifiably limiting of rights, because there are rights compliant alternatives, because those were identified in the policy record and also in the comparative material that we put before all three levels of the Court, the Court is fully informed. We are not in a vacuum and the case has not been brought on some sort of abstract basis. I'm leary because I think the last time I did this in this Court, it was suggested I was being unkind and I don't mean to be. But even just now the argument for Mr Chisnall was being described as apparent or not theorised or never invented.

From the very outset in front of Justice Whata at first instance, in this case in the declaration of inconsistency part of this case, we have said the UN standards, the UN case law, the European case law, the comparative practice of other states does explain what one does about dangerous people and what human rights standards require human rights compliant standards states parties to do. So it has not been abstract, it's not theorised and I'm going to leave it there. I think I'll come back to some of the specifics.

GLAZEBROOK J:
Can I just check –

MR KEITH:
Yes, Ma'am.

GLAZEBROOK J:
What you say they do about dangerous people overseas is to have a treatment focus, is that…

MR KEITH:
Yes, that's it. So, and we've given you all the authorities we could find, and my learned friends from the Commission I think have found some that I hadn't and

I'm grateful to them for that, but for that basic proposition that one can detain people on the basis of danger to themselves or others or otherwise restrict their movements or their other liberties but one does it in a care, treatment and if at all possible rehabilitation context and that is not what we have here on the face of the statutes.

So that was the – but sorry I got slightly side-tracked on the last reason it was important and I'm sorry we – well I'll come to again the writtens but before I do, the last reason it's important is, of course, the Court is engaged, not in scrutinising the internal affairs of the House, breaching the Parliamentary Privilege Act, I'll come to that question from the Chief Justice along the way, but it is not engaged in some sort of judicial review and that point has been made by the Court and has been made by other Courts. It is, on the other hand in paragraph 221 of the decision under appeal by the Crown, is exactly a statement of this, that is engaged in looking at the choice reflected in this legislation and asking whether that choice is justified, and as I don't think I have to persuade the Court, of course, that is a comparative exercise if there are rights compliant or less rights infringing alternatives. There is nothing wrong with that.

The United Kingdom Courts under their declaratory jurisdiction have made that point. They are not engaged in judicial review at Parliament. They are not looking at what was said or thought inside the House in that jurisdiction. They are looking at whether the end result can be justified and I think Justice Glazebrook put it very well just now. It's not evidence of what Parliament had in mind or what they did or didn't think, and I think having been involved in *R v Pora* [2001] 2 NZLR 37 (CA) and *R v Poumako* [2000] 2 NZLR 695 (CA) a long, long time ago, that is an instance of inadvertent legislation or not particularly coherent legislation without rights considerations, it is whether the end result is Bill of Rights compliant and that is the very task of a declaration of consistency court.

WILLIAMS J:

How does that stop us stepping into the shoes of the legislature and dreaming up our own policy responses?

MR KEITH:

You have to – well you don't need, sorry, Sir, I'll think before I talk. It's always a good idea. The standard of justification, whether one takes it from *Oakes*, whether one takes it from the Human Rights Committee's general comment on the obligations of the State's party to the covenant, whether one takes it from *Hansen*, the Court's task is to assess the justification or not of given legislation and, as part of that exercise, it is proper for the Court to look at whether there is an alternative or are alternatives and that is where – that is not necessarily for the Court to say: "Do you see there is one way this could be done, a different way this could be done in particular" but to say there is a rights compliant alternative and because the Parliament has not – and because the legislation, Parliament doesn't really matter at that point, because the legislation does not follow it, it is rights-inconsistent.

KÓS J:

And what do we do, Mr Keith, in relation to an option which is, for instance, vastly more expensive?

MR KEITH:

Well the Crown could then say, it hasn't attempted to here, well there is a justification for not doing X or Y or Z and one, in terms of the comment I just made and I was going to take your Honours to a point that we had cited from *Mackay v Manitoba* [1989] 2 SCR 357, in the Supreme Court of Canada, maybe that's a useful thing to do now.

1500

If we could bring up *Mackay* which is tab 15 in, I think it's our bundle.

GLAZEBROOK J:

Tab 15 in your bundle?

MR KEITH:

In our bundle. So it's, and I do like the Chief Justice's suggestion of a single casebook, and anything that would get us off doing all of the hyperlinking we'd be thrilled about. I'm not sure we can do that much.

WINKELMANN CJ:

Respondent bundle? I don't see any tab 15.

MR KEITH:

Sorry, I will find, this was something that came up this morning.

KÓS J:

MacKay v McCloy?

MR KEITH:

No, *Mackay and Manitoba* but –

WINKELMANN CJ:

It's 46 of your…

MR KEITH:

46 of ours, sorry, thank you your Honour, and there's also useful discussion of it…

WINKELMANN CJ:

My hyperlink's not working.

MR KEITH:

Better and better. It maybe easier, as something that does work, if we could bring up the respondent's appeal submissions. So the primary appeal submissions, at page 5.

GLAZEBROOK J:

That's your first hearing?

MR KEITH:

That's from the first hearing, the respondent's submissions from last year Ma'am.

WINKELMANN CJ:

And hopefully they're linked.

MR KEITH:

Mr Edgeler has included the word "linked" in the title and I do trust him on that.

WINKELMANN CJ:

Unfortunately our security settings sometimes unlink them. So I hope I didn't just give away secret information there. What footnote?

MR KEITH:

Footnote 8 on page 5.

WINKELMANN CJ:

Right. That's not working either unfortunately.

MR KEITH:

And what we had said in the written submissions at footnote 8.

KÓS J:

It does seem to be addressing a slightly different issue though, which is evidence as opposed to judicial selection.

MR KEITH:

Sorry, all I was going to so though Sir is if we are going – your question I think was what if the Crown say this alternative was too expensive, well, it wouldn't work, then that is where the *Mackay* excerpt comes in, which I rather painstakingly took your Honours to. That is it is perfectly normal answering my learned friend's suggestion that the Attorney-General couldn't be expected to provide a policy case, but the Supreme Court of Canada say exactly that that is necessary and I'll come to more of that.

WINKELMANN CJ:

Can I just ask. Is there academic writing, which just might short circuit this for us, which considers the Crown's, the obligation of the Attorney-General or Crown bears in relation to justification, evidential burden, the approaches to cross-jurisdictions.

MR KEITH:

There is. We have given you at the start of the, I think there was some comment that we could have cited some more academic commentary in our submissions, and I apologise to people who may have been harmed by that.

WINKELMANN CJ:

Well I don't think we've said that to you.

MR KEITH:

No, no, no, one of my colleagues picked up some social media comment by a member of the academic community. But if your Honours - the comparative, I didn't actually find, whether the Human Rights Commission has something I can check, but if your Honours go to our supplementary submissions, so that's the submissions filed for this hearing, at page 5 and following.

WINKELMANN CJ:

Page 5 and following?

MR KEITH:

Yes, paragraph 13. What we have there, and it's now up on the screen too, is the – so first under the ICCPR then the European Court of Human Rights, and then over the page we get into national jurisdiction, but the common thread throughout this is starting with 13, this is very close to in language and these people do read widely, very close to in language, the language found in the national and supernational jurisdictions, any restrictions on any covenant right: "Must be permissible under the relevant provisions…where such restrictions are made, States must demonstrate the necessity, only take such matters as are proportionate."

Then later, further on down the page, we have *Silver v United Kingdom* (1983) 5 EHRR 347, [1983] ECHR 5 which is the old but long-standing European exposition of that same principle. We have *Hansen* and *Oakes*. We have the United Kingdom, which we'll come to later, and we even have, although I may later be critical or we have been critical of the High Court of Australia or at least of the limited job it can do under that country's interesting constitution. They, too, when it comes to the rights that they have found in their constitution, this is the implied constitutional right, political communication. I think partly found in the (unclear 15:06:13) case in that court, we have the High Court of Australia doing exactly the same thing.

WINKELMANN CJ:

What I – I was thinking about whether anyone has done a comparative analysis as to the practical application of this, what this looks like in practice, because that's what we've been really discussing with Madam Solicitor-General.

MR KEITH:

Oh sorry. I can have a further look at what we've gone through and what the Commission particularly may have touched on or – I did look for a sort of potted summary of comparative practice and justification and didn't find one, but there may be more useful comment, particularly in the context of individual jurisdictions, but I think the *Mackay* excerpt that I took your Honours to in terms of the expectation, at least of the Supreme Court of Canada, for robust evidence from the Crown, is still, leaving aside obvious cases, that sort of thing, where there is a hard issue, that *Mackay* excerpt, I think, is still the standard.

WINKELMANN CJ:

Mmm.

WILLIAMS J:

Is that extract referring exclusively to the Crown or is it a caution against challenges unpinned to facts?

MR KEITH:

The statement is certainly in the context of the Crown, so *Mackay* involved an attempt by the Crown simply to defend a rights-infringing statute on the basis of a series of assertions and there wasn't tested evidence put forward, so –

WILLIAMS J:

So it wasn't a complaint about the –

MR KEITH:

It wasn't a complaint in that –

WILLIAMS J:

– *Mackay*'s approach to the case.

MR KEITH:

No, no, and we've touched on this a bit in the supplementaries. There are going to be cases where an applicant does have to show, does have to make out, for example, disparate impact of an apparently neutral law. So I think the example we give is a decision from last year of the Supreme Court of Canada, and I'll just find the reference, this is at – I won't take you to it, your Honours to it unless you wish, but the reference is at page 20, footnote 54 of the supplementary submissions, *Sharma v Canada* 2022 SSC 39 decision from last year of that court. Essentially, the argument was that indigenous offenders were adversely affected by restrictions on the right of home detention and I think, I can go back to it, but the argument was essentially that if you lived in a remote community your ability to access home detention was dramatically curtailed which meant that indigenous people, the argument was, were being detained in prison when people who lived in urban areas were not, and there the Court did say that the evidential case, the disparate impact, hadn't been made out.

But where we, as I was saying to start off with, where we say is simply this legislation on its face is a second penalty and that is conceded then we don't we say, have more to show other than to point to those less restrictive alternatives and we've done that. We don't need to then explain, well, in the

particular facts of some – of an individual's case, that is rights-infringing because it's rights-infringing per se, to use the term that was being bandied around before.

1510

WINKELMANN CJ:

Well it's said to you, said against you it's not rights-infringing per se because it's a justified limitation that's justified by the high threshold.

MR KEITH:

Yes, and just to be clear about that, and this is probably where I was saying it's a simple case in that way, and I think Justice Glazebrook may have mentioned where do victim's rights, where does the rights of – do the rights of the community enter into the analysis. In terms of the *Oakes*, sorry, *Hansen* or *Oakes* analysis, there's no question that protection of the community, protection of these individuals and to is a pressing social objective, of course it is. Nor is there an argument that jailing these people is a form of protection. So it is, in one sense, rationally connected, whether it's a legitimate, I think this comes up later, but where this falls down, and this has been our argument as I was saying, from the outset, is it cannot be viewed as proportionate or justified or least restrictive because there are rights-compliant alternatives that are not taken, and that applies across the board. It applies to anyone who is subjected to what is conceded to be a second penalty. Those people could be subject to clinical committal or clinical management, which would not infringe section 26(2) in terms of the European Court, but also my learned friend spent some time talking about Europe, also the UN standards, also the other case law, because it's not a penalty. It's got the distance to – sorry your Honours…

WINKELMANN CJ:

That's not that it's justified, that's that it's not a penalty.

MR KEITH:

It's not a penalty. It doesn't infringe the right at that point. There are, there's a descent, for example, in *Ilnseher* which says no, no, it's still a penalty to the hyphenated judge, whom I can't remember.

WINKELMANN CJ:

Yes.

MR KEITH:

But the Court, the full court sitting as a full court after should – so that is the most recent and most authoritative pronouncement by that Court.

WINKELMANN CJ:

He descends on the basis that prison sentences are also therapeutic.

MR KEITH:

Yes, but the Court as a whole, and it is sitting as is the full court, says no, there's sufficient separation.

WILLIAMS J:

So are you saying, for example, with respect to PPOs that section 36 isn't enough?

MR KEITH:

Yes Sir. Because –

WILLIAMS J:

You already said that last time?

MR KEITH:

Yes we did. Sorry.

WILLIAMS J:

Is that because it's limited by reasonable prospect? What if it wasn't?

MR KEITH:

This is the point that we were making by reference to the table at the end of the cross-appeal submissions last time too. We have to look at the statutory language, and the statutory language are the committal statute, like the Mental Health (Compulsory Assessment and Treatment) Act, is that the individual has a right, as in a Health and Disability Commissioner enforceable right, to care and treatment, and to clinical management and clinical decision-making about the restrictions on them, clinically driven process for their admission and release.

WILLIAMS J:

So this is, you say this right is too rudimentary and too conditional?

MR KEITH:

Yes. Yes, and does not, it doesn't confer, for example, that absolute right to care and treatment which a patient would have, and it's conditioned also, if you look at the language, if your Honour looks at the language of section 36, on whether or not the risk to the community is lessened. What you can't have, or what, and just as a practical illustration of the difference, I can be treated, I have a right to treatment under the mental health legislation because it will make me well. I only have a right to rehabilitation, whatever that is, under section 36 if it's assessed that is likely to lesson, or reasonable prospect I think is the language, to lessen the risk to the community.

WILLIAMS J:

They're probably the same thing, though, aren't they?

MR KEITH:

I don't, no, I don't think so Sir.

WILLIAMS J:

Give me a scenario when they're not?

MR KEITH:

Well, if…

WINKELMANN CJ:

Well there's some horrific but obvious examples, for instance, you know, if you harmed someone, then they would, you treated them, then they'd be safe. So if you drugged them very badly, and harmed them, but made them safe from offending. It's not the same thing.

MR KEITH:

Well, there might be other objections to that one too.

WINKELMANN CJ:

Yes.

MR KEITH:

But I think the simple point is to, or I think we can talk about how we understand different statutory regimes to work, and we've got the *Pori* case which goes into some detail about the conditions under which Mr Pori had been managed, and then why on earth he's ending up in prison again notwithstanding that he's quite a good example. Mr Pori, under the PPO legislation, yes, did get a number of things as a matter of practice so that's good but the nett result of his behaviour, says I think it's Justice Nation in that case, is that he is not being retained even in Matawhāiti, he is going back into prison because that is the only place he can be managed says the Department of Corrections and the Court has upheld that. That's nothing in prospect if he were a committed patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992. No matter how dangerous, disruptive, whatever, a Mr Pori, who fell within the scope of that Act and the scope is limited so it doesn't assist Mr Pori, he does not qualify as a mental health patient on the legislation –

WILLIAMS J:

Well because he's not a risk to himself?

MR KEITH:

No, because he has a mental disorder, not a mental illness. That's why none – why the two Acts are framed in terms of behavioural disorder, is that if someone has a mental disorder, sorry mental illness, for example, someone's schizophrenic, as a non-controversial instance, you may be able to say that is a mental illness, one can treat that, whether in the MH CAT, the Mental Health (Compulsory Assessment and Treatment) Act. The policy history shows, and we can find it if need be, is that the mental health legislation does not extend to people with behavioural disorders and so that's the difference. That's why Mr Pori is there and not in a secure ward somewhere or something similar as a matter of the legislation.

WILLIAMS J:

So the safety of the community is an overlapping subset of the treatment of the individual and, if safety of the community is your only issue, there are areas of treatment which the individual won't get because of the risk to community safety?

MR KEITH:

No, the community is going to be safe either way. If to take, and I don't mean any disrespect to him or anyone else involved, but to take the example of someone like Mr Pori, he is being put into prison because he cannot be managed in Matawhāiti say Corrections. If he were in a mental health ward he would not be ending up in a prison under prison conditions. That's the difference. Well that's a concrete example.

WILLIAMS J:

Yes, I think we're making the same point.

MR KEITH:

Yes, Sir.

GLAZEBROOK J:

And one of the issues with mental disorder is that, and one of the reasons they're not under the Mental Health Act, is that it's assumed they actually can't be treated. So somebody who can't be treated and is a major danger of the community, you would say there just is a bar on double punishment and it can never be justified?

MR KEITH:

Well first up whatever else you're doing to them, you don't need to punish them. I think we talked about in October what about the patient or detainee who simply refuses any form of rehabilitation or treatment or care, and I think Justice Williams might have asked me that and I said: "Well the State must do all it can" but if it's doing that but it is being stopped by the individual exercising their choice not to accept it.

GLAZEBROOK J:

But it is not stopped by the individual but just the fact that there doesn't exist a treatment?

MR KEITH:

Yes. Well just to – we do have, and I think it's in the submissions, well there are a couple of points about that. It's not been any part of the case that these people are untreatable. They don't qualify as patients under the mental health legislation.

GLAZEBROOK J:

Not being part of which case sorry?

MR KEITH:

Of this case, the declaration of inconsistency case.

GLAZEBROOK J:

But not part of your case?

MR KEITH:

Not part of any – there's been no argument that these people are untreatable from the Crown or anyone else so that's first up. Second, just in terms of the point that your Honour has made, the significance of cases like *Ilnseher* is that one is treating or at least attempting to treat people with behavioural disorders. So that is Mr Ilnseher's case for example.

1520

GLAZEBROOK J:

Yes of course.

MR KEITH:

I think we also have a reference somewhere and I'll find it if we can, two Department of Corrections, New Zealand Department of Corrections psychologists making the comment that, and I'll see if I can find it rather than give your Honour a garbled version of it, but I will – it's certainly – they essentially suggest that no – it's terribly difficult, it can be, but it's just not, I think they say it's a ripe area for future research in New Zealand, something like that, and I think possibly Justice Williams and your Honour Justice Glazebrook also touching on the success of some anti recidivism and so on programmes that prisons run, and those are dealing in some cases with people with behavioural disorders. So there are these mechanisms.

KÓS J:

Are you suggesting that a treatment regime for Mr Chisnall might not be a punishment at all? It seems to be a difficult argument to make because in as much as Mr Chisnall is selected for whatever regime is going to be applied to him, whether it be treatment focused or penal, or detention focused, the reason why he's been chosen is because he's currently a serving prisoner and it is a consequence of his sentence.

MR KEITH:

A released prisoner and that's the difference.

KÓS J:

Mmm.

MR KEITH:

The reason he's been chosen, in terms of the statute, is he had a finite sentence. He wasn't subject to preventative detention and so he becomes subject to this regime having committed a certain offence. Where the European cases take us and the German Constitutional Court and so on is, there are two separate points and I do want to make them with some care.

First up, the European Court decisions concerned with two rights, the right against arbitrary detention Article 5, and the right against a second penalty, Article 7 – sorry, against retrospectively to stage an Article 7, the Court found that provided there was – has found that provided there is sufficient separation that there is a new cause for the new detention. Then the fact that one ends up under consideration in the first place, by reason of having committed an offence, doesn't infringe those principles because – and one can see some sense in that. There's a separate point which does come up about arbitrariness and under inclusivity, but at a threshold, if you say here is a person whom putting the conviction to one side nonetheless needs to be placed in a secure environment for care and so forth, then that's not a new penalty.

WINKELMANN CJ:

The severing thing is – the new condition is the mental – is the diagnosis of psychologists and psychiatrists that there are risky – they're at risk.

MR KEITH:

Yes, so you're no longer relying in any way on the fact of the conviction.

WINKELMANN CJ:

Although you are, by select –

MR KEITH:

You got into the scheme.

WINKELMANN CJ:

Mmm.

MR KEITH:

But you're not then making an evaluation, whereas these statutes do incorporate the conviction as part of the assessment. So that's one of several reasons we say there isn't that separation, yes.

WINKELMANN CJ:

So in *Ilnseher* that scheme does not actually even take into account the fact, the conviction, one must do when they assess it, surely.

MR KEITH:

The risk – this is where I think Justice Glazebrook knows about risk assessment and I don't, or don't know very much, but the line set in the European Court cases, and really signed off by the full court in *Ilnseher*, is one goes from entry into the skill or consideration, which is by virtue of having been a serving prisoner, having committed certain offence, but the assessment as to whether Mr Ilnseher or whoever else should then be committed is wholly new, and that's why they were able to use that language of separation. So that's the first thing, and that is not what we have in these schemes.

WINKELMANN CJ:

Why is it not what we have in these schemes?

MR KEITH:

We don't have it in these schemes first up because the fact of the conviction is considered, but second because we say when one holds up these statutes next to the Corrections Act in particular it is a continuation of Corrections management, it is a continuation of penal measures. So it is not separate and it's not driven by that clinical assessment anymore. It is still, and this is where the section 26(2)) point and quite what it was the Crown has actually conceded becomes a bit important. It is a second penalty and it's been said it is.

One doesn't impose penalties on people being detained by reasons of mental health.

WILLIAMS J:

So your counterfactual would be Parliament should have amended the compulsory care regimes to accommodate people like Mr Chisnall, or those like Mr Pori, who are not amenable to interestingly Matawhāiti because it's less intrusive than compulsory care, less containing than compulsory care, to which the Solicitor-General says: "Well that is trenching in Parliament's space. It gets us thinking ourselves into the legislature's shoes and that's dangerous."

MR KEITH:

This is the point made in the supplementary submissions about the role of the Court when it is undertaking declarations of inconsistency, and I think we said something like this in the earlier submissions, but this is at page 3, paragraph 9 of the supplementaries from us. So we have the Court of Appeal in *Taylor* saying that the Court is forming its own opinion of whether legislation is compliant and carrying on down that page *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, one of the first declaration of inconsistency cases, that the Court does have a new role, it is different and this is where I depart from my learned friend the Solicitor-General –

WINKELMANN CJ:

Sorry, what page of the supplementary?

MR KEITH:

Page 3 of the supplementaries, foot of the page. So the quote of *Taylor* is about three lines down on page 9. That's the Court of Appeal, not this Court, and then the then House of Lords in *Wilson* and that is exactly the jurisdiction that the Court is exercising today, this Court is exercising today, albeit that it has been inferred from the Bill of Rights Act rather than specifically conferred by the Human Rights Act. It has now, of course, since this case started been recognised in the new section 7A and section 7B of our Act. But that is the task. It's fundamentally different. So their Lordships, they're now required to

evaluate the effect and make a formal declaration and they go on to say: “It must satisfy a proportionality test… This involves a ‘value judgment’” and in answer to your question Justice Williams, and I think this is where I say there is no authority for the proposition that a court looking at whether something is proportionate, there's no support here for the Crown position that a court can't look to less restrictive or rights compliant alternatives. That is at the heart of the exercise otherwise it really would be in a vacuum.

KÓS J:

Well it's explicitly what Justice Blanchard, Justice Tipping and Justice McGrath said in *Hansen*. It's also what Chief Justice McLachlin said in *Canada (Attorney-General) v JTI-MacDonald Corp* [2007] 2 SCR 610.

MR KEITH:

Yes.

KÓS J:

So each of those cases and each of those Judges referred to the consideration of alternatives.

MR KEITH:

Yes, and we do have to take *Hansen* as the example. Could the objective be met by something short of a reverse onus provision and there was some consideration of I think Scottish law which imposed an evidential onus and it seemed to work perfectly fine and so on. So it is the same exercise. So I think my short answer to Justice Williams’ question is “no.”

GLAZEBROOK J:

Can I, if you’ve finished on that point, can you go back to the European cases and the exact procedure. I mean I must admit, and I haven't re-read them, when I read them at the time, the idea of a separation seemed slightly ludicrous and a device to get out of a double penalty rather than actually a sensible way of distinguishing them but you say it's totally different from our procedure so I just wanted you to take me to the procedure to show me why it’s different.

1530

MR KEITH:

Oh. So just in terms of – I'll do both of those in sequence if I can. So one thing we did include in the supplementary submission at the back is an appendix which is a breakdown of the evolution that the German law went through. So we start with them, move past – I think we touch on *Bergmann,* another case called *Glien v Germany* [2013] ECHR 1206 and then end up – I don't think we include *Ilnseher* because your Honours have heard enough about that. But why we say it is different and why *Ilnseher* is the last word and the word of the full court, these other decisions are divisional courts leading up to *Ilnseher* is that degree of separation and the fact, I – well, one can view it another way.

The measures under our legislation as I say, and we said this in October, and it's in the writtens, the measures under the two Acts are very close in their terms to Corrections legislation. They are worlds apart from our own committal legislation. But also, if your Honour reads through particularly *Bergmann* whether or not, that idea that this is now an entirely separate assessment unconnected other than at the threshold points, so on the merits unconnected to the offending, and the institution is unconnected to the prison and penal system, it may be they're located on prison grounds and that point's made somewhere or other, but it is a wholly separate statutory scheme at that point. When one looks at our legislation it is not. Even the most moderate part so the extended supervision order parts of the Parole Act impose essentially the same, in some cases more stringent measures as on serving – sorry, sentenced prisoners under parole. So I think there was some discussion with my learned friend the Solicitor this morning about a standard and special conditions. Those provisions are all taken from the parole regime. They are not part of a separate therapeutic regime.

GLAZEBROOK J:

Are you going to take us to the exact provisions in Germany?

MR KEITH:

I can do that if –

GLAZEBROOK J:

It would be really useful for me.

MR KEITH:

Sorry, and by all means –

GLAZEBROOK J:

Because I can't see how they're unconnected to the offending because if they're related to risk – but if they're not related to risk I'm not sure what they are related to.

MR KEITH:

They are related – sorry. The excerpts that I'd taken your Honour to in terms of *Bergmann* particularly and in that table at the back of the supplementary submissions I think are illuminating. If – I think we'd talked about the provisions in the – sorry.

GLAZEBROOK J:

I'm just interested in the separation.

MR KEITH:

Yes.

GLAZEBROOK J:

Not so much in the other parts because I understand those submissions.

MR KEITH:

Yes.

WINKELMANN CJ:

Whose authorities is *Bergmann* in?

MR KEITH:

It's in ours, Ma'am, and there should be a working link in that table but I will – 52 of our bundle for this – sorry, 42 of our bundle.

WINKELMANN CJ:

For this hearing?

MR KEITH:

For this hearing.

WINKELMANN CJ:

Got it.

MR KEITH:

So I think, your Honour, I was going to talk about *Ilnseher* instead because it is more recent but I –

WINKELMANN CJ:

You were going to – I think Justice Glazebrook wants you to take us to the part of the decision that refers to the scheme.

MR KEITH:

So I think the critical assessment is the – and *Ilnseher* is the assessment under Article 7 so, as I was saying, we have the challenge on arbitrary detention grounds and that is looking at whether it is therapeutic. There is also –

GLAZEBROOK J:

I just wanted to know what they do and what the test is.

WINKELMANN CJ:

So paragraph 32 of *Bergmann* I think.

KÓS J:

Can I just ask why we're particularly concerned about this now given the Crown's concession in relation to these orders being non-penal. There's no

question that they avoid us going down the justification rabbit hole by establishing this is not a penal – not a breach of section 26(2).

MR KEITH:

Well really –

WINKELMANN CJ:

I'm not sure about that. They say it's justified, don't they?

KÓS J:

Well that's a different question. I'm not sure *Bergmann* helps us.

MR KEITH:

They don't say it's – sorry the Crown say that you can justify in each individual case.

WINKELMANN CJ:

Yes.

MR KEITH:

The comparative case law we have including this says by virtue of these particular features, which I can try and do my best to come into, is that in the view of the European Court because of the separation concept, because of all the things about how things were done differently in these regimes, one is no longer in the realm of penalty at all. So it's relevant, in answer to Justice Kós' question I think, and only in the sense that we say here is a concrete rights compliant alternative and that is why we say a DOI follows. So we don't get into the minutiae of justifying individual orders because the scheme just doesn't permit it. But I'm very keen to try to answer Justice Glazebrook's question and so just…

GLAZEBROOK J:

Well you have to have a mental disorder –

MR KEITH:

Yes.

GLAZEBROOK J:

– as I understand it, and that's as defined on the Act –

MR KEITH:

Yes.

GLAZEBROOK J:

– which presumably is wider than mental illness in our Act because otherwise one assumes there is a mental health compulsory treatment regime that this person could have been under and would have, one would have thought.

MR KEITH:

There was certainly no claim by either the respondent government or Mr Ilnseher I think. I don't think the German Government was saying: "Well we can't treat him for one thing." They were defending the scheme they came up with.

WINKELMANN CJ:

What *Ilnseher* said was that it had to be that any scheme had to have liberty as its starting point and you can see that in the language that is used and that every restriction had to be at an expressed and minimalist level.

MR KEITH:

I think that's right, Ma'am, and I think the good exposition that may be what Justice Glazebrook is looking for, and I can try harder if I'm not quite there yet, but paragraphs 210 onwards in *Ilnseher* we have the Court's assessment, and I think this is what your Honour was suggesting might be a bit convenient of –

GLAZEBROOK J:

Paragraph what sorry? Is this *Bergmann*?

MR KEITH:

So paragraph 210 onwards is the Court's – of *Ilnseher*, is the –

WINKELMANN CJ:

Which is not in the new bundle of authorities?

MR KEITH:

No, it's in the old bundle at tab 36.

GLAZEBROOK J:

And *Bergmann* doesn't summarise it?

MR KEITH:

Well *Bergmann* – my learned friend was slightly mistaken this morning, *Bergmann* is actually older. It's from 2016, this is a 2018 decision. *Ilnseher* deals with *Bergmann* and, as I say, is the decision of the full Bench of the Court so this is the ultimate word.

GLAZEBROOK J:

So where is that?

MR KEITH:

Where is the?

WILLIAMS J:

42 of the supplementaries.

MR KEITH:

So it's in the respondent's authorities from the original hearing at tab 36, I-L-N-S-E-H-E-R for anyone who is just finding it that way, and it's now up on the screen and what we have is, and I think in particular in terms of your Honour's question, and paragraphs 229 to 231, we have how it's imposed, to pick up on the Chief Justice's point, there is an assessment about the conditions, the severity, nature and purpose and so on, that's in that excerpt from 210 through to the Court's conclusions in 239.

1540

WINKELMANN CJ:

There's one thing that is, there is a gap between how the Crown is framing this and how it's been approached in other jurisdictions, which is that other jurisdictions find, well the ones you've referred us to Mr Keith, find these regimes are rights-compliant because they find the therapeutic focus is sufficient to stop that – so that they are not detentions, and what we haven't really heard from people on is if someone is a detention, as the Crown concedes it is, a post, so a detention which is post-sentence so a second penalty.

MR KEITH:

Mmm.

WINKELMANN CJ:

How, when is that justified?

GLAZEBROOK J:

Was there any reason this keeps flicking back and forth, rather than remaining where it is?

MR KEITH:

I think Ms Singleton is trying to be very efficient. Sorry.

WINKELMANN CJ:

If you could just put it back up on *Ilnseher*.

MR KEITH:

We had addressed, and the reference is in the respondent's submissions from October, and I will just pull up the reference.

WINKELMANN CJ:

A second detention can be justified.

MR KEITH:

Well –

WINKELMANN CJ:

Double jeopardy.

MR KEITH:

Double jeopardy. There are accepted exceptions to double jeopardy. A tainted acquittal is the main one, and the authorities that we went to for that are, just one moment. In the respondent's submissions from last year, the primary ones – oh, this is somewhere where I go further than the Human Rights Commission, possibly Dr Butler in particular, are at page 9, footnote 19 of the respondent, and that is what we have on double jeopardy. So in particular when one looks in that footnote half way down it, sorry it's a bit of a monster footnote, the commentary to the covenant by Bill Schabas, but the *Nowak* commentary which is the leading commentary, there's no suggestion of a justifiable second penalty. The European Convention in its protocol against second penalty, which the United Kingdom is not actually party to it, and is something my learned friends acknowledge, the right doesn't prevent, and this is about 10 lines from the bottom, doesn't prevent reopening of criminal cases where there's been a fundamental defect, but otherwise permits no derogation.

So that's what a justified second trial, or second penalty looks like. So I think the answer to your Honour's question is I think as your Honour had put to the Crown this morning.

WINKELMANN CJ:

But in the commentary to ICCPR, which I think Mr Ellis gave us.

MR KEITH:

Yes.

WINKELMANN CJ:

On Article 9, Liberty and Security of Persons.

MR KEITH:

Yes.

WINKELMANN CJ:

At paragraph 21.

MR KEITH:

This is the general comment.

WINKELMANN CJ:

Yes.

MR KEITH:

Right. Yes.

WINKELMANN CJ:

Is that making the point which is made in *Ilnseher* which is the conditions in such a tension – this is a – that's a detention imposed at the same time, is it?

MR KEITH:

No, it's a detention imposed after.

WINKELMANN CJ:

And it says, apropos of that. It seems to contemplate that: "If a prisoner has fully served the sentence imposed at the time of conviction, Articles 9 and 15… prohibit a retrospective increase in sentence. States may not circumvent this prohibition…" Oh. No it doesn't. "Prohibition by imposing a detention that is equivalent to penal imprisonment under any other label…" of civil detention citing *Fardon*.

MR KEITH:

Mmm.

WINKELMANN CJ:

So that's the gap that *Ilnseher* shimmies through then?

MR KEITH:

Yes, and I think, I'm not here to defend the German government's legislation, even though we place some reliance on it, but I think it does make sense in that, one point I think made by the Court this morning was that people are identified through the criminal process as having a personality disorder. They might not otherwise be picked up at all. But when they have been, what is a court to do, or what is legislation to do, and this is where we say we make no – we don't take any point about the objective being important, it's just what you then do that we find fault with.

I think somewhere in there I had not got to the second point about under-inclusiveness, and I'll just make that very briefly again. It's in the supplementary submissions, with particular reference to the decision of the House of Lords in *A (No 1)*.

WINKELMANN CJ:

Is this the arbitrariness point?

MR KEITH:

This is the arbitrariness point and I'm just trying to find the… sorry, I'll see if I can find the point and if I can't I'll move on.

WINKELMANN CJ:

You could give us some clues and we could look for it ourselves.

MR KEITH:

Yes, I was just looking, here we go. It's at page 16 of the supplementary submissions, and discussions at paragraph 37.3. your Honours may be familiar with the *A* cases already. *A (No 2)* is even more famous because it's about reliance on evidence obtained by torture, but *A (No 1)* was both in a counterterrorism context. *A (No 1)* was about a derogation that allowed imprisonment without trial of certain individuals on the grounds of public safety and security of the realm, and the House of Lords in the *A* decision, the critical point was that the detention regime, the derogation from the European Court of

Human Rights, applied only to foreign nationals, notwithstanding that there were British citizens no less dangerous. The reason for that is not the reason for that finding, or what that finding is, and I'll leave your Honours to read the judgment. But the reason, the finding was that the derogation was not proportionate. Not because you were picking on people, although I think there was a discrimination finding as well, it's mentioned at the footnote, but that if the Crown seeks to justify a departure from, a limitation on rights by reason of a public safety objective, but it takes a measure which doesn't, which on its face does not meet that objective because there are people left out, it is thereby disproportionate. You can't rely on the objective as justifying something that doesn't actually do the job.

WINKELMANN CJ:

So where does that leave us with the *Ilnseher*, that line of cases?

1550

MR KEITH:

As with your Honours we don't, and sorry the question hadn't occurred to me, we don't have evidence of what other committal regimes Germany has, but we do say in the context of this legislation that if one is going to detain people because they're dangerous and it's in the policy record, it's accepted that there are other people no less risky in the community but not targeted, not the subject of legislation, then at the very least it says, in terms of your Honour's question, it says that we do not have justification for the legislation, one, because of *Ilnseher* it says there's something else rights compliant or less rights impairing you could do but, two, because it is arbitrary, it is disproportionate because the reason claimed doesn't actually justify the distinction being drawn.

I don't have an answer for your Honour as to why in *Ilnseher's* case he was not also saying, I have been targeted as a former offender, and that's under inclusive. He does say the former offender engages the right and second penalty to the Court. He's not bothered by that. But what we do have here in *A (No 1)* is that proposition that if you're going to justify locking people up

without trial that justification can't be incoherent essentially or can't be uncomprehensive.

WINKELMANN CJ:

Is your first submission then it's penal and double jeopardy penalties really can't be justified except in the most extraordinary circumstances?

MR KEITH:

Narrow circumstances –

WINKELMANN CJ:

Narrow circumstances, yes.

MR KEITH:

– nothing to do with this anyway, yes.

WINKELMANN CJ:

I don't use the word extraordinary, exceptional, yes, narrow circumstances. So that's – and then *Ilnseher* shows us a pathway through that but that pathway is where it is sufficiently therapeutic so it's not a penalty so it's actually in a completely different field and then there's arbitrariness.

MR KEITH:

Yes, so as you'll hear from us tomorrow too, the problem with a scheme with these two Acts is, and I was trying to think, your Honour, of the logical sequence between those three steps, that your Honour the Chief Justice has just pointed to, one can look at these three Acts – at these two Acts from a number of different perspectives. One can say it is detention without trial so it is a breach of fair trial rights. One can say it is arbitrary detention because it's detention without the attendant safeguards that *Ilnseher* and the other cases impose or because it's under inclusive in terms of *A (No 1)*. One can equally say it's a double – it's a second penalty in terms of section 26(2).

One of the challenges, and we'll say something about this tomorrow, in the Court of Appeal in this case, the Court said section 26(2) was engaged and that was enough, they didn't need to go into whether other rights were engaged. I think they said it was somewhat artificial. In the comparative case law it does tend to crop up under a couple of different headings. So the pre-*Ilnseher* cases finding previous incarnations of the German regime, for example, to be in breach of the European Convention say both breach of the right against arbitrary detention and the right against second penalty. It's for essentially the same factual reasons but they do find both rights.

I was trying to think of, and it's always dangerous to come up with a hypothetical, a regime which would be not a second penalty but nonetheless arbitrary, for example, and I suppose if you had a committal regime which provided no treatment that was applied to the population at large, you couldn't say that was a second penalty. It wouldn't be a section 26(2) issue but it would be arbitrary detention because you're locking people up without the necessary care and protection. So –

WINKELMANN CJ:

Minority report type scenario.

MR KEITH:

That sort of thing, yes Ma'am, and likewise a scheme like that would avoid the idea of detention without trial because one instead says one is arbitrarily detained, or there could be an argument that it's arbitrary detention, but there's no argument that someone who's been committed, for example, had to have a criminal charge, defence and trial in terms of section 24 and section 25 of the Bill of Rights Act. What we have here though is a bit of a confluence of breaches of rights so we do engage a number of different points.

WINKELMANN CJ:

That's pretty much got us back to where we were at the end of the last hearing, thanks Mr Keith.

MR KEITH:

Yes. I am conscious, as I said, I'd say something about 4, 5 and 6 and I've tried to and I'll keep saying, I will say a few more things quickly and I'm conscious though we have a small amount of time left here, left today.

If I can perhaps make a very quick start on that and then I will be able to make rather fast time through the handful of specific points that I think we – that cropped up this morning which we haven't answered already. I'd already touched on pages 4 to 6 of the supplementary submissions that there's test for justification and the consideration of alternatives as found in various incarnations but very similar, I think the Human Rights Commission say strikingly similar language, and it's true, found across human rights jurisdictions and even in Australia. Sorry, that's impolite. True but impolite.

The critical point, and this might be something to end on for today, one thing that your Honours haven't heard from the Crown much about this morning, but I think the Court is alive to it, at page 7 we do have section 4. If we didn't we could have this legislation struck down. Mr Chisnall, I think Mr Edgeler was telling me, he hasn't in fact consented to anything. He's indicated he will if offered but he wouldn't have to go along with the legislation. He could have it overturned and he might end up in rather different circumstances. But what we have because of section 4, as in the UK too, can't strike down the legislation but nor can the legislation be rendered ineffectual by way of interpretation. And the simple point in terms of the two present Acts is the whole grain, to use that term, of this legislation is that it is a punitive post-release regime very closely based on the Corrections legislation and parole regime for released but still under sentence prisoners. One can't change that by dint of section 6 and there are two reasons why. One, we still haven't had an indication, other than this rather broad discretion of what a court making an order or not making an order can do but, two, a court simply can't in our system say: "I decline to apply this legislation on its terms because to do so would be inconsistent with the Bill of Rights Act." We did actually in terms –

KÓS J:

Your only succour is in section 6, which requires that there is choice.

MR KEITH:

If there's choice and there isn't a choice available.

KÓS J:

The rights friendly interpretation.

MR KEITH:

Yes. So if, for example, that's where we're saying there was a committal regime and that was wider, that didn't just cover people with diagnosed mental illnesses, then there'd be a choice but then there'd be no need for this regime anyway, which is probably the good point on which I should pretty much end. As I say, as I was saying, I think we can make fairly fast progress in the morning. You'll hear from Dr Ellis first thing, and we're all very grateful for that, for the Court's accommodation of that. Is it an appropriate point at which I should stop?

WINKELMANN CJ:

Yes, are you going to – there is – we did ask Ms Jagose about the process issues that the Commission has addressed and will you be addressing that?

MR KEITH:

Yes, I will, yes.

WINKELMANN CJ:

Thank you.

MR KEITH:

I think I've touched on some of it already.

WINKELMANN CJ:

Yes.

MR KEITH:

In terms of the kind of evidence and so on but I'll see if there's much more to say. I'll also touch on the privilege point, both for and against, because there was a little bit of both and one or two other points.

WINKELMANN CJ:

Like so many things in life there's a little bit of both. Right, we will adjourn.

COURT ADJOURNS: 3.59 PM

COURT RESUMES ON TUESDAY 4 APRIL 2023 AT 10.03 AM

WINKELMANN CJ:

Mōrena. Mr Ellis?

MR ELLIS:

Your Honours, I'm going to hopefully be about 20 minutes but that will, of course, depend on the questions but I'll be short anyway. Having arrived finally at nowhere, referring to Claudia Geiringer declarations of inconsistency *A Road to Nowhere*, I suppose it's a relief to have got to this stage and what I propose to talk to you about is the international jurisprudence, one comment the Commissioner made, a case in May in Wellington High Court, the *Garlett v Western Australia* [2022] HCA 30, (2022) 404 ALR 182, High Court of Australia case and Justice Nation's decision in *Pori*. So noting that the Chief Justice was yesterday mentioning general comment 35, which I think is really quite pivotal, if I could take your Honours to the case of *Miller and Carroll v New Zealand* [2010] NZCA 600 which hopefully will miraculously appear on the screen, at paragraph 8.3, when it turns up.

WINKELMANN CJ:

Is that *Miller*?

MR ELLIS:

Yes, *Miller*. It's not miraculously appearing on the screen.

WINKELMANN CJ:

Work is underway. We haven't got it yet but if you wait a moment and there'll be, in my experience when I've appeared remotely, there's a further lag from when we get it to when you get it.

MR ELLIS:

Oh, right.

WINKELMANN CJ:

Are you not able to find *Miller*?

WINKELMANN CJ:

Now we have it and you should have it shortly.

MR ELLIS:

Yes, I've got it. If we could go to paragraph 8.3 on page 13 please? Right, good. So this really incorporates all the general comment and arbitrariness as well so it's a good multitasking paragraph. So the context for this is we will remember that Mr Carroll had been preventively detained for 19 years, apart from seven months on parole, approximately 15 years ago. It was undisputed that while he breached his parole, he breached the conditions of parole, he didn't commit any criminal offence while on parole. Mr Miller was detained for 16 years. Thus after serving 10 year punitive sentences he also had been serving preventive detention for a further 15 years on the basis of suspicions that they might re-offend, and that's where we are today with Mr Chisnall. He's been detained on suspicion.

The Committee recalls its general comment No. 35 and in that context we remember that general comments arise in a collection of (inaudible 10:07:51) courts and case law and the select committee process that the first, second or third type reading that the Committee goes through and then comes up with its general comments, which then obviously date, so they need to be read in the light of subsequent cases like *Miller and Carroll* and also the one that I've hopefully – the registrar has sent to you this morning, for *Egypt*, which I will refer to shortly anyway.

So according to general comment 35 we get: "The notion of 'arbitrariness' is not to be equated with 'against the law' but… include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality… Preventative detention following a punitive period of imprisonment must, in order to avoid arbitrariness, be justified for compelling reasons," must have

regular "reviews by an independent body… States must only use such detention as a last resort, and must exercise caution and provide appropriate guarantees in evaluating future dangers. More – and then just a little over the page, "must be aimed at… rehabilitation and reintegration" so it brings in Article 10.3. "The Committee considers that in this case, the conditions and protracted length of the… detention raise serious [doubts] as to… reasonableness, necessity, proportionality, and continued justification and independent review."

1010

At the bottom in footnote 18: "The burden of proof lies on the States parties to show that the individual poses a threat that cannot be addressed by alternative measures." So those are all important. Then I don't know if Mr Registrar has provided you with my conclusions and observations in respect of *Egypt*.

WINKELMANN CJ:

Yes, we have that.

MR ELLIS:

Of March the 23rd.

O'REGAN J:

We have got it.

MR ELLIS:

Oh good. Well my apologies for asking you to look at paragraph 23, I should have said 32. So if we could go to 32. Right, 32. So this is a very recent, the recent sitting of the UN Human Rights Committee, one of the three each year, and at the end of it they publish their concluding observations in respect of their – and *Egypt* is a rather full-on one because it hadn't (inaudible 10:11:33) 20 years, and at paragraph 32 there it's discussing "general comment No. 35" and the Committee is recommending that the State party: "Ensure that no detainee is held without the prompt filing of criminal charges, and that all pretrial detainees are brought to trial expeditiously in public trials that meet fundamental

due-process requirements." In (c) it's recommending: "Increase the the availability of and recourse to alternatives to pretrial detention, in light of the… Standards Minimum Rules…" Tokyo standard minimum rules, and what I say here is that Mr Chisnall is effectively detained in pre-trial detention without trial, without charges. That is a breach because where is the prompt filing of criminal charges? That is, when is the prompt trial? Where are the due process requirements? It's all arbitrary and there's no – there hasn't been a satisfactory explanation really for what possible alternatives there could have been, so, and that's March 23rd of this year so we're completely up-to-date with the Committee's thinking.

Now if I go then to the Intervener's submissions, just the one brief excursion into them, in paragraph 48 of their submissions, they're talking of exceptional circumstances a court can determine not to make a declaration, and they refer the Court to *R v Manawatu* (2006) 23 CRNZ 833, noting that the Court of Appeal, without determining whether it had the power to make a declaration, "held it would be 'gratuitous and unnecessary' to grant a DOI because a clause repealing section 398(1)" of the Crimes Act "had been added to the Criminal Procedure Bill, which was before select committee".

Mr Butler says there that the Court's position is undoubtedly correct. The Court shouldn't make a declaration where it formed the view that it would be gratuitous or unnecessary, but he footnotes it with really the opposite point of view. In footnote 137: "It does not follow the existence, or prospect, of a Bill removing the inconsistency will *always* make a DOI 'gratuitous and unnecessary'…" and it refers to *Howard v Attorney-General* where the Human Rights Review Tribunal said the opposite and, I suppose, when you look at the Supreme Court leave decision (inaudible 10:15:21) which says that the President had written to the Rules Committee then it would seem that the Court of Appeal were up to their neck in involvement in the provision in the Criminal Procedure Bill to repeal section 398, which probably nobody knows what it is. Section 398 was the provision that said you couldn't in a criminal case dissent unless the President approved it, and that was obviously different to what a full High Court or a Supreme Court could do. It was only in the Court of Appeal that there was this

provision and Justice Chambers was on the Rules Committee and he said during the course of the hearing: “Well I've this put forward to the Rules Committee.” It would have helped, of course, if that had been said before the hearing, rather than after it, but I suppose what it illustrates, or at least what I thought it illustrated, together (inaudible 10:16:40) when this Court said, oh well the Court of Appeal got it wrong on this point but we’re not going to give you leave to appeal. There’s been a certain reluctance to get to grips with declarations of inconsistency which, as the tide has well and truly turned, and quite the opposite, it is apparent from the previous hearing and this continued one so that is more than welcome.

But having read the Commission’s submissions in detail, and I thought to myself well up and coming is a case called *Matara v R* [2021] NZCA 692 which is a declaration arising from a second strike due to be heard shortly, and I thought to myself well these submissions are absolutely wonderful for that case. I'm not quite sure how the Court is going to react to them in this case but they are very helpful for a first instance case and we’re well and truly overdue in having directions of how do we process a declaration of inconsistency.

So that takes me to the last few points I wanted to make, which were the reference to *Garlett*, which is in our submissions in the supplementary submissions, the last set of submissions we filed on 14 March, and it's very brief but we have – they're not clipped, I can't find *Garlett* of course now, excuse me one moment.

WINKELMANN CJ:

Can you just give us an indication about where that appears in the authorities?

MR ELLIS:

Yes, it's in – I've found it – no, I can't but I'm sure one of my colleagues will, I apologise, but I'm only referring to the two paragraphs which are set –

WINKELMANN CJ:

I think Mr Keith’s going to help us.

MR KEITH:

So we've got it on the screen, Ma'am, but it's also tab 26 of our supplementary authorities *Garlett v Western Australia* and the passage in the supplementary submissions is at paragraph 5 on page 2.

WILLIAMS J:

This is the respondent's supplementary authorities?

MR KEITH:

Yes, Sir.

MR ELLIS:

Yes. Sorry I've been –

MR KEITH:

Sorry, the appellant's supplementary authorities. I'm doing very badly on the screen.

WINKELMANN CJ:

Oh, it did seem strange.

MR ELLIS:

Is it appellant?

KÓS J:

Yes.

1020

MR ELLIS:

Right, so I'm looking at paragraph 5 of the submissions which sets out a couple of the paragraphs from Justice Gordon. "Labelling the HRSO Act scheme, and the role –

WINKELMANN CJ:

It's gone off the screen I think. Is there a reason?

MR ELLIS:

Is it on the screen? No it's not on the screen.

WINKELMANN CJ:

Right, got it.

MR ELLIS:

Right. It should be – no, that's not – that looks like a – I don't know what it looks like but it wasn't the right page.

WINKELMANN CJ:

Which – can you give us a citation at the top of your version that you have that you want to refer us to? Or some clues as to which *Garlett*.

MR ELLIS:

Yes. It was paragraph 5, which Mr Keith just identified, of our supplementary submissions from the respondent/cross-appellant.

WINKELMANN CJ:

That's all we need really isn't it, I think?

O'REGAN J:

We can refer to it there.

MR ELLIS:

Yes, and then – right. Not on the screen, I don't know whether you've got them in front of you in hard copy. Well, I'll continue while we look for it: "Labelling the HRSO Act scheme, and the role of the Supreme Court, as 'preventative justice' is a misnomer. It is not justice. The… scheme, at least in its operation in respect of robbery, is contrary to Ch III of the constitution and undermines the two key rationales – or constitutional values underpinning Ch III's strict separation of Commonwealth judicial power from executive and legislative power: first, the historical judicial protection of liberty against incursions by the legislature or the Executive; and second, the protection of the independence

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

Her Honour continues, which is the point that attracted higher tension: "… the potential normalisation of regimes that override individuals' liberty on the grounds of legislatively asserted 'preventative' or 'protective' imperatives, unrelated to the adjudgment and punishment of criminal guilt inevitably presents risks to the institutional integrity of courts."

In the next paragraph there in bold: "The Court, therefore, must be cognisant of, and vigilant to protect against, laws that are corrosive to or erode those key rationales… That cognisance and vigilance is not limited to laws that involve some overt or 'outright conscription' of the judiciary to do the work of the legislative or executive branches of government. The Court must be cognisant of, and vigilant to protect against, 'the creeping normalisation of piecemeal borrowing of judicial services to do the work of the legislature or the executive' that gradually erodes judicial independence." And that creeping normalisation, I say, has spread to New Zealand in this legislation. So what I put to your Honours is that we've got to view this from a judicial independence lens, as well as the ones that you have been viewing it from before.

Then finally if I can, in *Pori*, which is footnote 1 I think, *Pori*, where is it, yes, footnote 1 of that judgment, of those submissions, that's Justice Nation giving a detention order in prison and then the footnote 1, last year, a prison detention order. "Such an order will require his continued detention in prison when he has not been charged with any offence for which he could be imprisoned and he is not subject to a sentence of imprisonment."

That puts it very neatly into the context of Justice Gordon. What business is it of judges to be sending people to prison for something that you're not charged with and you're not subject to a sentence of imprisonment? So you do have to look at it from a judicial independence lens as well as anything else, and I suppose it's probably trite to say, well, it's rather like Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL), the Humpty Dumpty aspect that

Justice Glazebrook mentioned in *Fitzgerald*, I mean it's remarkable that a High Court Judge can say: "I'm locking you up," effectively for life, when you haven't committed an offence and you're not subject to a sentence of imprisonment, but that's what this Public Safety Act allows to happen. It's a day of such a disgrace that it hopefully will sit beside *Liversidge v Anderson* in future cases, and on that note I've finished unless there are any questions, your Honour.

WINKELMANN CJ:

Thank you very much for your submissions.

MR KEITH:

Mōrena, and may it please the Court, again we're very grateful to the Court for accommodating Mr Ellis out of sequence. Just a signpost from here, I will complete my part of the submissions in response to the appeal. Mr Edgeler has some, I think, brief points too and then my learned friends will reply – sorry, then we'll hear from my learned friends from the Human Rights Commission, Crown in reply, and then the cross-appeal. I should say on that I anticipate since we've canvassed an awful lot of the cross-appeal points, or at least the arbitrary detention side of things, I think we can expect to make fairly quick work through those.

WINKELMANN CJ:

Have you discussed a timetable?

MR KEITH:

I haven't discussed a timetable except I've given my learned friend, the Solicitor, an estimate that Mr Edgeler and I will be about half an hour, if that, now. We do expect to be done within the day.

WINKELMANN CJ:

Right. You all expect to be done within the day.

MR KEITH:

We all expect to be done within the day.

SOLICITOR-GENERAL:

Can I just make a point on timings? We had anticipated or we –

WINKELMANN CJ:

Sorry we can't hear you. Perhaps if you move there.

SOLICITOR-GENERAL:

We had perhaps miscommunicated with Mr Keith about our intended approach which we think is more efficient but we'll be in the Court's hands for Mr McKillop actually to complete the appeal reply and any cross-appeal points that need to be made at once. They are not so indistinguishable from each other that that doesn't make but I'm also happy to stay in the Court's hands if you want to run it in the strict order.

WINKELMANN CJ:

Well, it sounds sensible to me. Mr Keith, are you content with that?

MR KEITH:

Not especially, Ma'am, just because we haven't done our cross-appeal yet, so Mr McKillop would be responding to a case that the Court has not yet had put.

WINKELMANN CJ:

Well, he would go after you.

MR KEITH:

Sorry, I thought it was suggested running the two together.

WINKELMANN CJ:

No. Well, it is suggested running the two together but after you.

MR KEITH:

So I'd…

MR MCKILLOP:

The issue I think was caused by – it was suggested to us that Mr Ellis' address now is going to be a cross-appeal address and so it's led to me preparing just one address to your Honour on all of these points, but this was actually, seemed to be, an address on the supplementary submissions, so I mean it would be a very inefficient way for me to split it up now because the points are really all intermingled, but if it's necessary to keep the peace I can but we were under the impression this was a cross-appeal address this morning.

1030

WINKELMANN CJ:

Is there any reason why we can't move on to the cross-appeal directly from – well, no it couldn't work, it doesn't…

O'REGAN J:

They can discuss it at morning tea.

WINKELMANN CJ:

Yes. Could you work it out over morning tea?

MR KEITH:

We'll work it out over morning tea, Ma'am. Sorry, I thought we'd worked it out on Friday.

WINKELMANN CJ:

You've now got me completely confused, but…

MR KEITH:

But I'm a little boondoggled too and I certainly don't mean to disadvantage my friend Mr McKillop.

WINKELMANN CJ:

Well no, but nor should you be disadvantaged.

MR KEITH:

No. Well, so in the interests of that time estimate and I do not, as ever, want to deter the Court from asking questions or run my learned friends from the Commission who have done a great deal of interesting and useful work, into the weeds either.

WINKELMANN CJ:

Yes because we should say we are very interested to hear from the Commission.

MR KEITH:

Yes.

WINKELMANN CJ:

Because their submissions were very helpful on matters of some of the questions that we had asked in the minute.

MR KEITH:

Thank you Ma'am. So I think I can be fairly brief on what I have left and I think Mr Edgeler will be too. In answer to a question posed, two questions posed yesterday, I think your Honour the Chief Justice asked whether there was any comparative commentary on evidence in relation to limitations of rights and I've given you the Christopher Tran article which is 2012 but does include a useful survey, including of this Court's decision in *Hansen*, of how different courts have dealt with that. I will come to one point about the Tran article, but otherwise leave your Honours to look at that. Particularly, pages 298 to 306, the survey of other jurisdictions approaches.

Second question that I think the Court put late when we were up yesterday afternoon, whether we agree with the paragraph 45 proposal by the Human Rights Commission, that is the Attorney-General either, if an apparent limitation on rights is shown, either lead evidence to meet the onus of proof or if relying on an argument as to discretion, show what that argument is.

So there are two parts to that. The question of leading evidence, yes, we agree that the Attorney should lead evidence but the Human Rights Commission does cite *Make It 16*, the comment that sometimes only limited evidence may be required. I'll also – we can go to it if your Honours wish, but a comment by Sir John McGrath in *Hansen*, paragraph 232, that sometimes sufficiently self-evident legislative facts, I'm interpolating the words "legislative facts", may be implicit in the relevant legislation or – thank you. So, some relevant considerations: "May be implicit in the relevant legislation, or readily identifiable."

So this is dealing with this question of legislative fact evidence that his Honour refers to at 231 to 232. So on occasion it will be open simply to say, look, the statute says what it says.

GLAZEBROOK J:

What do you say in this case should have been the evidence? We obviously discussed yesterday that it's about conditions, that have been helpful, but –

MR KEITH:

Well I think the evidence from – I said I didn't think it was fair to say we had, for our part, put up a factual vacuum. We put up a very clear case based on the statue plus the comparative material. But the evidence in reply, I think a member of the Court, it may have been Justice Kós, asked what if it was too expensive? What if it were ineffectual to run a therapeutic programme, something like that. That sort of evidence could be adduced.

I'm not sure what evidence of this programme not being punitive would look like. We have to take the statute in its terms as they are. The fact that a statute might, in practice, be administered more lightly doesn't alter that particular, when we look at the factors that led the Court below and the Court in *Belcher* to categorise the Parole Act provisions, the ESO provisions, as punitive. We can't alter most of those through administration and I have already, I think in answer to Justice Williams' question, the case of Mr Pori is indicative of just how different this scheme is.

KÓS J:

It's hardly an issue here, punitiveness or penalty. Our focus is really on justification and evidence relating to that.

MR KEITH:

Yes and I think – sorry, you're quite right. Well, there was –

WINKELMANN CJ:

I don't know if that's quite right because the Solicitor-General did submit that really it was a scheme which was very like the German scheme and therefore was therapeutic, I think was the submission.

MR KEITH:

Well certainly it's been said it's indistinguishable from *Ilnseher* and –

KÓS J:

I must say I understood that for myself to be relevant to the question of justification under section 5 not inconsistency.

MR KEITH:

Well I think –

O'REGAN J:

I think the point was it's a penalty in terms of the Bill of Rights concept but it's not a penalty in terms of being a punishment for an offence that's been committed.

MR KEITH:

Yes.

O'REGAN J:

So that was the distinction that was being drawn but there was no question that there's the concession about it being a penalty is still made.

MR KEITH:

Yes, and I will come to the point that your Honour Justice O'Regan has just made about that rather more qualified concession as we now understand it. But I think the point on evidence then would be either to say well, sorry, I'm just trying to be careful about, or helpful about this, that the Crown case put short is that there are individuals for whom a second penalty can be justified, and I think we said in the primary argument last year, I can't understand when that would be. There just – I can't conceive of a circumstance, leaving aside tainted convictions, tainted acquittals and things like that, I can't conceive of a circumstance, and we have no material that conceives of a circumstance, in which inflicting a second penalty makes any sense at all. You can commit someone to a therapeutic regime, not a penalty, and that would achieve the object of public safety. Why it has to be punitive we don't know, and I don't know what evidence of that would look like. So it's a bit difficult to talk about it in the instant case.

WINKELMANN CJ:

I must say I'm now in a situation where I'm not quite 100% sure what the Crown's position is on all of this. It might be that Ms Jagose might need to give us some bullet points in her reply just to summarise it because I think I had a sense it moved during the course of yesterday and…

MR KEITH:

Well I do have some –

WINKELMANN CJ:

Although Ms Jagose said it didn't but…

MR KEITH:

I'd say it did, and I'll come to that, but if I can come to that next that might be more useful. I can give your Honours some concrete case law and so forth. The second point about the Human Rights Commission's proposed approach on the evidence, what I do say in terms of evidence generally, and this is the it's not a vacuum point, but also in answer to my learned friend the solicitor's

point yesterday about what could be expected of the Attorney-General, in terms of providing a policy justification, one very good point made by the Human Rights Commission, which I should have made, or we should have made ourselves, of course, we have the phenomenon quite well established of Human Rights Act declaration proceedings where extensive evidence has been adduced and so that is nothing new. That's kind of what the Crown had already signed up for when the declaration jurisdiction was introduced to the Human Rights Act in I think 2001. But also, and further to that point and this is the case here, the pre-legislative policy record will in New Zealand, because of Cabinet manual requirements for a human rights assessment because of regulatory impact statement requirements, which again require a human rights assessment, will canvas human rights obligations, and if it's done well, and it was actually done reasonably well here, it just didn't impact, it didn't have any consequence, those papers will identify rights compliant alternatives.

So your Honours will recall from last October's hearing, my learned friend Ms Jagose took you through the main Cabinet paper talking about these five options between civil commitment and so on. So there is that, and I should say in terms of evidence and looking at the Tran paper too, not only do we have those requirements, and those are not a universal, the human rights assessments and so on, but also in the UK and Canada at least, two jurisdictions I do know this about, Australia I'm not sure, Cabinet papers are usually subject to public interest immunity, they can't be disclosed so we have the benefit of this very good record here, and that makes the evidential task, I think, a little more straightforward all around.

1040

The second point from the Commission's two-step approach is about a discretionary power, whether the Attorney-General should be required to set that out. Yes, we agree with that, and it's been a criticism and concern in this appeal because it's really the first time the discretionary line – well certainly the discretionary line wasn't run in the Court of Appeal. The – yes we do need that spelled out for the prescribed by law rule of law reason that the Commission

has flagged, and I think the Court talked about, but also more practically, and if I can go to our written supplementary submissions –

WINKELMANN CJ:

Sorry, can you just repeat what you just, I think you may have, you were giving us a lot of information and I lost the thread on that one.

MR KEITH:

I was just saying, sorry.

WINKELMANN CJ:

Don't apologise, it's my fault.

MR KEITH:

The question of whether the Attorney-General must set out how a statute can be construed so as not to breach a right, the only way I think that it has been explained is that there is a discretion and a court could say no, it hasn't, but it could. I think we need something more than that, and I'll come to why. The Human Rights Commission makes the very good point that if we are to depend for rights consistency on reading the statute in a particular way, the prescribed by law requirement in section 5 of the Bill of Rights Act, and the wider, I think it was a member of the Bench yesterday, if there's a rule of law issue, we need to know what that is. So that at the level of principle is right. Then I was just going to move to two further points about that discretionary power and pick up a passage in our supplementary submissions at paragraphs 37.1 and 37.2.

The point here, and this is with reference to three cases, two from the UK, *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, and *R (on the application of Wright and others) v Secretary of State for Health* [2009] UKHL 3, [2009] AC 739 , and one from Canada, *R v KRJ* [2016] 1 SCR 906, which is actually about retrospective penalties on, in that case, sexual offenders. The *Anderson* passage quoted there, and then more fully I think in the footnote, there are limits to

rights-consistent interpretation. It's often difficult and the other reference I can give you there, I won't take you to it unless your Honours wish, page 4, note 10 of the supplementary submissions, there's a reference to a very good article by Alison Young in the UK with a table of declaration of inconsistencies setting out just how regularly the UK Courts have found rights-consistent interpretations not to be possible, and that's not a question of it necessarily being an absolutely statement in the Act, it's not like the prisoner voting prohibition which was just absolute, or the voting age, where it's just absolute. It can also simply be in these cases illustrated where the scheme of the statute does not permit reading in. The Human Rights Act, of course, has similar, possibly slightly looser, but similar interpretative constraints to our section 4 of the Bill of Rights Act.

So that's – and the *Wright* case is set out in the footnote at the foot of that page, the excerpt, is rather nice. There are two reasons why it can't be compatible and the first reason I haven't given you the second, I can go and find out what it is, but there is – so this was a listing procedure by which medical staff, if they were accused of misconduct, could be prevented from working with vulnerable people, and I think the House of Lords is simply saying the scheme creates this result. We can't rewrite it, and I think we have the same here.

The other reference, this is 37.2 the *R v KRJ* case, particularly closely on point. Your Honours will recall this is the Supreme Court of Canada dealing with a sentencing provision. So at the time of sentence certain offenders could be subject to post-release restrictions, and there were two in particular; not having any contact with any young person, not having any access to the internet and the – but it was expressed to apply retrospectively and the retrospective application that the Court did, unlike courts in other jurisdictions including here, consider that a retrospective penalty could be justified, and there are reasons for that and we talk about that in the respondent's submissions from last year, but they did find, notwithstanding that this was a discretionary sentencing power, that that couldn't be retrospectively applied, a charge of consistently. In one respect, the internet restrictions could be because this was when the internet was a sort of new thing I think, or a newer thing, but the others could

not. So the fact it was a discretion, did not save it. So that is an important point about requiring the Attorney to say how an Act is to be read.

But the last point, and this is really about giving a real remedy, if the Crown is here saying that these Acts can be read to not permit orders about particular individuals or about particular circumstances, and we know we've had no case in which that's been done, but if the Crown is saying there is a category of people, like the category found now by this Court in *Fitzgerald*, if there's a category of people for whom this is justified and then there's a category of circumstances or people for whom it's not, well those people would benefit by that clarification from the Crown. They could then say "I fall in or out of that" but we don't have that. So that was my answer on –

KÓS J:
But that's really because the threshold, once met, almost impels the order.

MR KEITH:
Well that's what I say.

KÓS J:
It's the consequence of the Crown's new argument, or evolved argument, which is that the threshold is so high that it represents a more qualified or smaller limit.

MR KEITH:
Well I think this is where we may have –

WINKELMANN CJ:
Well there's an internal inconsistency perhaps in the Crown's argument, and Ms Jagose can cover in the bullet points, I think is what Justice Kós is pointing out.

MR KEITH:
Well I think either one says – I had understood the Crown argument, at least at the beginning of the day yesterday, to be there is a discretion to refuse and if

that's being said we want to know what that is. We have to know what that is because the Court has to test whether it's plausible because – and anyway you'd need to look at whether that margin, whether carving those people out, saves the –

KÓS J:

Well in 323 ESOs you'd imagine there'd be one example of the discretion not being exercised, sorry, being exercised against the order but there isn't one.

MR KEITH:

You would imagine but if the Crown position has perhaps evolved that there's now an acceptance and might, for example, Justice Cooke's comment in the *Gray* case you were taken to yesterday, that there are some people who shouldn't be and we want to know who that is and we want to know whether that's sufficient to justify.

KÓS J:

Although the major battle in *Gray* was over whether the threshold had been met.

MR KEITH:

Yes, yes, and Justice Cooke did say, and of course there's a section 4 issue there, likewise in the *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 case and we deal with this in the supplementaries, and I won't go into it, but the Court is essentially left saying we will make sure that it's justified or that it is warranted. I'm not – I don't think they're using justified in a section 5 sense because you can't get there for the reasons given. If, on the other hand, the argument is the threshold is so high that any time it's met there's justification, well that is, as the Chief Justice suggested, possibly an internal inconsistency. We don't have a discretion anymore. It's rather that we're back to the statutory scheme being so stringent that any person who falls foul in those 323 cases deserves a second penalty and I'd say no one deserves a second penalty so it doesn't advance us much.

1050

WILLIAMS J:

Well, it is an argument if the likely or, sorry, high risk, very risk standards are read in as rights-consistent way as possible, that it is the minimum intrusion because you've got to be really, really bad before you qualify.

MR KEITH:

It's the best that can be made of the Act.

WILLIAMS J:

But why is that not an appropriate minimisation?

MR KEITH:

But it's not the minimum. It's not the minimum infringement of rights that can be achieved.

WILLIAMS J:

Well, the minimum infringement of rights is to not impose a second penalty at all but you're not really arguing that completely purist line, are you, because that would be inconsistent with BORA itself.

WINKELMANN CJ:

No, you're not. You're arguing for a therapeutic scheme.

MR KEITH:

Yes, sorry, the – so –

WILLIAMS J:

But you're not saying that the second penalty is never, ever, ever, ever possible.

GLAZEBROOK J:

I think they might be.

MR KEITH:

Not a – I'm saying it's never justified –

WILLIAMS J:

I think you are, aren't you?

MR KEITH:

I am, Sir. So it's helpful to clarify that.

GLAZEBROOK J:

Yes, because they're saying it has to be a therapeutic – a totally separate therapeutic as I understand.

WINKELMANN CJ:

Yes, and that has been the position throughout that you've taken.

MR KEITH:

Yes, yes, Ma'am, and – so when I was saying maybe –

WILLIAMS J:

But if it's therapeutic it's not penalty, correct?

MR KEITH:

That's why and it would achieve the social objective that the legislation is intended to achieve. So as I was say yesterday, no one is saying these people, the risk does not warrant doing something, but I'm saying the risk never warrants a second penalty.

KÓS J:

Why is that the only option? The Canadian architecture is for a provisional sentencing regime so that a sentence evolves and by that mechanism you avoid a second penalty because the penalty ultimately becomes part of the original sentence. The person is declared a dangerous offender and their sentence can be adjusted.

MR KEITH:

There is that. The legislation we have before us though is concerned with people who have not, for example, been subject to preventive detention and I

think we made the point in the respondent's submission that, for example, in the Public Safety (PPO) legislation a court can't say: "I'm not going to impose preventive detention because I can rely on the future prospect of an order." So I agree with your Honour that that would be one way of addressing a risk posed by an offender to impose that kind of sentence, but this scheme, and why I'm talking about a therapeutic option as the permissible alternative is in the scenario we have here someone didn't warrant that at trial and sentence, the perceived problem, and we don't dispute it, is that some people at the end of a finite sentence are still at risk. What does one do about them? We say you can treat them, as Justice Glazebrook says, through a therapeutic regime.

O'REGAN J:
And if you do, you're saying it's not a second penalty?

MR KEITH:
No.

O'REGAN J:
Are you also saying it's not a breach of the other provisions referred to in the cross-appeal?

MR KEITH:
Provided that it is therapeutic and so forth, yes, so –

WINKELMANN CJ:
Would it still not be the problem with arbitrariness?

MR KEITH:
The under-inclusiveness point about arbitrariness is one limb of the arbitrariness problem. I think you could – if the concern is cast as there being dangerous people who have personality disorders who need to be managed, cared for, whatever – well, managed and cared for, not whatever – that could be a scheme of general application. There'd be –

WINKELMANN CJ:

You could say the fact someone has offended places them at the top of the list. It should be reserved for the people who are the most dangerous and that's a very good way of triaging the most dangerous, that they have offended.

MR KEITH:

But they may also – and thinking about things I'll come to briefly, the non-penal measures that the Crown has pointed the Court to, particularly control orders for – there's a case called *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, that I'll speak about in a moment – one can identify a person as dangerous or posing a risk to the public through things other than a conviction and what we were saying yesterday, and I think it's still right is, as Justice Glazebrook said, the fact of a conviction is a very good way of identifying that you pose a risk. It's not the only way of identifying that you pose a risk. You might have someone who engages in conduct that is either not criminal or not pursued by criminal sanctions, but nonetheless shows there is real reason for concern, and we do that under the mental health legislation, for example.

So I don't discount the practical consequence that a lot of people covered by a scheme like this would probably come to the attention of the authorities by offending in the first place, or that a risk assessment, and I think this was Justice Glazebrook's other point, or that a risk assessment would look at that background but this is where we get into, in terms of the European Court line, the separation between the fact of the risk someone represents based on whatever evidence at the time they're being assessed and the prior conviction. So you would have, yes, you wouldn't be a second penalty. You could conceivably be arbitrary depending upon terms of that regime.

WINKELMANN CJ:

What – how do the European cases, the German cases, address the issue of arbitrariness or was it not argued?

MR KEITH:

It was argued. So the Article 5 part of the – of each of those cases, so they're brought, those cases are each decided under Article 5, the arbitrary detention right, and Article 7, the penalty, retrospective penalty prohibition. So the Article 5 right, the Court is saying is this a new ground for detention? That is we have moved from punishment for the offence to management of the offender and that – sorry, management of a person who poses a risk, and they don't quibble with the premise that someone is identified as posing a risk because of that offence, but that is a threshold not a, not itself. The conviction has, itself, is not the reason or not the factor in the balance, it's an entry mechanism.

I did actually look, I think Justice Kós asked and I was leery of doing this but I can provide it to the Court if the Court wants. There's an EU study on –

WINKELMANN CJ:

But what did they do about the arbitrariness though?

MR KEITH:

Oh. They said as long as it's a new –

WINKELMANN CJ:

The same thing it was –

MR KEITH:

That the arbitrariness by under inclusion they don't answer. Sorry, that was probably your Honour's question.

WINKELMANN CJ:

Okay right. Yes that was my question.

MR KEITH:

The factual answer I could give, and we could give your Honours the study –

WINKELMANN CJ:

Well you said, I think you answered it yesterday.

MR KEITH:

Yes.

WINKELMANN CJ:

Which, where you said we don't know the broader scheme.

MR KEITH:

No.

WINKELMANN CJ:

Yes.

MR KEITH:

Some of us might have found out the broader scheme overnight, but I don't want to unduly complicate things. There was an EU study that looked at comparative committal regimes and it does record that people are committed for personality disorders in Germany but, and I can provide that if the Court wishes but I am leery of getting into too much complexity.

WINKELMANN CJ:

Right. It's a minority report. It's the minority report scenario where you haven't offended, but your –

MR KEITH:

No, I – what I think it is, and this is getting back to the scope of our Mental Health (Compulsory Assessment and Treatment) Act, is that someone who is, for example, assessed as being a psychopath, and I think we've also given you in the supplementary submissions the Wiley textbook on committal of people with psychopathy. But that's not a mental illness. You cannot be admitted under the MH(CAT) legislation for being a psychopath. You can be admitted for many other reasons but that is not an illness. That is a disorder.

That's the distinction and that's why these people, the sideways, the sort of escape route out of this legislation into the Compulsory Assessment and Treatment legislation, doesn't work for people with personality disorders.

WINKELMANN CJ:

Mmm.

MR KEITH:

The point I was making about personality – people with personality disorders being committed, if for whatever reason whether you've committed an offence or just somehow come to the attention of authorities, the EU study did indicate that people are committed on the basis of disorders as well as illness.

GLAZEBROOK J:

Well certainly the, just having a quick look at the legislation that's quoted.

MR KEITH:

Mmm.

GLAZEBROOK J:

A mental disorder seems, in Germany, to have quite a wide meaning.

MR KEITH:

Yes, yes.

GLAZEBROOK J:

In fact, worryingly wide actually if you're looking at, if you're looking at other arbitrary detention issues, but –

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MR KEITH:

I think your Honour is right. I mean the saving grace in terms of Article 5 is, if it's not, you would still need to make out that the disorder –

GLAZEBROOK J:

Yes.

MR KEITH:

– required the person to be detained or otherwise restricted for protection of their own safety of that of others, or that of others.

WINKELMANN CJ:

Right, okay.

MR KEITH:

Right.

GLAZEBROOK J:

I suppose my concern is that I'm not totally convinced that just saying "therapeutic" necessarily –

WILLIAMS J:

Changes much.

GLAZEBROOK J:

– makes it less arbitrary or less concerning.

WILLIAMS J:

It's certainly exactly the same risk assessment, harm to self or others.

GLAZEBROOK J:

Well it might be worse because in Germany it looks like a very low threshold as against the very high threshold under this legislation.

MR KEITH:

I think the definition is wider. I think the threshold for committal, just because of Article 5, will still be stringent. One can't commit willy-nilly. In answer to Justice Williams' question, no one's quibbling I think, Sir, about the risk. It's about who makes the assessment, what is the process and what is the –

what is the statutory scheme for the management of these people and that is where we get back to the comparison.

WILLIAMS J:

Yes, well your best argument is that one's utterly therapeutic although, in fact, in many cases it's far more intrusive than a Matawhāiti regime and your answer to that might be "but someone who isn't suitable for Matawhāiti goes back to jail anyway."

MR KEITH:

Well that was what we saw from the –

WILLIAMS J:

With *Pori*.

MR KEITH:

From *Pori*, yes, Sir. And what we do, Sir, and this is coming back to that comparison table between the mental health legislation and these, is the differences in that. So in terms of her Honour Justice Glazebrook's point, the therapeutic orientation is not just that care is provided but that, for example, one has a right to treatment, that the reviews are a clinical process and frequent and so on. And to take my point from *Pori* I think made in answer to a question from Justice Williams yesterday, if one is a difficult patient, you don't end up being sent to prison, which is what happened to Mr Pori, and that is why we say this is different and that is the statutory scheme.

KÓS J:

But in this case we know that it may not be 323 people but there are at least some people who, even on Mr Ellis' more generous view, are not fit because of the danger they pose to be on the public streets. So the justifiability limb of your analysis now requires amendments to three pieces of legislation; the two Acts and direct question and also the Mental Health (Compulsory Assessment and Treatment) legislation which currently, as you say, does not absorb people with these conditions.

MR KEITH:

Well I think amendment of the third only in the sense that we are pointing to the alternative. These Acts we say did not need to be passed, can't be justified as passed. If one instead had a Dangerous Persons Act or something, or if even one had a scheme like the *Ilnseher* scheme, then it would be –

KÓS J:

Except, I mean, you know, Parliament has been, the Executive have been dealing with years the question of whether of whether the Mental Health Act should be enlarged to deal with disorders and they have always shied away from that.

MR KEITH:

Yes.

KÓS J:

For some obvious and some less obvious reasons.

MR KEITH:

Yes. But what they have done is to make this legislation, which is not an alternative, we say, or not a rights compliant alternative. Obviously up to them what they do.

WILLIAMS J:

The shying away from it is probably because it would turn mental treatment institutions into prisons because so many prisoners have mental disorders or personality disorders.

MR KEITH:

Yes, and anyone who deals with serious offenders at any time, and I'm conscious this Court does, is aware of those including, and I think I said yesterday, the object of a therapeutic regime is not only the safety of the public, it is also, and your Honours will have all encountered people like this, who desperately need some form of care, or some form of treatment, or at least

could, if the opportunity were given, be safer in themselves and we all have our own experiences of people who haven't had that for one reason or another.

WINKELMANN CJ:
Right.

MR KEITH:
Yes, one point also arising from the Human Rights Commission is a discussion of the point in the observation of the, or finding of the Court, in *Make It 16* that the age limit there had not been justified. This is paragraph 44 of the Human Rights Commission submissions, and there's a suggestion that there is the same risk here, that is rather than saying it is not justified, saying that it has not been, sorry, cannot be justified. So that's up on the screen now.

We do say we can go – we agree with, I think, the main point the Commissioner is making which is the Crown does have to bring evidence if it's going to make arguments of justification, subject to what I've just said about where limited evidence may be required, but in the present case it is possible to say this can't be justified. There's no authority for limiting the right against double jeopardy or the other rights in this way and no one has said the section 26(2) right can be read down in that way or can be justifiably breached in that way, and just very briefly, the rights-compliant alternative, and that's what we've just been talking about, has been demonstrated throughout by the international and comparative material. That material, or some of it anyway, had been canvassed in the policy record, those are the papers from last year, and if there were evidence to the contrary that could have been adduced, I think the Crown actually said when they applied for leave that they would apply to adduce further evidence, but we're left with the case that has been put for Mr Chisnall, that is, as we say, there are rights-compliant alternatives and those mean that any, that this penal regime is not correct, or not justifiable rather.

Almost at the end, your Honours, and I'm conscious Mr Edgeler has little to say at least.

Parliamentary privilege, I did say we would speak to. My learned friend, the Solicitor, did yesterday. The straightforward answer, and we'd cited this in our supplementary submissions, but if we can go to *Wilson v First County Trust Ltd* our supplementary authorities, tab 8, paragraph 60, please.

So the enthusiastic Mr Sumption QC, as he was then, did raise broad privilege point and Lord Nicholls has dealt with it very thoroughly. I think this passage is also mentioned in the Court of Appeal decision in *Taylor*, but the critical points are, paragraph 60, we start with *Pepper v Hart* and interpretation, and then the question at the end of paragraph 60 is whether statements made in Parliament may be innocuously used, that is used without infringing privilege. There's the passage which I think we've already quoted, that the Human Rights Act as the declaratory jurisdiction is fundamentally different from interpreting and applying legislation, so I don't agree with the Solicitor's comments yesterday about the Court still is interpreting, the Court is making its own evaluation.

The Court goes on, and I'll leave your Honours to read the passage. It carries on through to 67. But the couple of critical points, 64, and this is what we have done, the background to the legislation "may be found in published documents, such as a government white paper, relevant information provided…in the course of debate," and so we had here, I think, some rather frank advice from officials to the select committee considering an ESO amendment, and we talked to that last year.

So all of that can be looked at in the proportionality analysis.

WINKELMANN CJ:

Well, this is in England?

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MR KEITH:

Yes, I'm going to come to section 11 of our Act and I think we're all right there but I'll get to that. And then we have what my learned friend indicated we had objected to and we did in the High Court. There was a whole lot of Hansard put

in. We objected to it pre-trial and it wasn't relied on. Paragraph 67 is really the bit where the UK Supreme Court accept there is a privilege problem. So Hansard is a source of background information, fine, but the content of debates has no direct relevance. They're not a, this is line 4, "the debates are not a proper matter for investigation or consideration by the Courts" and I think this is a point Justice Kós had already made, the will of Parliament is expressed in the enactment, we look at the product, we don't look at the process at –

KÓS J:

That is really paragraph 66 that makes that point very clearly: "Should an occasion arise the Courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament" and I think we're fairly careful of that point.

MR KEITH:

Yes, and then the objection that we were taking, and this was the proposition that there are people whose risks hadn't been identified by imprisonment, said people, hadn't been addressed by imprisonment, I think was what was being suggested and I'm happy to be corrected. But that to me seemed to fall within the last couple of lines of paragraph 67 on that page, ministerial statements and so on, the statements about the desirability, likely effect of the legislation and over the page taking those sorts of statements, partly they say well Ministers say all sorts of things, which I probably agree with, but in any case contravenes Article 9.

Then in our authorities at tab 66 we have the relevant parts of the Parliamentary Privilege Act. For something that's supposed to clarify – no actually, sorry, I did have a case about this but I think what is being – what Lord Nicholls is describing in *Wilson* can be squared with section 11, that is no one – his Lordship was very clear that we are not taking ministerial statements about the intended effect or desirability into account and no one is questioning or relying on truth or looking at motive or anything like that. What we are saying, what I say can be fitted within section 11 is looking, for example, to the policy record so the papers put up and those sorts of things.

KÓS J:

I'm interested in who has the burden of proof on this limb, the justifiability limb. It seems to me you have to be able to show us that there is an alternative, an alternative which is more rights-consistent. It then seems to me it swings to the Attorney here to explain why that is not on the table and that goes to the question of whether it's a justifiable limitation or not. Now unavailability of the alternative you propose for a reason seems to me to be inherent in the Attorney's function. It's not for you to prove that there's a better alternative. How could you? You don't have those resources. You can't do the computation of costs, the fiscal implications.

MR KEITH:

There's a sort of inevitable better alternative that could easily be done. No, I don't think we could disprove that or that we could prove that –

KÓS J:

Prove it.

MR KEITH:

– in the way your Honour puts it, yes.

WINKELMANN CJ:

Well I mean –

GLAZEBROOK J:

But you go further anyway in that you say this is just not justifiable per se so because it's a second punishment. That's the – it's not that there are other alternatives, it's your primary argument it's not justifiable, isn't it, not able to be justified?

MR KEITH:

I'm not – I think that is logically prior anyway, yes.

KÓS J:

Yes, but it's not a complete answer.

WINKELMANN CJ:

But you don't bear – are you accepting that you bear a burden on an aspect of justification because I would have thought you wouldn't accept that?

MR KEITH:

No, to make out the inconsistency, I say, if our argument is – we could have an argument and I'm not – and we do make this in terms of section 26(2), that there's no justifiable limit in this context and that's straightforward in an illimitable right context, non-derogable context under section 9. Here we say it is – there isn't any authority saying you can limit the 26(2) right in the way that this legislation does. So it is illimitable in the way, so that is, as I said to Justice Glazebrook, and that doesn't require – that requires us to show that it is a penalty and I think – a second penalty, and I think that's about it.

The other argument is, can't be justified anyway and as I say, we rest entirely on the availability of an alternative scheme. We don't say the objective is not important and so in terms of *Oakes* one and two or *Hansen* one through four I think it is. Yes. So there are those two limbs, and so the burden we bear in the first is more straightforward. The burden we bear in the second is there.

KÓS J:

It seems to me it then swings to the Crown to say and prove that this is simply unavailable.

MR KEITH:

Yes.

KÓS J:

And say we are left then with the fact that we have a need for certain people who are sentenced offenders not to return to the community and there is no

alternative available. The Crown bears the burden of establishing that your alternative is simply not available.

MR KEITH:

Yes. I think that's right.

So I think that was everything I had to say about privilege. Just to round out that point, but I'd be happy to try to explain section 11 – oh, and section 13 which has been talked about is the *Pepper v Hart* rule, the interpretative rule. As said in *Wilson*, we are – there's no question about that, but that's not what I think was – we're talking about.

WINKELMANN CJ:

Well no question about that, what, because Ms Jagose says that even when you get past interpreting the legislation and you're looking for justification and departure it applies, and you say no it doesn't.

MR KEITH:

No it doesn't for the reasons given in *Wilson* and the reasons given in section 11. I didn't understand the intention of section 11 and when one looks at it against the breakdown in *Wilson* of what privilege does and doesn't permit, I think *Wilson* and section 11 are on all fours. So one doesn't have the prohibition either.

I think three more points and then – first, and this is something that the Court has brought up again this morning, it was expressed yesterday and I do not think before that the Crown concession that this is a penalty is based on the wider view of penalty expressed in *Belcher* and so the reasoning goes, well, more things are penalties for section 26(2) and so limits to that are justifiable.

WINKELMANN CJ:

More things are limiters – the penalties and purposes –

MR KEITH:

More things are penalties.

WINKELMANN CJ:

Penalties for the purposes of sections 26(2) than would be the case in other jurisdictions.

MR KEITH:

I think that was what was being said.

WINKELMANN CJ:

Yes.

MR KEITH:

I do want to just talk briefly about that. It is a new argument so I've done the best we can, but –

WINKELMANN CJ:

I don't think it is a new argument. It was argued last time at the last hearing.

MR KEITH:

If I didn't quite understand it I do apologise. The important point anyway is if one looks at *Belcher*, just to start off with, so that's our respondent authorities at tab 19, page 522 which is page 16 of the report. This is where the, I think I've got the right reference, yes. So 521 to 522, sorry, so if we can – the Court is there dealing with *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787, some other authorities in the UK. The main point I'd make about that, with the exception of one that we're coming to further down in *Belcher, McCann* of course is about antisocial behaviour orders at the like. *Gough v Chief Constable of the Derbyshire Constabulary* [2001] 4 All ER 289, paragraph 43, is about football banning orders. *R v Field* [2003] 1 WLR 882; [2003] 3 All ER 769 (CA) about disqualification from working with children.

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So what we have there, and I'll come to the further authorities the Crown have cited in their supplementary submissions, but what we have are a number of measures far short of, for example, committal or detention in Matawhāiti or 24-hour residential restriction which is what the Parole Act provides for ESO people, by way of special condition, I should say, but the power is there and we can't pretend it's not for inconsistency purposes. So what we have are a number of measures well short of – or I think people have actually suggested that the UK very much skirts the extreme edge of what the European Convention doesn't class as penalties, and I'll come back to that point in a moment with reference to my learned friend's supplementary submissions. But the other two in *Belcher*, just to go further down that page, so we have –

WINKELMANN CJ:

So what's your point on these authorities then?

MR KEITH:

My point is one can't point at those and say: "Look, the UK doesn't regard these things as penalties." That is, here is *Belcher* taking a wider view. It's true that *Belcher* is saying we won't take quite that wide a view, but the measures that we are complaining about in the – well, impugning – in the Public Safety legislation and in the Parole Act, are not football banning orders or ASBOs.

WINKELMANN CJ:

So your point is that whatever the broader issue is about our definition of penalties, some of the conditions imposed in this are as standard conditions and as operated would meet the standard under international jurisprudence, comparative jurisprudence.

MR KEITH:

Yes, and that – yes, Ma'am, that's exactly it, that one can't say: "My goodness, we're taking this very wide view," because whether a marginal question, like a football banning order, is a penalty in New Zealand law, I have no idea, but we're not talking about football banning orders under either of these Acts.

The last authority, two last authorities, one is *Kansas v Hendricks* 521 US 346 (1997), United States Supreme Court, about civil committal, and not criminal and so on, so that doesn't get us more, and then *Fardon* at the High Court of Australia, saying that that isn't a penalty and that the difficulty in that is, of course, after *Belcher* was decided the Human Rights Committee which, of course, is the high authority under the ICCPR, said no, of course not, it is penal. So one can not really rely much on what the High Court of Australia said in terms of the ICCPR or the Bill of Rights Act.

Same point, and I can be pretty quick about it, in the supplementary submissions for the Crown at paragraph 54.2, so we first have a point that in any case the Human Rights in the UK does not incorporate the double jeopardy right. The UK hasn't actually ratified Protocol 7 to the European Convention and possibly now never will. So what we're talking about specifically doesn't arise under the HRA in the United Kingdom, but going to the point that I was just making, 2, orders being regarded as civil in nature is a little bit efficient. So we've had *McCann*, the antisocial behaviour orders. The one that comes closest out of these is the *MB* case. That's cited in footnote 75 down the foot of the page. I just leave your Honours to read it if you wish, but it's concerned with what was called a non-derogating control order and that is a European Convention compliant control order imposed on someone thought to be a national security risk.

WINKELMANN CJ:

Can I ask you, what submissions are we looking at at the moment? Are they –

MR KEITH:

We're looking at the supplementary submissions for the Crown.

WINKELMANN CJ:

For the Crown? Right.

MR KEITH:

Sorry, Ma'am. So page 21.

WINKELMANN CJ:

No, it's my fault. I didn't think they looked like your 54.

MR KEITH:

No, Ma'am.

WINKELMANN CJ:

Carry on.

MR KEITH:

So I was just engaging with 54.1, so the first, the issue on appeal, whether this is a double punishment doesn't actually directly come up. That's not the whole answer because, of course, under Article 5 one is obliged to look at whether something is a penalty anyway. None, as the Crown later, and I think say earlier, or later, it's not – they say here in 54.2, the Courts don't appear to have considered the situation where a person qualifies by reason of a conviction. So we don't get much further there.

But the case I was just going to talk about briefly was *MB*, that's the second of the cases in the footnote for the orders regarding civil. What I was saying was these are counterterrorism orders. There were, at the time, both what were called derogating and non-derogating control orders. So orders that breached the European Convention, but had been imposed during a period where the United Kingdom had notified a state of emergency and was essentially saying we're allowed to derogate. That was overturned in the *A* case we talked about yesterday. This is what was left, a non-derogating order, that is a convention compliant order, and the question for the Court was whether a 14 hour a day curfew was a penalty and therefore not permitted under Article 5. The Court said, 14 hours a day, this might be another one of those marginal calls or mind-drawing exercises, 14 hours a day was not a penalty. More than that would be. I still think it's rather a lot but that's just me. But my point is in terms of we don't have the point that, gosh, these things would be regarded as civil in the UK, that's just not been made out. There are some measures that would be regarded as civil in the UK but that's not what these acts authorise.

In particular, as I say, the ESO provisions authorise as a special condition a 24-hour residential requirement for the first year. PPOs of course are detention simpliciter. So one can't place more on that.

So I suppose the summary point is just that the argument that *Belcher* takes a more, a wider than usual view.

WINKELMANN CJ:

So they authorise a 24-hour residential condition? Is it a curfew?

MR KEITH:

The ESO legislation does, yes.

WINKELMANN CJ:

But it's not a curfew, you don't have to stay there for 24 hours do you?

MR KEITH:

Yes, you're in your residence 24 hours a day.

WINKELMANN CJ:

Okay. And you would say that's detention and it's a penalty?

MR KEITH:

Yes, and in terms of the UK and European stuff, whether a 14-hour curfew really is civil I struggle slightly with, but I suppose at least you're in your own house. But when we're up past 14 hours the case law is clear. It becomes arbitrary detention, it becomes a penalty.

WILLIAMS J:

On what basis do they draw the line at 14? Just for my interest.

MR KEITH:

There's sort of a common sense idea to it.

WILLIAMS J:

Really?

MR KEITH:

If you're saying you've got a tearaway child and they have to stay home with mum and dad all night, have they been subject to a sentence at that point. Have they been subject to a penalty.

WILLIAMS J:

I think the tearaway child would think they had.

MR KEITH:

Oh yes they would, but they might think all sorts of things. Not that any of us have tearaway children.

WINKELMANN CJ:

That's kind of sleeping, that kind of thing, and you can go about your ordinary life for 10 hours a day.

MR KEITH:

Yes, so we're really into line calls, and like I say, whether we might all agree with them or not, but there is some premise that saying you have to be at home overnight, not a penalty necessarily. Saying you have to be at home all the time, or you have to go to a particular residence, which is what the ESO provision permits, authorises –

WILLIAMS J:

Would suggest that you shouldn't take that into account when sentencing following a lengthy period of bail in which you have a night curfew which doesn't seem right to me.

MR KEITH:

I hadn't thought of that.

WILLIAMS J:

Because it's not a penalty.

MR KEITH:

No, I mean I suppose the – that's a good question Sir.

WILLIAMS J:

Anyway.

MR KEITH:

But in any case in terms of this premise that the international jurisprudence doesn't regard these things as criminal, penalties, that's just not right. I think I said I had three points. The last one is really just we spent quite a lot of time because it was being pushed, and I'm not sure if it's being pushed now, on what the – on the Court's question about whether a different justification approach, so not *Hansen* but *D* and we – so from paragraphs 20 onwards in the respondent/cross-appellant supplementary submissions, we had talked about that. The critical passage I think is at paragraph 25, that's up on the screen now, talking about *Doré* and as we explained the looser standard, I think it's called an unstructured proportionality analysis in the Crown supplementary submissions, the more flexible standard, it is, as the Court has said in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, not watered down, it's just different. We are talking about individual administrative decisions and is set out.

That whole question about what rights-consistency does to judicial review, complicated question, Canadians particularly have struggled on it, about it, the UK are starting to, and those are the footnotes on page 11, *R (on the application of Lord Carlile of Berriew QC) v Home Secretary* [2014] UKSC 60, [2015] AC 945, so forth, and then *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65, [2019] 4 SCR 65, the most recent Supreme Court of Canada decision dealing with some of these issues. This is at paragraph 31, which we'll have now, and the Supreme Court of Canada drawing a distinction between effective administrative decisions and whether

the enabling statute violates the Charter, and we are clearly in the latter. So we say that discretionary unstructured proportionality analysis has no place. I think, unless your Honours have any questions…

WINKELMANN CJ:

It's morning tea in any case.

MR KEITH:

Sorry, I got carried away with myself.

WINKELMANN CJ:

Well normally one of my colleagues will point it out to me, but they haven't this morning. You must have been riveting.

GLAZEBROOK J:

We wanted your third point.

MR KEITH:

That's a convenient time. I don't think there's anything else but we'll sort out the sequencing, yes Ma'am.

WINKELMANN CJ:

Thank you.

MR KEITH:

I should also say, just before the Human Rights Commission, because I'll forget to say it, or Mr Edgeler won't, but before the Human Rights Commission start, whenever they start, we've agreed, arranged that counsel will come up and plug into the technology at the front desk, because they can't do it from there. So if we could have a short adjournment when they start, we'd be grateful.

WINKELMANN CJ:

Yes.

MR KEITH:

Thank you.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:

Mr Edgeler.

MR EDGELER:

Thank you, Ma'am. We have had the discussion over the break of the progress of the matter for today. It is me finishing off Mr Chisnall's submissions on the Crown appeal, five minutes perhaps 10 depending on questions. The Commission to follow. Mr Keith on the cross-appeal to follow the Commission. Mr McKillop to respond to the cross-appeal and to – sorry?

WINKELMANN CJ:

All right, so, Mr Butler then Mr McKillop?

MR EDGELER:

No, Ma'am.

WINKELMANN CJ:

Sorry, okay. I went wrong with the very first – Mr Keith on the cross-appeal.

MR EDGELER:

Mr Keith on the cross-appeal. Then Mr McKillop on the cross-appeal and the Crown reply on their own appeal as well.

WINKELMANN CJ:

And then we'll –

MR EDGELER:

Then Mr Keith, anything in reply.

WINKELMANN CJ:

Mr Keith, all right. Thank you.

MR EDGELER:

The timing obviously a matter for the Court but the parties indicate, or have indicated, that if the Court wishes to go a little beyond four the parties are available to accompany that but of course entirely up to the Court how long things take.

WINKELMANN CJ:

All right.

MR EDGELER:

I had in the written submissions, and I suspect I don't need to go to most of them although perhaps we'll start with paragraph 77, is one matter I had sorry – I shall stop fogging up I think, excuse me. I had issues of pleadings and what pleadings should look like and I think essentially, we are happy to stand on that and what the parties would appreciate guidance from the Court as to what these look like. This was pleaded in this way I think because until very recently, this is what certainly everyone expected a declaration of inconsistency pleadings to look like unconnected to substantive proceedings, this is a law. We say the law is an unreasonable limit and you look at the law and you don't look at the facts of any particular case. If that is not to be the case it would benefit a great number of potential claimants I think. I don't think we have anything more to say on it but that was sort of what we anticipated this was like and why the case was brought in this way. Certainly, some of the issues might be issues of standing rather sort of anything like that.

The question, the other question I had in the written submissions that again probably don't need to go to is what declarations should look like in declaration proceedings, and this is something on which the Human Rights Commission I

think has some good things and so I don't need to repeat what they are going to say or have already said. There will be different types of declarations depending on the nature of the, you know, the *Make It 16* declaration or the *Taylor* declarations are very confined because if you change the word, the number 18 to the number 16, or deleted, you know, the bit that says "sentenced prisoners" you would solve it.

When it's a challenge to a scheme where it's all the bits of the Act together, what make it punitive and what make it, you know, pointing to a particular section we think is unnecessary and was the reason why in the Court of Appeal we were suggesting what the declaration should look like. The Court of Appeal largely adopted our proposal of they should be wide. The problem is Part 1A of the Parole Act, the problem is the Public Safety Act and anyone wanting to know the details can read the judgment. Potentially you could have, you know in a summary form, you know particularly when we're getting the cross-appeal if you're looking at different declarations for different sections, you know, the declarations might say for the reason, for the summary given in, you know, paragraphs 40 to 42.

WINKELMANN CJ:

You might just have to slow down a tiny bit, Mr Edgeler.

MR EDGELER:

Sorry, absolutely.

WINKELMANN CJ:

Not a thing I normally say to people but I think you might just have to slow down because we want to get what you're saying.

MR EDGELER:

Yes, so it could be that you have this sort of submission or the declaration – for the reasons given in paragraphs 40 to 42, you know, declaration is made in respect of section 22 or section 26(1) or any of the others and it might be anyone looking to work out why the Court said that something was in breach and why

it was an unjustified limitation or couldn't or hadn't been justified should read the whole judgment. It would certainly be reasonable for a court in crafting judgment, a declaration in a case like this to use that summary form and again, I suspect judges who will be dealing with these would be assisted by what this Court makes a declaration on a case involving a scheme rather than the number 18 or the number 16.

So we had some indication, I don't think I need to take it to you, in 77 of our submissions with 77.1, .2 and .3, of the nature of why we seek other submissions, other declarations than what we sought, largely a matter for the cross-appeal but it was the question that the Court raised of what should declarations look like and the Human Rights Commission's observations on cannot be justified versus have not been justified are useful ones, particularly when you're looking at if it has not been justified because they chose not to bring evidence, it's not like they're going to have an opportunity to bring evidence in a year or two. It's this is their opportunity to do it, and so hasn't been justified or cannot be justified is something for the Court to consider, and I think the Human Rights Commission's observations on that are useful.

But the final matters, I think I have to say at this point, are largely some matters that arose from some submissions that were heard, or questions that came up yesterday, about the nature of extended supervision orders and the nature of public protection orders.

There are no special conditions under public protection orders. It's like a prison sentence. The Court or the Parole Board or whatever equivalent, can't impose special conditions on someone. You're in prison. You're under a PPO. The conditions of prison, the conditions of Matawhāiti apply to you. They're set out in the Act.

Similarly, but in a slightly different way, the standard conditions of an extended supervision order – and it might be useful if we have the section 14 and 107JA comparison – the standard conditions of an extended supervision order apply to everyone on an extended supervision order. There is a process under 107K

for the Parole Board to suspend standard conditions but it can't do so at the request of the person subject to the order. It does so if a special condition would essentially override it. One of the standard conditions is within the first 72 hours of your release on an ESO attend at your parole officer's office to meet them and if you've got a 24-hour curfew that is something you shouldn't be doing. If you've got a direction that you have to live at Tōruatanga then the standard condition about "tell us where you're going to live" or "ask us permission if you want to change address" is irrelevant, and so when we're getting rid of standard conditions it's only at the request of the Corrections and only if there is a special condition that essentially renders it irrelevant.

WILLIAMS J:

Is that a matter of the practice or is that what the statute says?

MR EDGELER:

I think that's what the section says. It's certainly different for interim supervision orders and slightly different for interim conditions of final orders, but when we look at section 107K, if we could, it talks about suspending conditions, so 107K(1) is certainly the – if I've got the right one – on the application of the probation officer, and the power to suspend conditions is if there is a – I'll just make sure I get the right one, 107K(3) – if the Board considers that any special conditions are incompatible with the standard conditions "the Board may", so it's not just – 107K(3)(c), so about half way down the page on the right. The special conditions have to be incompatible. So, for example, the turn up to your parole officer within 72 hours, well I can't, I have to stay at home every day.

1200

WILLIAMS J:

So there's no power to remove the standard conditions simpliciter?

MR EDGELER:

Correct.

GLAZEBROOK J:

Except interim rule, what we were taken to yesterday.

MR EDGELER:

Yes. Yes, so an interim supervision order, the High Court Judge making it just –

GLAZEBROOK J:

Or whatever.

MR EDGELER:

– you may make the conditions, interim conditions of a final order that is, you know, in the – well it will take a month before this gets to the Parole Board and the ESO has to start tomorrow because that's your release date. There is some slightly more powers for the High Court judge or a District Court judge sometimes making the order, but as a general rule, special conditions for anyone on an ESO for the 10 years or longer if they get a second one, standard conditions apply to everyone.

Something that came up, the standard conditions in the comparison with 107J, the standard conditions of an extended supervision order are stricter than these standard conditions of Parole. Everyone on an extended supervision order, for example, has – you may not have contact with children without permission. The residential, the standard conditions of a parole order, don't move to a new parole area without our permission. The standard condition for an ESO is don't move at all, and particularly, you know, ESOs tend to have quite strict or at least a lot of ESOs tend to have special conditions which impose you must live here or you cannot – you must live where we tell you. In the case, certainly if someone under residential restrictions, certainly on someone under intensive monitoring, it's you will be you will be living Tōruatanga or, I'm not going to remember it, the similar facility in the prison in Waikato. So if you're in intensive monitoring the practice is now you're at one of those two places, and the one directed by the Parole Board or your probation officer who would like to move you to the other one.

I think two more matters.

SOLICITOR-GENERAL:

I'm sorry, your Honours. Before Mr Edgeler finishes that point, can I point out 107O?

GLAZEBROOK J:

We're going to need the microphone.

O'REGAN J:

You need to pull your microphone towards you.

SOLICITOR-GENERAL:

Apologies, but can I point out section 107O just before Mr Edgeler finishes that point. I wasn't sure if he was taking the point as to matter of practice or as matter of law, but 107O is relevant to that discussion.

MR EDGELER:

Yes. A person can certainly apply to a Board to cancel or vary special conditions that have been made, and so if the Board imposes a special – standard conditions are imposed by the Act. If the Board imposes a special condition, for example even something like intensive monitoring or residential restrictions, the person can apply to the Board to cancel the special condition. Or, I want to move address and my probation officer isn't letting me. So condition –

WINKELMANN CJ:

Are you sure it's special conditions? It says any condition of the order.

MR EDGELER:

I may at this point be thinking of practice rather than the law.

WINKELMANN CJ:

Yes.

MR EDGELER:

Again, sort of looking at it above, that was the reason why it called – section 107K talked about suspending conditions rather than cancelling them.

WINKELMANN CJ:

Okay.

MR EDGELER:

The final two matters, I think one of the things that was raised and I probably won't need to take you to the sections of the Act, the question of – you know, one of the things that when a Court is looking at making a PPO, one of the things it will be considering in determining whether to exercise its discretion is the management plan and whether this is a – is this a justified limitation in this particular case? Under sections 41 and 42 of the Public Protection Order, management plans don't come into existence until after an order is made.

Of course, I certainly don't need to take you to the next one because I took you to them when we spoke in October, the distinction between a management plan for a prisoner under the Corrections Act and a distinction between a management plan for a resident under the Public Protection Act, they are functionally identical. The fact that there is a management plan doesn't mean this is therapeutic because management plans are what everyone in Corrections custody, whether it's a prison or a residence, gets, and indeed, for that matter, everyone in the non-custody under an extended supervision order, if they are under one which does not have custody involved once residential restrictions have expired, for example.

Finally, I think one point of just clarification in relation to a point that was made yesterday, something arising out of the Court of Appeal's judgment under the public protection order appeal. Mr Chisnall did give his consent for the High Court reviewers who were giving evidence at the trial of the PPO to have access to his treatment notes. The consent was not given in respect of a reviewer for a public protection order review panel, and so the High Court and the Court of Appeal in respect of their decisions and should the PPO be made,

did have access to his treatment details, or at least such relevance that were provided to the reporters who then were able to include them in their evidence.

Unless I can assist the Court with anything else, and certainly there are the written submissions, essentially the last 20 paragraphs of which were mine, that is it and –

WINKELMANN CJ:
Thank you, Mr Edgeler.

MR EDGELER:
I understand we are taking an adjournment for a –

WINKELMANN CJ:
Oh, yes, we'll take…

MR ELLIS:
Yes, if we could just have two or three minutes, your Honour, just –

WINKELMANN CJ:
Okay, we'll do that. Just adjourn for a short time.

COURT ADJOURNS: 12.06 PM

COURT RESUMES: 12.12 PM

MR BUTLER KC:
Well, your Honours, this has been quite a hearing so far, and I expect there's more to come.

WINKELMANN CJ:
Well we hope so.

MR BUTLER KC:

Can I at the outset acknowledge the contributions of many hands to the submissions that have been filed on the behalf of the Commission, and also I will be asking in a moment for your Honours collectively to file just some supplementary material arising out of discussions that were had yesterday. But I do want to acknowledgement the contribution of many hands, and in particular Mr Harris who is not able to be here today, but who is online, and many other colleagues at my chambers.

WINKELMANN CJ:

Is that Mr Max Harris?

MR BUTLER KC:

That's correct. So your Honours I would propose to outline the submissions for the Commissioner. I've got some opening remarks that I'd like to do with your Honours leave, because I think one of the important things here is to try and focus, not just on some of the minutiae of what's arisen, but also to lift or raise our sights a little bit just to remind ourselves about what it is we're actually engaged in here, and I'd quite like to do that if I could, and then descend to some of the detail of the submissions. At the end of that I would propose to provide you with a road map of how I intend to deal with the issues that have arisen, just to keep me disciplined as much as anything else, so I'd suggest that your Honours would allow me to do that, and in the road map I'll make reference to materials that have been filed by us and other parties, and also some of that supplementary material which we've generated overnight, and which I hope will be helpful to the Court.

WINKELMANN CJ:

In the interests of speed, we'll try to restrain ourselves from questioning you.

MR BUTLER KC:

I'm certainly not going to demand that of your Honours. Past experience suggests it would be –

WINKELMANN CJ:

Well it'd probably be too much demand.

MR BUTLER KC:

Yes, quite. So your Honours, having outlined that can I start. So this hearing represents the next phase in that part of our constitutional journeying focused on declarations of inconsistency. Unlike, perhaps, in *Taylor*'s case the Court can proceed on this part of the journey fully confident that its next steps have the support of both the executive and of Parliament. The thoughtful debates that occurred in the Wharenui diagonally opposite us here, in respect of the New Zealand Bill of Rights Declarations of Inconsistency Bill, and the subsequent adoption of sections 7A and 7B of the Bill of Rights Act, as well as the alterations made to the standing orders of the House, are all proof of that. It is important to recall that these changes were done on the back of a lengthy deliberative process, and that the legislative approvals were adopted with full cross-party support.

So what I say we are trying to do here today, and yesterday, is to work out how best to enable the three great organs of State, the legislative, the executive and the judicial, to settle a process that works for them, and I would interpolate here, and has worked for many of them to date, and for citizens who wish to test the consistency of legislation with the Bill of Rights. In doing so I say that we should all be mindful that the goal is to fulfil the constitutional and statutorily mandated purposes of the Bill of Rights in a manner that, one, fits with the Courts jurisdiction and institutional competence. Two, draws on the best traditions and innovation of the Courts, and this Court. Three, utilises the experience garnered under the Human Rights Act 1993, and under the Attorney-General's practice under section 7 of the Bill of Rights to date. Four, that is conscious always that the Bill of Rights speaks to all three great organs of State, and so we can, and I will submit should, seek as much operational alignment of the Bill of Rights across those great organs of State, while of course acknowledging, where appropriate, and to the extent necessary, the different modes of work. Working style, competence of each of those organs.

So I say that's the overarching context that we're operating within, and from time to time when I'm making my submissions on the detail, I'll probably be referring back to some of those ideas, and I just thought I might as well lay out the premise of the underlying ideas that I say should animate our approach to the more detailed considerations.

Of course on this appeal there's a number of more detailed or particular issues which arise. Issue 1 appears to be, a little confusingly for me, the question as to whether ESO and PPO orders amount to penalties and therefore prima facie infringe section 26(2). I think where we've landed is an acceptance that for the purposes of section 26(2) the Crown concedes that they are, indeed, penalties, both regimes involve the imposition of penalties for the purpose of section 26(2).

There are, of course, on the cross-appeal, issues raised as to what other rights the regimes may breach. The question then which arises is whether or not, and I understand this to be conceded by the Crown, whether or not, it being accepted that the ESO and PPO regimes do, indeed, prima facie infringe, and that's the phrase I always use when I'm describing whether or not you're into a gateway, so that's the phrase, that's what I will always mean when I say "prima facie infringe". Whether if on the basis that section 26(2) has been prima facie infringed, whether that prima facie infringement is justified. My understanding of the approach that the Crown says is it says, we don't need to adduce any evidence to make out justification. All we need to do is persuade the Court that in any particular instance where there would be an unjustified infringement of section 26(2), that the Court will be able to deal with that instance through the discretion provided to a court under both the ESO and PPO regimes.

So that's what I understand their case to be, and I'm saying it out loud so that if I am wrong that might help your Honours figure out whether you think I've got it right or wrong, but more importantly we can draw from the Crown what their position is. That's how I understand things sit today. But the key thing to understand in terms of the Crown's position, in terms of how I see we are trying to address it today, is the Crown is saying that when you're looking at the architecture of the ESO and PPO regime for the purposes of this question of

inconsistency, the key, in fact sole focus that the Court should have is on the use of the word "may" in the ESO and the PPO regimes. That is the key feature of the architecture. That is sufficient to avoid any inconsistency.

1220

GLAZEBROOK J:

Can I just, I think there had been a slight change in the Crown position through the submissions because I think, although it was skating between discretion and otherwise, but I think the high point of the Crown position is that this is justified because these people are of that level of dangerousness and that is a per se justification without the need for – well, actually, that's probably not quite true.

MR BUTLER KC:

No.

GLAZEBROOK J:

Because alongside the therapeutic nature of the regime and the fact that it isn't prison regime is sufficient justification. Now I'm probably not putting that in the way that the Solicitor might have put it but –

WINKELMANN CJ:

I did suggest to Ms Jagose it might assist if she could bullet point for us what the Crown position is. I wonder if that, rather than us all chasing around, if we could ask Ms Jagose to re-put the Crown position. You might have to go a little bit slowly.

SOLICITOR-GENERAL:

Thank you, your Honours. The three points were these. The first is that the breadth of the concept of what is a penalty includes not just matters that are punitive or attribute but includes matters that are preventive, protective. That's the first point. The breadth of 26(2) and penalty.

WINKELMANN CJ:

Under section 26(2)?

SOLICITOR-GENERAL:

Yes. The second point –

KÓS J:

So that these are?

SOLICITOR-GENERAL:

These are, yes. We accept the Court of Appeal's finding that, in substance, these are penalties that are caught by section 26(2).

The second bullet point, if you like – and I must say, parenthetically, it isn't new; it was first raised in our statement of defence – is that the threshold is of such a magnitude that if the evidence before the PPO or ESO court is sufficient to meet that threshold in that judge's opinion, then it is likely that it will be met – sorry, then it was likely that'll be a justified limit on the right against second penalty. The third point being, and I accept that it will be an exceptional case, in any event, if the Court faced with a person for whom, for whatever reason, meeting the threshold still isn't enough to be justified, the Court is not obliged to make the order.

GLAZEBROOK J:

And at one stage you did have some reliance – you were placing some reliance, I thought, on the conditions and the treatment issue, or is that a backup argument?

WINKELMANN CJ:

Is that in your first level which is –

SOLICITOR-GENERAL:

I think it probably properly comes into the first point, your Honour, about this is not a punitive – this is not punishing the person for the thing they did before for

which they have served their sentence, and the way that the – yes, it goes into the first point.

GLAZEBROOK J:

Thank you.

WINKELMANN CJ:

Thank you, Ms Jagose, that's really helpful.

MR BUTLER KC:

Thank you. Well, I'm glad I provoked that clarification.

WINKELMANN CJ:

So is that what you were saying? I think it is.

MR BUTLER KC:

Yes, it is. So I was saying that my understanding had been that the primary justification, so as to speak, was on the use of the word "may" and so in effect I'm not wrong in that regard because as her third point the Solicitor said for those exceptional cases the word "may" does the work and that's how, through the use of discretion in what she refers to as exceptional cases, the unjustified limit can be avoided, so I think I'm right in that.

WILLIAMS J:

The way it was articulated by the Solicitor gave me the impression that number 2 is where all the work is being done. That the standard in the two provisions should, if it is not now being read so tightly, should be read so tightly as to make any right-thinking citizen accept that this was a good thing to do.

MR BUTLER KC:

So if we come to the second point, because remember I'm just giving you an outline of where I'm going so I'm trying desperately to avoid being sucked in, if I can use that phrase, into a debate about penalties and I'll explain why in a moment.

But if we do quickly look at that second justification, of course the contentions you've got before you are from my friends for Mr Chisnall who say it is simply not possible, broadly speaking, to justify the imposition of a second penalty, it having been accepted by the Crown that this is indeed a second penalty. So that's a first order argument to say that is not an acceptable justification here.

Then of course, the second justification, and it can be either a justification or a categorisation issue, and I can explain that in one moment, appears to be well look, if what you were trying to do through the imposition of this second penalty, accepting Mr Chisnall reasonably concedes, it's a broad definition of penalty you're prepared to concede, so I need in response to concede a generosity of spirit in terms of how you can justify the imposition of a second penalty. What I – a way of understanding the argument advanced on behalf of Mr Chisnall is to say we might accept your second point about it being a justified limit, we might accept that if in addition to having a preventative purpose, using the language that my friend the Solicitor has advanced, has accepted, that the scheme does and brings it within the notion of penalty, if in addition to that preventative purpose there was an overriding or very strong therapeutic element –

WILLIAMS J:
He would say compulsory, wouldn't he?

MR BUTLER KC:
He would, he would. Again, I'm just trying to paraphrase for the purposes of the Court for helping the Court expose a way of thinking about the issues because I –

WINKELMANN CJ:
So that bridges the two different ways that it's been framed.

MR BUTLER KC:

That bridges the two different – because at times I felt it's gone like this.

WINKELMANN CJ:

Yes, there's two different framings.

MR BUTLER KC:

When I went back and read the transcript from the first time, I just thought there was just two ships passing in the night. No criticism of anybody but each has got their position. But it seemed to me when I was thinking about it, I think that's another way of rejigging, for want of a phrase, the various contentions that are out there.

GLAZEBROOK J:

Although I think that the – for Mr Chisnall it said that that actually wouldn't be a penalty if it was therapeutic.

WINKELMANN CJ:

No, yes and that's why it's bridging.

MR BUTLER KC:

I think that's right, but that's why if you work with the Crown's concession that it is a penalty, because they accept it's got this preventative element to it, so we're in through the gateway, once you're in the gateway you're in section 5 territory. So what I, if I was on the Crown side I'd be saying that one of the reasons why, even though it's a penalty on the basis of a broad interpretation of penalty, the reason why it's justified is because not only does it set a high threshold, so therefore the scope of it is limited, but what it aims to do is not just simply to warehouse people, and here I'm not picking sides I'm just using the phrase that was used in the first hearing by my friends for Mr Chisnall, it's not simply warehousing as is alleged, it's not simply a preventative protective measure, it also has a strong underlying therapeutic element.

Because you're not bound, of course, to analyse this case in exactly the same way as the European Court of Human Rights did. What you can do of course, which is the great thing about comparative materials, is you can draw from it to see well what are the – to distil the core issues that arise, why was it that to the European Court of Human Rights this therapeutic aspect counted so strongly? Was it simply for doctrinal reasons? Yes. But not simply doctrinal reasons. It was also for substantive reasonableness of how Germany went about tackling what Germany regarded as being a difficult social problem. You can look at the same sort of material to satisfy yourselves as to whether you think this scheme is or is not a justified limit on the rights in section 26(2) and indeed the other rights that are raised on the cross-appeal.

GLAZEBROOK J:

Although when I put to the Solicitor that that was a third justification, she said it wasn't. It came within the first aspect of penalty.

MR BUTLER KC:

Yes, and the –

GLAZEBROOK J:

But anyway, it probably isn't worth debating.

1230

MR BUTLER KC:

Well, I think it is worth debating actually and I did want just to fasten on that because it seems to me by not getting things in the right order we end up with confusion. If I may say, one of the points I have continually emphasised when I've appeared not only in this Court but other courts and in my writings has been the importance of structuring the analysis because it's through the structure and going through stages, I'm not a great fan of steps because that's what you do in a dance, but going through a form of structured analysis can really help flush issues out. So I say that I know the Solicitor said what she said that really the issue of therapy and so on is something that's a – it's an issue that arises at stage 1. That can't be, in my submission, that can't be consistent with the

approach the Crown is advocating because at stage 1 she's already accepted it's a penalty.

GLAZEBROOK J:

You don't have to convince me. I'm just saying what the Solicitor said.

MR BUTLER KC:

But again, if my job is to try and just expose the issues for the Court, which I think it is, I just wanted to finish on that particular point.

WILLIAMS J:

So to put it in a nutshell, the argument that you're reflecting from the respondent is that because treatment is optional and its focus is preventive rather than wellness –

MR BUTLER KC:

Correct, correct.

WILLIAMS J:

– that fact alone is fatal in the section 5 balancing process.

MR BUTLER KC:

Yes, and again, to be very clear, the Commission is treading a line here in terms of –

WILLIAMS J:

I'm not saying you're arguing that.

MR BUTLER KC:

Exactly right. So I wanted to make it quite clear what the Commissioner is trying to do has helped you tackle this issue. We've not actually, for the purpose of this hearing, said what's right or what's wrong. We're not in the position to do that and we don't think that's right for us on that issue. We have lots to say about process where we certainly won't be standing on the sideline.

WINKELMANN CJ:

Right.

KÓS J:

I hope your enthusiasm for structure doesn't prevent you from suggesting a new one for *Hansen* analysis because that is one of the reasons why we recalled the matter for re-hearing here.

MR BUTLER KC:

Mhm, I do have things –

KÓS J:

We haven't really talked much about it.

MR BUTLER KC:

No, we haven't.

KÓS J:

But I think it is fair to say that something must be done.

MR BUTLER KC:

Thank you, your Honour, and I do have things to say about that and I'd anticipated that that might be the case and I'll come back to what I've tried to attempt to do about that in light of the limited amount of time I've got and the fact I'm merely an intervener.

WINKELMANN CJ:

Yes, so we should let you be getting on with it, let you crack on with it, Mr Butler.

MR BUTLER KC:

So that was issue 1. We're doing well. Issue 2. So it seemed to me that assuming the answer is yes, so we actually are in the area of section 5 justification, as I understand the questions that have been, the supplementary issues the Court wanted addressed, a question arises as to how section 5 of BORA operates in a DOI setting. That's, so as to speak, up for grabs.

We're hoping we can assist you with this. What we think you need to do is broadly, broadly affirm the proportionality framework adopted in *Hansen*, not the steps, but broadly affirm the proportionality framework, and in some supplementary materials what I'm going to suggest is rather than looking at *Hansen* as a painting-by-numbers exercise we would be emphasising that it's an evaluative exercise and I want to draw your Honours' attention to the way in which the *Oakes* style test has been formulated in overseas statutory formulations, for example, the Victorian Charter, the Queensland Human Rights Act, those sorts of places that have actually drawn on the experience over time and which have attempted to set out a multifactorial approach to the implementation of the requirements of their equivalents of section 5. But again, what we will be suggesting the Court should be doing is emphasising that any proportionality approach should be structured.

So that's the first aspect of what we say you should do in terms of section 5 BORA in the DOI setting.

The second thing we suggest the Court could usefully do is restate what is already well known, namely that the Crown bears the burden under section 5 of the Bill of Rights, and your Honour, Justice Kós, this morning raised one or two issues with my friend, Mr Keith, about whether there's an obligation on a plaintiff to put something in issue in terms of alternatives. I'll address that question for you when I come and deal with the detail of it.

KÓS J:

Yes, I think I took it too far.

MR BUTLER KC:

Yes, Sir. Thank you, makes life easy. The third thing, that we suggest you should do when thinking about the section 5 analysis in the DOI setting, is consider whether the prescribed by law limb may assume some importance, because we feel that in a case like this it's not the perfect illustration of it but certainly one of the first things I did, when I was looking at this statute and the issue which popped up for the Court, was does actually this scheme pass the

prescribed by law standard of section 5, noting that of course the prescribed by law standard is a separate aspect of the section 5 test, you can have, in other words, a policy proposal or in theory powers could be conferred on people that might pass a reasonableness test, but in fact have they been conferred? Or have they been conferred with sufficient safeguards or sufficient assistance as to how a discretion might be exercised, and I'll come and explain that later.

Issue 3 is that the Crown has proposed a model for considering how you should go about assessing DOI challenges. It says you will be assisted by distinguishing between self-executing provisions and discretion conferring provisions. Now we haven't heard very much about that in the oral arguments, so I don't know how much you want me to focus on that, but I do have a few things I'd like to say –

WINKELMANN CJ:

I thought we had heard quite a bit about that.

MR BUTLER KC:

Well I hadn't heard them using that language.

GLAZEBROOK J:

We were just – we were referred to the table so they're certainly relying on it.

MR BUTLER KC:

Great. Well then I certainly have some things I want to say on that. Allied, as I understand it, to that aspect of a proposed model, the Crown also says that an abstract and regime focused approach in DOI cases is wrong and that the focus should be on particular provisions that give rise to BORA-inconsistency in respect of an individual litigant or a reasonably hypothetical one. We'll submit to you later that adopting those aspects of their proposed model won't assist the courts.

Now the reason I'm saying the courts, of course, is – and this is a point I will emphasise time and again, you'll be glad for me to sit down, is you are sitting

at the apex. But there's lots of us, lots of ants going around dealing with these issues on a pretty frequent basis. The Attorney deals with it all the time. The Human Rights Review Tribunal, there's already been four declarations issued by that Tribunal and quite a number rejected

So let's see how they tackle these sorts of thing. Have they found that they needed, as the Crown suggested in those forums, that you need to distinguish between self-executing provisions and discretion conferring provisions? To spoil the surprise, it has not. So why now, at this apex level, is that suggested to you as being the model that should be adopted and applied? We'll draw on overseas jurisprudence to show you that DOIs can be made in quite a wide range of circumstances that look not just on particular provisions but also look at the model as a whole.

The fourth issue is that the Crown suggests that the existence of discretion in the two regimes means the Court cannot and should not make a DOI, and I want to emphasise they, as I understand their argument, cannot. Not that it could but shouldn't, but rather cannot. What I propose to do is to draw your Honours attention to decisions of overseas courts and to reports of Attorneys General to show you that you should reject that proposition.

The fifth issue, as I understand it, is that the Crown submits that the power to make ESOs and PPOs are discretionary powers. I probably won't need to spend a huge amount of time on that because it now appears – we had raised in our submissions that we weren't sure that that's actually what the Crown had been suggesting based on what had been argued below and also based on the pleadings such as they were. But it does seem to be the Crown's primary position put quite firmly and passionately in a human rights positive way by Madam Solicitor yesterday that they really do see these provisions as being discretionary, and so I probably don't need to spend a huge amount of time looking at that.

There was, however, in her submissions reference to *Doré*. That was, as I understand it, an answer to – in response, rather to the Court's invitation for

counsel to address whether or not it should be taking into account a *Doré* style application of the word "may" in the relevant provisions and how that should all be factored in.

WINKELMANN CJ:

I think that was the party's suggestion to the Court rather than (unclear 12:39:39) generated idea.

MR BUTLER KC:

There you go. Anyway, it's there somewhere. My understanding of the Crown's submission is that it suggests that once you classify powers as discretionary you should abjure in a DOI context, you should abjure the use of a *Hansen* or *Oakes* style structured proportionality framework. We say that goes too far and I'll try and explain by reference to concrete examples why you should not accept that proposition as a general proposition.

1240

I am not saying, to be clear, that the Court was wrong in saying *Moncrief-Spittle* to adopt a slightly more flexible approach there, but I want to explore why it is that in a case like *Moncrief-Spittle* this Court adopted a slightly different framework. I've said we don't apply in an unthinking way a *Hansen* style analysis.

O'REGAN J:

But *Moncrief-Spittle* was about an individual decision, not about –

MR BUTLER KC:

Exactly, that's exactly right, and not only an individual decision but by a decision-maker who, let's be frank, couldn't be expected to have *Hansen* sitting on the desk while they're trying to figure out whether or not they're going to proceed with a particular event. So it's all about, as always, we know, *ex parte Daly* and law context is everything. So I just want to emphasise that point, broadly because I'm concerned that from both sides I think at times are strong propositions that are made that are like the 10 commandments, you

know, that are hard edged, and I just think in some aspects a little bit, some a bit softer, would more appropriately reflect the position.

The sixth issue is the Court has sought assistance on the form of order to be made if its satisfied that a statute does breach the Bill of Rights in an unjustified way, and I will attempt to assist you by drawing your attention to the way in which the Tribunal, the Tribunal is the Human Rights Review Tribunal, the Tribunal and overseas Courts have tackled this issue.

Lastly, as you know, the Commission does want to make some remarks on how the conduct of these cases should be undertaken with a particular focus on the Crown. Your Honour, the Chief Justice, asked yesterday, flagged yesterday this issue whether there's materials available. I have been able to find some materials overnight from overseas jurisdictions which I think may be of some assistance to the Court in that regard, and I'll offer those up.

WINKELMANN CJ:

I also asked the Solicitor-General as to whether the Attorney-General should be proposing, the Crown, should be proposing an interpretation for the purposes of section 6.

MR BUTLER KC:

And I can certainly answer from the Commission's perspective, absolutely, and we would be saying that a good place for that to be found would be in a pleading, for example. Not saying that the detail needs to be fully explored. In the usual way of pleadings, the relevant Judge whose case managing it or the parties can say, well, have you provided enough detail or not around why it is you say, or how it is that you say, a particular provision can be interpreted, and I'll refer you to for –

WINKELMANN CJ:

And applied in this case.

MR BUTLER KC:

And applied, exactly, and so, for example, issues like that arose in the Adoption Act challenge before the Human Rights Review Tribunal, my point being if the Tribunal can deal with it I'm sure the ordinary courts can deal with those sorts of issues of pleading and interpretation and the intersection between those things.

So I just had wanted to flag one or two things. In light of the time constraints and conscious that you've got two parties before you who are well motivated to argue the intricacies of section 26(2) jurisprudence and section 5 justification particular to the question of penalties, I'm not proposing to spend a huge amount of time on that topic. What I have done, however, is in the road map that I would like leave to be able to make available to you and in some of this, what I've referred to as tables, supplementary tables, I have tried to gather together some of the information, pinpoint citations, for example, I'm thinking yes to the exchange that you had, Justice Glazebrook, I think with my friend, Mr Keith, about how the scheme works and so on, so I've just tried to capture in the road map, because it's not an easy case, let's be honest, to read and go back to, so I was just trying to make it a bit easier and what I've also done is, for example, prepared a table which maps the European approach, the *Ilnseher* approach, onto the ESO Act and the PPO Act. Again, and in respect of those, because I'm not one of the parties and because in one sense it doesn't matter as much to me, could you regard that table, and what I say in the road map, as a starter for 10 but hopefully a good starter for 10 in terms of tackling those issues. I'm putting it to try and be helpful. I hope it's helpful but others may have a different take on it.

The next thing I wanted to indicate is that when you see the road map it may be that I've had to clump together one or two of the issues to try and, for example, take you – I think it would be helpful to take you to some of the material in the bundles, but the way I would propose to do that is can we turn to the *White Paper*? I'd like you to look at paragraphs, pages X, Y and Z. They're not all going to be relevant to the same issue but I just thought you might as well see it, and then having done that with a couple of the cases in the

materials I then would be able to say well as you'll recall at page X, or whatever it is. I think it'll be time saving. I hope it's time saving, that's the idea of it.

Lastly, I have prepared, as I have flagged, a range of hand ups. I'm trying to save time and to assist your Honours' consideration of issues. They are a road map, then a couple of hand ups which involve tables and stuff like that, and then some supplementary materials which are referred to either, that are referred to in the roadmap. I've provided a copy, a hard copy to my friends for the Crown and to Mr Chisnall. However, I did not have leave so I have not asked Mr Registrar to send it to the Court until your Honours have given me leave to do so. But he –

WINKELMANN CJ:
Yes, you have leave.

MR BUTLER KC:
Thank you. So if you wouldn't mind Jack, just – thank you.

WINKELMANN CJ:
Oh I see.

MR BUTLER KC:
I've made hard copies but –

O'REGAN J:
I think you should have shown us how much there was before you asked.

MR BUTLER KC:
I know, exactly.

WINKELMANN CJ:
That was a very cunning move on your part.

MR BUTLER KC:

My father would be very proud, he was a salesman, and he would be very pleased to see that it's run down through the ages.

WILLIAMS J:

That figures, Mr Butler, that figures.

KÓS J:

Could we revoke it?

MR BUTLER KC:

But really, I'm not going to take you to all of it. It's – I think when you see it the idea is just – it really is designed to save time.

WINKELMANN CJ:

Well you can assist us with pronunciation of the case *Ilnseher.*

MR BUTLER KC:

Yes, I can. Well, *Ilnseher*, so I can definitely help you with that. Iln as in kiln, and then seher as in, I don't know, seher. So we've got – if we could turn then to the speaking notes, which hopefully is up on the top of those materials that your Honours have got, is that right?

WINKELMANN CJ:

Yes, it is.

MR BUTLER KC:

Great. So you'll see the way I've tried to do it is I've tried to identify the issue and then relevant cross references. So the first issue that I picked up was penalty, second penalty, and if you see, I don't know whether – it's come out in faint shading. I think in the original that you'll get it's in red, you'll see I put in for example here, 12 to 17.

WINKELMANN CJ:

12 to 17.

MR BUTLER KC:

That's a reference to our written submissions. Just again, just trying to help you –

O'REGAN J:

It's red in our copy, so.

MR BUTLER KC:

It is red in your copies?

O'REGAN J:

Yes.

MR BUTLER KC:

Great. So I got the cheap copies.

O'REGAN J:

Right.

MR BUTLER KC:

So I've set out here what I consider to be the principle facts of *Ilnseher.* Again, as indicated, I'm not going to be going into the great detail in relation to these particular matters but I had wanted just to focus, for example, on the key parts of the majority reasoning as I understand it to be, which is half way down the page. I think an important element of the way in which the European Court looked at it, and again just to emphasise the point I made when I was doing my opening, you're not bound by how the Court obviously, I know it goes without saying, but you're not bound by how they look at it. But just because they might structure their analysis of the issue differently doesn't mean that there isn't benefit to be drawn from the way in which they've tackled the issue.

So on this issue of second penalty, it – I thought worth emphasising that the Court accepted that it has both a retrospective element and a strong

prospective element, and that's from page (unclear 12:48:25) when it was characterising the regime.

It focused first on the breach, the alleged breach of Article 5(1), so that's our equivalent, I suppose, of the arbitrary detention ground. Now remember of course, under the European jurisprudence, you've got to find a ground that is set out in Article 5(1)(a) to (f). If you can't find a ground in there then you are not allowed to detain. They found that the detention basis was that of unsound mind. They set out what the legal tests were. I've given you the cross references there. The basis for the law was upheld. In other words yes, this is law about persons of unsound mind.

Now what is of interest I think, both to your section 22 argument yet to come although some of it's been presaged I think by the debate, by the exchanges that have been had already, but it's also relevant I think to justification for a second penalty under section 26(2) is whether or not the detention was "in accordance with law". Now here I'm going to stop. "In accordance with law", I will submit, is in the New Zealand case captured by both prescribed by law and the reasonableness standard in section 5.

1250

So the legal tests for "in accordance with law" for Article 5 purposes is set out in those paragraphs that I've highlighted for you, and the Court held ultimately that those tests were met because there was a domestic basis for the detention in German law. It was to be found in an accessible form. It then said, however, there's an additional rule of law element which is introduced by the "in accordance with law" standard, and that is can you show that preventative detention is necessary, and the Court found yes, there were no other measures that were suitable to deal with a person of this sort, but that conclusion was reached, recall, after the Court had first been persuaded that Mr Ilnseher had been offered a therapeutic environment suitable to a person of unsound mind. In other words, the environment that he found himself in, that he was put into, was an environment that was adapted to people of unsound mind.

That's a really important point. You can use any number of labels you wish to describe it. Is there a rational connection to it? In other words, as I read it, what the Court was saying is, well, we want to be careful about labels in this space, and here I'll look at Justice Glazebrook because one of the concerns I think your Honour has raised, this is my take on it, your Honour, is that, well, don't you need to be very careful in this space because with a few swifties – my term, you'd never use that term, your Honour, and I can't quite think what's the right phrase – but with a few swift –

GLAZEBROOK J:

Well, it's a drift really, isn't it? It's a drift from these really dangerous people to people who may possibly commit something but who knows.

MR BUTLER KC:

Correct, because here's the thing, because if you accept what I'll refer to as the swifty of renaming things and relabelling things, there's a risk there because you make things seem to be things they are not, and then the second thing is the slide phenomenon. We've seen the slide phenomenon already obviously in the space of bodily samples. We were all told when bodily samples legislation was introduced that this is for exceptional circumstances, exceptional crimes, only limited retention, et cetera, et cetera, and, of course, once the principle's established, ah, well, sure, another couple of crimes and then another couple of crimes and then more bodily samples and so on. So I just wanted to take the opportunity to affirm your Honour's concern about what the effects of relabelling could be.

WILLIAMS J:

You mean like "civil"?

MR BUTLER KC:

Correct, like "civil". Correct.

WINKELMANN CJ:

And the Court addresses that, don't they?

MR BUTLER KC:

Yes, it does.

So if we look then at the breach of Article 7, again what I've tried to do is just identify for you where the legal tests are discussed. Again, this is just really as much a road map through the decision as anything else. It was noted in that case that the right against second penalty is an essential element of the rule of law. I've given you the reference. Penalty has an autonomous meaning. We know that. Substance is important, and I've written down just a couple of the sorts of factors that are looked for. In this particular case the Court said that the order was linked to prior conviction. So it accepted that this clearly linked as it had to because in a sense you've self-selected yourself for consideration for this regime by being convicted of one of the qualifying expenses – qualifying offences.

WILLIAMS J:

That's the tax case for next week.

MR BUTLER KC:

That's the tax case, exactly. That's what I've got to get back to when I get back to the office.

Right, so what the Court did emphasise strongly when looking at this breach of Article 7(1) remember is the ultimate conclusion the Court reached was that the conditions of detention in a sense erased, not in a sense, erased the punitive or penal element. So that's why it is that the Court found there was no breach of Article 7 ultimately, and so what did it do? It focused on a number of things to reach that conclusion. First of all, that there was a detention in a special institution and there's quite a bit of material in the case about the nature of the special institutions, the resources that were expended to create these new institutions. They are centres that are set apart. The purpose of the institutions was examined and the purpose was to receive treatment for a mental disorder.

GLAZEBROOK J:

That includes the personality disorders it's brought much – yes.

MR BUTLER KC:

It does, yes. Because remember it's a curious decision because the European Court had to convince itself that mental disorder comes within the rubric of unsound mind, and it did. So then, so we see that it's in a special centre. The purpose of being there is to receive treatment. Importantly, the conditions are materially better than jail. There is an individual treatment plan and that plan is aimed at reducing the risk that Mr Ilnseher posed, and also importantly it was aimed at securing his release. Again, the language there is release "as soon as possible" I think was the phrase that was used, but again your Honours can go and have a look there.

Of relevance, the Court said that the mental disorder requirement was of decisive importance because that requirement made it – meant that the order under which he was being detained was independent of conviction. But relevantly, it wasn't just that he's been locked up. It is that there is a central focus on medical and therapeutic treatment of the detainee. The punitive element, therefore, is erased and therefore the "subsequent preventative detention", which is a phrase the Court came up with, is not a penalty.

Now you'll know that in my written submissions I did suggest you have a read of the dissenting view of Judge Pinto de Albuquerque, and that view reflects a very respectable view within criminal law and criminology and criminal justice thinking around when you detain people and when you do not. It is well worth reading even if your Honours don't agree with it because it is a great way of testing this issue about labels and potential slide, and I think any reading of *Ilnseher* has to – the majority don't really deal with it, which is unfortunate, don't speak to it, but he certainly speaks sometimes a bit passionately but if you take out the passion and just look at the dispassionate analysis of it, there is much of value in there in terms of expressing the traditional concerns about the use of criminal mechanisms to achieve something other than punishing somebody

for an offence they have actually committed as opposed to something they might commit.

WINKELMANN CJ:

So we're going to break in two moments.

MR BUTLER KC:

Mhm.

WINKELMANN CJ:

I just wanted to ask you something before we broke.

MR BUTLER KC:

Sure.

WINKELMANN CJ:

Which you'll probably want to come back to after we break, or I – unless you can deal with it very quickly, which is you said it's open to us to take a different analytical approach. The Crown's effectively asking us to do that because they're asking us to see the prohibition, general prohibition against the imposition of second penalties as divisible into two kinds of penalties.

MR BUTLER KC:

Mhm.

WINKELMANN CJ:

Those which are punitive and those which are protective, preventive and protective. I think implicit in Ms Jagose's submission is that there is – that the justification for a prima facie breach is easier when you're in the preventive protective zone and that would be a different framework, as I understand it, from that which has been adopted elsewhere. I'm just interested in what the implications of that would be if we zoom out from this individual case but – and look at New Zealand's broad international obligations and the general rights scape internationally.

MR BUTLER KC:

I'll –

GLAZEBROOK J:

That might be related to what you say you might have argued had you been arguing for the Crown in relation to the therapeutic nature or not of –

MR BUTLER KC:

Yes, correct. That's correct. So I can address the generic issue and come back to the specific issue of 26 after the break. So the generic issue which arises is that whenever one interprets the underlying right broadly it is likely that one must accept that in certain instances the level of rigour that a court applies or demands of the Crown to justify a limit is less in respect of rights at the periphery rather than those at the core.

1300

So for example to make it make it real, if we're in the space of section 14, freedom of expression, some jurisdictions used to hold what we would refer to as commercial expression, advertising. It's not really the sort of speech that is intended to be protected by freedom of expression. But if it is then the way in which an *Oakes/Hansen*, call it what you will, a proportionality analysis will be applied will not be the same or will not look the same when it comes to alternatives, for example, as it would if what we're talking about is the law of sedition. So that's the generic –

WILLIAMS J:

Unless you're advertising revolution.

MR BUTLER KC:

Yes, quite, unless exactly you're advertising revolution, quite. In which case then you're not really advertising, you're just on social media.

Then I'll come back with some more specifics, your Honour, in terms of section 26 because I wasn't sure myself whether this question, in light of the

concession that's been made by the Crown, I just wasn't quite sure where the Court is at in terms of being comfortable to proceed on the basis of the concession that's been made, albeit a qualified concession.

WINKELMANN CJ:

Mmm.

MR BUTLER KC:

I'll concede so long as you accept that I am being very generous. As opposed to the Court saying no no no, actually we'd rather test whether your generosity is well founded. So I'm not quite –

KÓS J:

Well I think we have to. I mean, we have this problem in other cases with concessions.

MR BUTLER KC:

Yes.

KÓS J:

But at the end of the day, isn't the position here an awful lot simpler? It is this. We have an apparent penalty. It's not for this Court to say to Parliament you should or you must, either of those, amend the Mental Health (Compulsory Assessment and Treatment) Act.

MR BUTLER KC:

Mhm.

KÓS J:

Rather it is to say to Madam Solicitor, you tell me why that's not a feasible option.

MR BUTLER KC:

Correct, correct.

KÓS J:

If you don't bother doing that then, you know, declarations kind of –

MR BUTLER KC:

Kind of follow. Exactly, and if I can, just again to whet your appetite for the material, the clump of material, I think "kadunk" is what Madam Solicitor said when I gave her a copy of it, the kadunk of material. In my material are copies of the section 7 Attorney-General reports where the then Attorney, Christopher Finlayson KC, pointed to what other alternatives were out there, not only domestically but also by reference to the Canadian framework, for example.

WINKELMANN CJ:

All right, okay, we'll take the adjournment.

MR BUTLER KC:

So just in term – in light of time. I was going to – did you want to come back a little bit earlier?

WINKELMANN CJ:

We'll come back at 2 I think.

DISCUSSIONS REGARDING TIMING

MR BUTLER KC:

We'll be here at 2.

WINKELMANN CJ:

Yes.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.02 PM

MR BUTLER KC:

Thank you, your Honours. I thought I should probably introduce a little bit more of the kadunk of material. So on the top was the handouts, they're numbered, from 1 to 22. Again, I emphasise the idea of this was simply to try to gather some information again as a resource and many of these I won't need to refer to except to say the information is in the table. That's the plan.

So if you look at page 1, I've just tried to gather together in the one place all of the relevant provisions that are in play, as I now understand it, between the appeal and the cross-appeal. I won't be referring to those again. I just thought it might be helpful for the Court to have them for comparative purposes. Then at page 6 is the table I attempted for myself in terms of comparing the *Ilnseher* regime and the ESO and PPO regime. As I emphasised before the break that's my starter for 10. What I've tried to do is refer to the relevant statutory provisions but also pick up discussions of it in *Chisnall* below where I thought that might be helpful. Again I won't be referring to that again.

Page 10 is just a little schematic just trying to emphasise the extent to which the Attorney is heavily involved in this kind of work and, again, I just want to pause on this one. I do want to pause because you'll recall that I said in my outline that one of the things that I suggest the Court should be thinking about, when it's looking at how this all operates, is what I refer to as operational alignment. In other words, the Court is but one actor in this overall exercise, what we referred to in our written submissions as a shared project.

Somebody who is very significantly involved in this constitutional process, of course, is the Attorney-General. I should have included but failed to, but it is in the road map, additional references to the Human Rights Act 1993 because, of course it's the Attorney-General who must be notified wherever a claim is made that a statute is inconsistent with section 19 of the Bill of Rights. So that's a statutory requirement and I'll give you that reference when I come to it in the road map. And what I say is that when we're in the area of constitutionality

because, of course, we have, as we all know, an unwritten constitution which, of course, is not quite right, it's written in various bits and places, one of the things I know the Court does do is try and get a sense of constitutional practice. Practice is part of how our constitution works.

So that's why I thought, having a look at how the Attorney goes about discharging or tackling some of these issues, it might be helpful for this Court, if you accept my underlying premise that it's a shared project, three great organs of State, each of which operating in their sphere, is attempting to fulfil the purposes of the Bill of Rights. That's how I see it.

So page 11 then is meant to be, it looks pretty random, but you'll see the purpose of it is that I have put in click links to various section 7 reports. It's just a selected sample just to give the Court a bit of a feel for how the Attorney undertakes the section 7 task. What it is that various Attorneys – and the reason I've gone back as far as 1997 is just to show it's a consistent practice broadly speaking across Attorneys and the points to draw, I might as well draw on them here now because I'll refer to them in the road map, I think you'll find this material useful because, first of all, it shows you how the Attorney goes about applying section 5 of the Bill of Rights, pausing, largely consistently with an *Oakes/Hansen* type approach. Typically the reports illustrate a working through the stages of the steps but I never read those reports as being – regarding those tests as rigid but rather as things that inform the overall evaluation and, of course, that makes sense because what the purpose of the section 7 reports is, is to inform Parliament as to the Attorney's opinion or view as to whether or not a Bill does or doesn't comply.

You will see when you read the reports, and I do urge that you read them, I make reference to one or two of them in the road map, but there are references to alternatives. Alternatives include not only references to alternatives available within the domestic system but also available to overseas systems. So just as a taster, for example, the Land Transport Bill 1997, the second one down, which is a very extensive report, you'll see, just have a look at how many pages it is, can somebody tell me how many, I can't – 14 pages – contains a number of

references to how equivalent provisions work in Canada, Scotland and other places besides. So my point simply being the Attorney certainly regards looking at other models as being something that's useful for the discharge of the obligation. The Attorney doesn't take the model that is found in the Bill, even a Bill that's a Government Bill, his or her own Government Bill, the Attorney says: "Well I'm happy to look at other models for the purposes of undertaking the section 7 analysis."

The other thing I thought you might find helpful about the reports is how the Attorney goes about expressing the opinion. Sometimes when you look at the reports you'll see the Attorney focuses in on particular provisions and says: "This clause of the Bill is inconsistent but such and such are right." In other cases the Attorney will conclude that the scheme or parts of the Bill are inconsistent, and I say that's consistent, that practice is consistent with what the Commission urges upon you as being the approach you should say to other Courts, who will be doing the hard mahi more often than you will be, that they can go about tackling the form of a DOI.

WILLIAMS J:

Is there anything to be said about options/analyses being a matter within legislative competence but not judicial competence and so relevant for advice to the House but necessarily for judges?

MR BUTLER KC:

No, I would reject that proposition, you won't be surprised to hear, and because one of my next tables I think will address that issue, if I may raise that, but since you've put it to me, Sir, I want to be clear no the Commission would never accept such a proposition as a general proposition. That's not to say that the Commission wouldn't recognise that in a particular area. You need to leave room for politics and political l choice, those sorts of things, but the idea that this type of material is not material that the Courts are competent to have tested by them, it was definitely not accepted.

1410

WILLIAMS J:
Why not?

MR BUTLER KC:
So it's not accepted because actually, there is a legal test, a legal standard. Section 5 lays down a legal standard. The Courts apply legal standards all the time. What is reasonable? Is it – the word "reasonable" is something that appears in any number of statutory provisions, which the Courts analyse by reference to the evidence that is appropriate to the evaluative exercise that needs to be undertaken by the Court in that particular context.

WILLIAMS J:
So these are just counterfactuals in the particular context and the work of the Court is counterfactuals?

MR BUTLER KC:
Correct, correct.

WILLIAMS J:
All right.

MR BUTLER KC:
When you're testing things like plausibility and so on, I'll take you to it again, I think that's important is, that's why I'm keen to put these tables in front of you, is to remind the Court that of course since at least 2002 when Part 1A, and the ancillary provisions giving effect to Part 1A of the Human Rights Act came into force, the Tribunal has had jurisdiction to make declarations of inconsistency and has on four occasions done so, and on other occasions rejected propositions, and it's been able to deal with this type of material, and has dealt with that material. As did the Court of Appeal for example in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 and –

KÓS J:

Sure. But I mean the running here is made by the Attorney. We agree the burden is on them in relation to this part. Of those counterfactuals they have a couple of choices. One is to say this is not a true counterfactual, it is simply not available.

MR BUTLER KC:

Correct.

KÓS J:

It's absolutely unrealistic, cannot be imposed. The other one is to say this counterfactual is no less limiting than the one that's an issue.

MR BUTLER KC:

Correct, that's right. So that's why I say you can't – my submission is you can't have a generic rule it in/rule it out exercise. It very much again is, in law, context is everything. For example, going to the idea of alternatives, and now I'm straying from my own road map, so I –

WINKELMANN CJ:

Well yes, I know you're under time pressure, so we've got to be mindful of that.

MR BUTLER KC:

Yes. So just on that but since it's come up, for example, *Make It 16* and *Taylor*'s case are relatively straightforward cases because either you accept that 18 is or is not justified, and the alternative is 18 or not 18. Or in *Taylor*'s case, you accept that the exclusion of prisoners either is or isn't justified.

We've lost Mr Ellis. He must be bored. Do I need to – ah, here we go.

O'REGAN J:

Here he is, he's back.

MR BUTLER KC:

In other cases, which goes to the point I think that your – may be going to the point that your Honour Justice Williams is raising with me is in other cases, there could be a smorgasbord of alternatives. A range of different counterfactuals. It's not so stark. In which case, the Court might find itself saying so who are we actually to choose between all of what's on offer? That's kind of what Parliament does. So that's why context, it seems to me, can be relevant. But again, what I want to do is take you to some of the Tribunal decisions, the issues the Tribunals had to look at, because the Tribunals had to deal with issues of smorgasbord and what have you. Is that helpful?

WINKELMANN CJ:

Yes, it's very helpful.

MR BUTLER KC:

Thank you. So that's what the purpose of that hand up at page 11 is. At page 12, I've tried to list for your benefit some reliance on parliamentary materials, because that's something that's popped up through your Honour, the Chief Justice's queries about the Parliamentary Privileges Act 2014.

WINKELMANN CJ:

Mmm.

MR BUTLER KC:

I support what you've heard from Mr Keith in that regard, and I would just supplement what Mr Keith had to say, and this is probably worth taking a note on because it means I can skip it when I come to the road map.

Mr Keith took you through *Wilson v First County Trust*. I agree with what – the assistance he draws from that particular case. He also then took you to the relevant sections of the Parliamentary Privileges Act. What he didn't mention, no criticism but just left me with a bit of space to say something a little bit original or different of assistance I hope, which is that of course the Parliamentary Privileges Act 2014 is a constitutional statute. It's an expression of a

constitutional practice and constitutional legislation that is part of our inheritance, part of the Bill of Rights 1688, preserved upon the establishment of the colony and then preserved by the imperial, whatever it was, the Imperial Legislation Act and now in the Parliamentary Privileges. So it is constitutional legislation, but so too is the Bill of Rights and the Bill of Rights is constitutional law and the idea isn't – I think it would be wrong to approach the question of how to interpret the Parliamentary Privileges Act by treating constitutional litigation of the sort that can be involved in a Bill of Rights case as somehow being subordinated to a strict reading, technical reading I would say, of the 2014 Act, rather you make the two of them work together, just as was done in *Wilson's* case.

All I am saying is that in many cases you won't need to rely on parliamentary materials, in other words what was uttered in the House, but my submission is you shouldn't rule out, you shouldn't rule that possibility out that assistance can be derived from that from time to time. As Mr Keith has indicated, in very many cases we are lucky in New Zealand that public interest immunity is not claimed to suppress access to options considered by Cabinet so the reality is that very often we will have access to the materials that were fed into the Wellington machine to get us to the statute that we have in front of us.

WINKELMANN CJ:
So you're rather more aligned with the Solicitor-General on this point?

MR BUTLER KC:
No, I'm aligned with Mr, on alliance – oh well.

WINKELMANN CJ:
Well no because the Solicitor-General says give a purposive interpretation.

MR BUTLER KC:
Yes, I am, quite right. Yes, I am aligned with the Solicitor in that regard, quite right, thank you, sorry.

So all I do at page 12 onwards is just give you a couple of examples just from a number of cases of the sorts of material that Courts have found to be useful. I'm not intending to spend a huge amount of time on it but, you know, for example CPAG, *Child Poverty Action Group Inc v Attorney-General* [2008] NZHRRT 31 is a good example. So there was a wholesale challenge to the statutory provisions that provided for Working for Families. That I imagine (unclear 14:17:10) is something that is the sort of issue that maybe your Honour was thinking of, well crikey, you wouldn't say crikey, but crumbs how does one deal with –

WILLIAMS J:
I'd probably say crikey.

MR BUTLER KC:
Yes. How does one deal with that and the point, I'm simply making a submission, is well the Tribunal and the High Court were able to deal with that. They had the assistance of materials that undertook that and what's really important is having an understanding of what the purpose of the exercise is that the Tribunal or the Court is engaged in. So it's not so much a question of how can one do it but rather what is one doing.

I've given on page 13 just some examples again from the Tribunal, just to give your Honours a bit of a feel for how these cases have been conducted thus far. Page 14 of the hand up.

WILLIAMS J:
Can I just ask?

MR BUTLER KC:
Yes Sir.

WILLIAMS J:

The Attorney's effective waiver of public interest, immunity or privilege, or whatever the correct terminology is, does that arise because the material is justificatory and is put forward that way?

MR BUTLER KC:

So the first point I would make is that this is the material that we talk about that I'm referencing and that one has access to is not privileged material in the sense. Some of it is. Sometimes it's legal advice and that's been provided and the Attorney, as I understand it, will generally speaking assert privilege and respect to that background material but, of course, as we know the practice since the Climate Change Response Bill under the then Labour Government was to say whatever the final form of section 7 advice received by the Attorney from Ministry of Justice or Crown Law privilege is pretty much, as a matter of practice, waived in respect of that. That's why we can always go online and find on the Ministry of Justice's website why it is that the Ministry or the Crown Law formed the view that it was justified or not. And I haven't put any of that material in front of you because –

KÓS J:

Yes, but that's an Executive privilege. We're talking about parliamentary privilege. It's not for the Attorney to waive that.

MR BUTLER KC:

Yes, exactly, correct. That's where I was going. So the privilege that, when one turns to the Attorney, the Attorney waives the legal privilege. When we're talking about the broader privilege in terms of the bundle of material that goes to the Executive, that would be Executive privilege. The State is of Executive privilege in New Zealand is a subject of some uncertainty. In written constitutions, which may be a reason to be advanced against those who advocate in favour of such a thing, in written constitutions there is jurisprudence to the effect that it is a rule that material provided to Cabinet cannot be disclosed so that is in Cabinet discussions and such like that, that for example is the rule in Ireland but we –

1420

WINKELMANN CJ:

We know the Cabinet discussions is the rule.

MR BUTLER KC:

Correct, correct but the materials provided – we do indeed, your Honour – but the state of supporting materials that is fed into it is more open-ended.

WILLIAMS J:

Yes, so the cases you cite here you say establish a fairly consistent approach to the provision of this material in litigation.

MR BUTLER KC:

Yes, yes.

WILLIAMS J:

Material that the Attorney in this case says is effectively not relevant partly because of the nature of the challenge. Do you know whether this material when it is proffered is proffered for justificatory purposes or some other purpose?

MR BUTLER KC:

So proffered within the policy process for example –

WILLIAMS J:

No, no, within the litigation.

MR BUTLER KC:

Within the litigation it's proffered typically absolutely for justificatory purposes. I could imagine in one or two cases it might be used to say, look, it's –

WINKELMANN CJ:

Interpretation.

MR BUTLER KC:

It's interpretation, exactly, but –

KÓS J:

Well that may be so but who is here to speak for Parliament?

MR BUTLER KC:

Correct, and the way in which – that's why I want to come to the point about –

WINKELMANN CJ:

Well that's often a very interesting question.

MR BUTLER KC:

Well it's very much why I have asserted quite strongly in my written submissions, and would like to do so orally, the obligation on the Attorney to turn up and to argue the case for the reasonableness or otherwise of legislation. So I say that that is the role that is expected to be discharged by the Crown, by the Attorney wearing his law officer hat. He's there not as a representative of the government of the day but as a representative of the rule of law. If Parliament has passed legislation, and it hasn't been repealed, it needs to be defended. The idea that we would have counsel for the speaker turn up who would have limited –

WINKELMANN CJ:

Which we have before.

MR BUTLER KC:

Which we have but for very limited purposes of protecting the privileges of the House –

KÓS J:

Which is what we're talking about.

MR BUTLER KC:

Sorry. So here's what, here becomes the question, where does this fit on the spectrum. Speaking out loud, if I was on the Crown side, I think I would prefer that the duty lie on the Attorney to represent the State and the parliamentary manifestation limb of the State for the purposes of defending legislation. That is consistent – that approach is what is consistent with the practice in overseas jurisdictions that we normally compare ourselves to, such as Canada, I've got the guidance from Canada, which is in the bundle of materials, Ireland, the UK and such like.

WILLIAMS J:

There are potentially situations where the Attorney might not want to support the legislation because, for example, a minority government is in place and there is disagreement between the House and the Attorney on these things.

MR BUTLER KC:

Quite, and that is the reason why, Sir, I have suggested in my written submissions that this Court should indicate a constitutional expectation that litigation of that sort is not caught in party politics. This is law officer hat territory, not party political territory. Just in the same way –

WINKELMANN CJ:

Well this just is again a change of government, one Attorney to the next, you know, so.

MR BUTLER KC:

Correct. So this is a bit like the observable practice in respect of the section 7 reports. One of the things that was said on the debates while the New Zealand Bill of Rights Act Bill was before Parliament and was said, from memory, by Sir Douglas Graham who was justice spokesperson at the time for the National party and opposition – I'm pretty sure I'm right in that reference but I can check if it matters. The comment he made is: "I can't imagine what you're expecting the Attorney to dob in on his own, her own team. Not going to happen. Can't see it happening."

Of course, the observable practice now for 33 years almost, is that Attorneys understand they are wearing their law officer hat. You might disagree from time to time about some line drawing that's done by particular attorneys on particular issues, but the general posture that attorneys have brought to discharging their role under section 7 has been one, which I think most commentators would accept, has been discharged fully cognisant of the constitutional significance of that function and with – in good faith honest attempt to discharge that obligation as the Attorney sees fit, not on a party political basis.

I say, and this is what I'm getting at, when I talk about operational alignment, that observable practice within the House, I say when you translate into the mahi that is done in a court or a tribunal what it looks like is an expectation that a good faith attempt will be made to justify legislation, where that's able to be done, and I think, I think we're at a stage now where the Court can say that is a reasonable constitutional expectation, to make this important function work. Remember Parliament has signalled that it wants it to work through the enactment of sections 7A and B, and through the standing orders, I have the standing orders in the materials for you.

KÓS J:

Well I think we saw in *Make It 16* the importance of the Attorney-General taking every available argument on each limb.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

Well not every available argument.

MR BUTLER KC:

No, well, I don't want to stand between the members of the Court so I'm going to stand, not above it, but to the side. I can't obviously be above your Honours.

WINKELMANN CJ:

A responsible argument.

MR BUTLER KC:

But I do make reference to *Make It 16* not with a, to agree or disagree with the result on the particular case, but to respond to the, I would say, you may disagree, the concern or the query, whatever the right word is, that the Court had about are we having everything put in front of us.

KÓS J:

That's all I'm…

MR BUTLER KC:

That we ought to have in front of us in order to be able to make a fully informed decision, and I will take you, it's in the hand up, I will take you to similar concerns expressed by the constitutional court of South Africa, and to commentators in Canada wanting to make sure that as a matter of practice we do this stuff right, and doing it right depends, no criticism intended to anybody here to my right at all, obviously, because we're all in new territory somewhat, but it depends on it being approached in the right way. Now what I say, it's new somewhat, what I mean to say is it's new in the ordinary courts, but we have been doing this since 2002 under the Human Rights Act, and when you look at the cases you'll see that broadly speaking the Crown will turn up with evidence, and will attempt to justify what it think is justifiable even, for example, in the *Adoption Action* case where it was agreed by everybody, look, this Adoption Act is ancient, and is no longer in keeping with social mores, where certain things that the Crown said, look, we just don't think we can justify certain aspects of it, but here's some helpful material, because you ultimately, the Tribunal, are the one that's got to make a decision on this, and then in other cases, in other aspects of the legislation the Crown said, here, we think there's a good argument to be made as to the reasonableness or otherwise of a particular provision which was rejected by the Tribunal, but the Tribunal had the benefit of the Crown testing it.

WINKELMANN CJ:

And it's actually pretty critical that there is a clear understanding as to what the expectation is because you can see it is new territory for everybody and there is a need for it to…

MR BUTLER KC:

To work.

WINKELMANN CJ:

To work. Mr Butler, just before we leave this topic, so we don't have a speaker here, it is a Parliamentary Privileges issue, but I suppose Ms Jagose –

MR BUTLER KC:

I don't –

WINKELMANN CJ:

I think we just assumed that Crown Law has dealt with it as it sees fit.

MR BUTLER KC:

Here's my take on the constitutional position, and again this is me going back, I told you I'd bore you, and I am going to, operational alignment. This is not a new issue. The Human Rights Act Part 1A regime that allowed DOIs to be sought in respect of statutory provisions, has dealt with the issue. The notification, when a complaint is made against a statutory provision that is said to breach section 19 of the Bill of Rights, is not made to the speaker, is made to the Attorney. You can take that as parliamentary tick to the idea that in a DOI case it is the Attorney who ponies up and who defends the legislation and represents the Crown.

WINKELMANN CJ:

Right.

MR BUTLER KC:

So I say I'm not asking you to do anything different from what Parliament has already approved in terms of the right way of tackling it.

WINKELMANN CJ:

I was rather thinking more of the parliamentary privileges point, because sometimes we've had the speaker make representations on that. But I think…

MR BUTLER KC:

Oh I see. I see what you're saying. So if in a particular context one of the parties wishes to raise something that was uttered in the House…

WINKELMANN CJ:

Well it's more that we asked about it, I think, that…

MR BUTLER KC:

Yes, I get you. okay.

WILLIAMS J:

The long and short of what you're saying is that the law offers a senior law officer speaking for the legislation in a DOI case, is the best mechanism to ensure the conversation between the branches of government is principled and constitutional.

MR BUTLER KC:

And fruitful, correct.

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WILLIAMS J:

And constitutional?

MR BUTLER KC:

And constitutional, quite right. I would say, I said at the outset, you might remember there was four things I said that when you're thinking about how you go about this exercise that one of them was fit and operating within our

traditions and innovation. I see this as one aspect of that. There is now a 20-year tradition of the Attorney fronting up to the Tribunal on – and defending the legislation. Even legislation that was not introduced under the auspices of that Attorney's government.

So then if we look at the next part of the hand up, page 14 to 16. So these set out the provisions about reasonable limits from a range of different statutory and constitutional texts.

KÓS J:

I should know this. There's nothing in the Human Rights Act that's parallel?

MR BUTLER KC:

To this? No.

KÓS J:

No, yes.

MR BUTLER KC:

The Human Rights Act just makes reference to section 5. The great thing the Human Rights Act did do was it made it plain that section 5 is part of the equation.

KÓS J:

Yes, I'm sorry, I was referring to the United Kingdom one.

MR BUTLER KC:

Oh, sorry. No.

KÓS J:

No.

WINKELMANN CJ:

What –

MR BUTLER KC:

So it's because the United Kingdom one just schedules the European Convention to the back.

KÓS J:

Yes.

MR BUTLER KC:

So it doesn't say anything substantive about particular rights in the body of the Act itself.

WINKELMANN CJ:

Although it schedules them.

MR BUTLER KC:

It schedules them but they're – but just replicates. It doesn't, in other words, have a section 5 equivalent.

WINKELMANN CJ:

It doesn't have a different take on it?

MR BUTLER KC:

Correct.

What I think is interesting about these provisions, and I just will make the point and then it means I don't have to dwell on it, just while we're in there, is if you have a look at them, particularly the Australian ones, but equally the two African ones being South Africa and Kenya, you'll see, just take for example, let's just take – shall we just take the Victorian one? So number 4 – section 7(2): "A human right", so they list their human rights, "a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society", that sounds pretty familiar territory, "based on human dignity, equality and freedom, and taking into account all relevant factors including." So, typically this is understood is here is factors (a) through to (e)

which are regarded as pretty much always going to be relevant, and there may be other factors to be taken account of in any particular case.

A similar style was adopted in the earlier Human Rights Act 2004 of the ACT, which is on the next page, heading 5. Equally at number 6, the Constitution of South Africa. Now you'll recall your Honours that in our written submissions we did make reference to the fact that in South Africa the approach has been to abjure a mechanistic application of the *Oakes* test and to adopt a more evaluative factorial approach, structured. So you will often see headings that you'd expect to see in a Canadian case with the headings. It's just not mechanistically applied.

Of course, the important thing to recall is even in Canada, the Supreme Court post-*Oakes* has been at pains to emphasise that the *Oakes* test is not a test as such to be rigidly applied, it's rather a framework which can help elucidate the ultimate test which is that of whether the limit is reasonable and justified in a free and democratic society. My authority for that is the *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 case and the judgment of La Forest J page 229 to 230, I think from memory, though my memory may fail me. Is that right? Towards the bottom. My memory does fail me, I've got the wrong page. 269, sorry, 269 to 270. Might as well just pull it up because then I don't need to refer to it again, 269's at the bottom of the page, from memory.

Do you see there the paragraph: "It is my view that Chabot J's approach was not the correct one…civil burden of proof must be 'applied rigorously'." You see at the very bottom: "I find it necessary to clarify in more detail the nature of the error. Throughout his judgment, he referred to the requirements set forth in *Oakes* as a 'test'. In so doing, he adopted the view, unfortunately still held by some commentators, that the proportionality requirements established in *Oakes* are synonymous with, or have even superseded, the requirements" of, and then goes on.

So even in Canada *Oakes* is not a test to be rigidly applied, rather it's a framework. I think it's referred to here as guidelines. "These guidelines should

not be interpreted as a substitute for section 1 itself," because what you're always trying to do is test the reasonableness of what's in front of you, and that's why in our written submissions we've said the important thing is to focus on what you're trying to achieve rather than the words used to describe in particular cases how that has been achieved.

So that's that part of the hand up and then at page 17 of the hand up I've put forward examples of how judges favour the least BORA inconsistent interpretation, and the relevance of this, your Honours, and again I've given you the cases, as many of them where it happens, is because very reasonably my learned friend, the Solicitor-General, has said to you, look, the Crown says that the word "may" in the ESO and PPO legislation means "may" and that means a court could decline to make an ESO or a PPO if it would otherwise produce a breach – that may or may not be right. What I want to say here, however, is that even if your Honours are of the view that the statutory scheme is Bill of Rights inconsistent, for, for example, it fails to meet the prescribed by law standard or it fails to be therapeutic enough, my proposition is that even though it might be Bill of Rights inconsistent you can still draw on the acceptance made by the Solicitor that you can try and read down a statute. In other words, the purpose of section 6 of the Bill of Rights isn't simply to produce outcomes that don't infringe the Bill of Rights.

WINKELMANN CJ:

It's not dichotomous.

MR BUTLER KC:

It's not dichotomous. Thank you, exactly what I'm saying.

KÓS J:

Yes, that must be so. But that's really before we get to the section 5 departure.

MR BUTLER KC:

Yes, and I say if you're trying to square that use of section 6 with, well, it's a Bill of reasonable rights, which is the language that Professor Rishworth uses so

effectively and often and it's a really nice way of capturing things, of course, it's not just a Bill of reasonable rights. It's also a Bill of rights that are prescribed by law, and to be prescribed by law, the idea of prescription by law includes interpretations that are beneficial to the protection of civil liberties.

KÓS J:

I mean I worry about that expression of Bill of reasonable rights because I think that truncates the process.

MR BUTLER KC:

It does.

WINKELMANN CJ:

Lots of people do worry about it.

MR BUTLER KC:

Yes, and I understand why. I'm approbating it simply because I think it is a way of capturing an essence of something. It can be helpful but it can be overegged and I –

WINKELMANN CJ:

The reality is that all of the international covenants are actually Bills of reasonable rights because they allow reasonable limitations on them and that's all it captures, isn't it?

MR BUTLER KC:

Correct.

KÓS J:

Exactly. It's the end point.

MR BUTLER KC:

Correct, that is the end point, and then I think this is the last item in the hand up is page 18. So this is a summary table of some of the DOI cases in the Tribunal and ordinary courts, and what I do here is I'm noting the role, the use to which

section 7 reports have been put in those cases. I've noted those cases where section 6 has arisen for discussion or not and I also discuss evidence that's been raised. I just thought in one place this might be a helpful resource for you to go to because actually putting this together took – this was not an overnight job, as you will understand. I had this ready in case this was territory that your Honours were going into, conscious of my 25-page limits, and my sense of yesterday and today is this is territory you're interested in exploring, so I think you might find this a useful jumping off point if you want to explore how these sorts of issues have been tackled before.

But a couple of things I did think were interesting about it, if you look at the column: "section 6 BORA involved?", quite a lot of these cases there's no issue about section 6 for the Bill of Rights because just no way to read, there's no interpretation job.

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Now the reason that was important, to put in this table, is to address the issue on behalf of Ma'am Solicitor when she was saying, really DOIs still have to have an interpretive aspect or element to them. That's not consistent with the way in which, that's not a requirement under Part 1A of the Human Rights Act. The Human Rights Act doesn't say you can seek a DOI so long as you do so having first tried to achieve, explored whether or it's section 6 consistent in the individual facts of a particular case. It's not how it's expressed. In many cases it will be obvious. Here's what the statute says, there's no other way of reading it. The question really is, is it justified or not.

KÓS J:

But I mean section 6 is surely always involved. When you're interpreting the primary legislation.

MR BUTLER KC:

Correct.

KÓS J:

Yes.

MR BUTLER KC:

And of course in many ways *Fitzgerald* shows that because ultimately, and this is one aspect I must concede to – not concede but acknowledge. It hasn't been stated but it should be acknowledged I think for the Court to be able to grapple with these issues should acknowledge, that sometimes through the process of a particular case focused on a particular individual a court can see a way through, through section 6, that can remove some, if not all, of an inconsistency that might not have been obvious at the time at which the legislation was enacted. That, to me, is, *Fitzgerald* is an example of that, I think.

WINKELMANN CJ:

Well we certainly thought it was.

MR BUTLER KC:

Yes. Quite. So that's what makes the work of the Court a little bit different from the work of the Attorney. The Attorney is working with a Bill. The Bill is prepared often under exigent circumstances. So sometimes the Attorney just doesn't have the luxury of time to be able to explore in detail all of the ways in which legislation could be read consistently with the Bill of Rights. So it's not something that any of the other parties have raised, but I think I need to raise it for the Commission because the nature of the work the Court does is different. That's an example of how it's different. But in many cases my point simply is, in many cases that section 6 isn't realistically on the table.

An example of that was *Howard*, the very first DOI that was made, that's the first item in the table that I've given to you. A successful challenge raised to a provision in the old ACC legislation. You'll see in the column evidence raised you'll see quite a bit of evidence that was raised to explain the policy behind the provision, and the Tribunal looked at it all, and felt no. This is not minimally impaired, effectively.

So I hope that table will be a useful resource to you, to give you just a feel.

WINKELMANN CJ:

I believe it will.

MR BUTLER KC:

Thank you your Honour. Then the last is at page 21. So this is the formulations of DOIs. Again, just a selection to give you a feel for how it's been tackled. So I've given you, at page 21, the first four are just examples I've taken from decisions of the ordinary Courts, if I can call them that. Then the next examples are the Tribunal. Obviously the Tribunal sets out in great detail in its reasons what the nature of the inconsistency is. Then I've given you some examples from the UK.

WINKELMANN CJ:

We can hear you Mr Ellis. Mr Butler is mortally wounded.

MR BUTLER KC:

Mr Ellis not able to offend me. So your Honours that was the purpose of those tables. Taking you to them means I can skip over quite a bit of stuff I've outlined to say in the road map, because it just summarises what's – the road map summarises the material that's in those tables. So if I can go back then to the question I was asked just before the break about penalties. What's the approach to be taken on penalties. You'll see that the approach that the Commission is adopting in the written submissions, and I adopt here again today, is as I said we're not trying to get between the parties on this. But if I was nailed against the wall and said, come along Mr Butler, tell us your view, we'd like to hear your view, in my view the concession that is being made that this is a penalty is the correct one, and it would be a correct one even if we didn't have it on a basis that Madam Solicitor argues, i.e. that in New Zealand we've got a broader approach to penalty, it is a penalty. It is also a – if for the purposes of some of the other provisions section 22, for example, it's a detention regime and all those sorts of things so we shouldn't lose sight of those and I would just simply adopt the approach, the tests and approach adopted in

Belcher and *Chisnall* and I would also note the section 7 reports prepared by the Honourable Christopher Finlayson in 2009 and 2014 –

WINKELMANN CJ:

I was rather more interested in my question, and I might have been obscure and the question might be too obscure, in whether the sort of slice and dice approach which is taken to the right, which I haven't heard previously, and I might – it may be that there are other people who have analysed the right in that way, tends to erode or abnegate what right in a way. I was wondering about whether you've come across this before or…

MR BUTLER KC:

No, no, I haven't. No.

GLAZEBROOK J:

Slice and dice?

WINKELMANN CJ:

Well because this is how I conceptualise Ms Jagose's submissions really, that there are two kinds of penalties really.

GLAZEBROOK J:

Okay, I understand.

MR BUTLER KC:

And the only thing I would add to that is, as I understood the way that the Crown conceptualises the concept of penalty, it says for New Zealand purposes it's not just about punishment it's also about prevention, and presumably that's made in the context here of say, for example, the PPO Act because if you look at the objective section 4 and you look at the principle section 5 they say it's not about punishment, it's about prevention. So for that reason then Madam Solicitor would say: "Well since I acknowledge the prevention dimension as being sufficient to erase penalty, then I have to accept that PPO falls within but I want

to emphasise when you're looking at the justified, the justification for it's about prevention, it's not about punishment –

WINKELMANN CJ:
What I thought you might – you haven't finished.

MR BUTLER KC:
So what I was coming to say was but if prevention is what – a prevention is sufficient to come into penalty, I wonder then where does that leave something like, you know, compulsory treatment under the Mental Health Act because that's about treatment but it is also about prevention, self-harm and harm to others so that's probably as far as I can take –

WINKELMANN CJ:
Well what I was going – I thought you might have some more rights overview type of view that might assist us which is that when you look at the rights they don't tend to – your right isn't defined by what another person's motivation is for taking away from you –

MR BUTLER KC:
Correct.

WINKELMANN CJ:
It's your experience of it so –

MR BUTLER KC:
Correct.

WINKELMANN CJ:
– motivations tend to sit somewhere in the justification not at the rights definition right point?

MR BUTLER KC:
That's right and that's a fair point and I think if you look at the cases that – *Ilnseher* and some of the cases that precede it, they do talk about what

the impact on you is because typically when you're defining the right, you look at it from the perspective of the rights holder, when you're looking to limit it and see whether the limit is justified, you're looking at it from the perspective of both the rights holder and the relevant public interest that is being advanced to seek to limit it. So to that extent yes, your Honour, I would agree with that overarching point.

GLAZEBROOK J:

It's not quite a dichotomy anyway because the Sentencing Act is about rehabilitation, prevention, safety and explicitly in certain sessions.

MR BUTLER KC:

That's correct, your Honour, and that's why, for example, Judge Pinto de Albuquerque in his dissenting opinion says: "Really this is just a relabelling." I mean he's really strong on the relabelling point. He's just saying you're just trying to convert something that clearly is a punishment and a penalty into something that looks like it's not a punishment or a penalty by fiddling around with a couple of labels and saying it's therapeutic when we – how do we know it's therapeutic. All I can say to you is the European Court has decided, understandably after how many cases did it have in Germany in respect of preventive detention? It must be right up there with the cases from Italy about delay in the court system, and there's just buckets of cases on preventive detention from Germany. So I think my read of the cases, if you're standing and stripping it all away, is to say: "Look we're satisfied. We know we are never going to get Germany to abandon the idea of preventive detention which has been part of their law for a long time. What we're looking to try and do is narrow its reach and sharpen its focus on what it's trying to achieve." All right, so if I go back to the hand up, please. So in the hand up –

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WINKELMANN CJ:

Are you in your road map now?

MR BUTLER KC:

Sorry, yes, I beg your pardon, the road map, that's what I meant. So I say that when you're looking at these three issues of the substantive test of reasonableness and the burden of proof as well as "prescribed by law", you should be approaching them against the backdrop of the purposes of the Bill of Rights, to protect, promote and affirm human rights and New Zealand's commitment to the ICCPR. I think it's right to think about the BORA as a shared project for the reasons set out in the written submissions.

There is a utility in having an operational alignment. Not saying it's always going to be the same everywhere. I gave you an example of interpretation: not reasonable to expect the Attorney to explore every interpretive possibility on the face of a Bill; very reasonable to expect a court to explore interpretive possibilities; very reasonable to expect the Crown, if defending legislation that is attacked under a DOI, to advance what it says are the constructions of the statute available because it has time to do that; and, of course, the culture of justification.

Now I wanted to remind the Court of what the *White Paper* says, and if I had more time I'd take you to that but I'll just note at page 6 of the *White Paper*. Presciently, one of the points that Sir Geoffrey was making with the Bill of Rights is this is not meant to be a measure which is focused simply to judge – talks to judges. It is one which sends "an important set of messages to the machinery of government itself," and the message is "certain sorts of laws should not be passed, certain actions should not be engaged in by government," and I want to come back to that phrase in a moment. It "provides a set of navigation lights for the whole process of government to observe." So I say that language supports my operational alignment type approach.

Could I come back to the second of those: "Certain sorts of laws should not be passed, certain actions should not be engaged in by government." I say that understanding of the Bill of Rights feeds into section 5 of the Bill of Rights. So when I appeared in front of this Court in *Fitzgerald* one of the things I said to the Court was when thinking about the structure of the Bill of Rights, and in

particular what purpose section 5 fulfils, section 5 in a way is about identifying outcomes to be avoided. I think there was an exchange, your Honour, the Chief Justice, between you and Madam Solicitor yesterday to that effect. I think you put it to my learned friend something to this effect: so what are the outcomes, the unjustified limits, that we should be seeking to avoid? And that is a way, I think, it's a helpful way of thinking about section 5. Section 5 is about ruling out things: "You shall not do this." But it's not saying: "You must do that." So it leaves choices available to Parliament, or to government actors, but identifies certain things that can't be engaged in.

Now could I take you to the *White Paper*? Within the *White Paper* which is up on the screen, could I just take you then to paragraphs 10.24 to 10.34 because that's where the *White Paper* talks about the Bill of Rights, about section 5. Could I commend the whole of this discussion to your Honours, but could I particularly ask you – so 10.26(e), see: "New Zealand courts will be able, in this respect as in others, to take advantage of the developing jurisprudence of the Canadian Courts." So already at that early stage there was an expectation that the way in which the Bill of Rights, but particularly section 5, would be approached, what's now section 5, would be approached, would draw on what was happening in Canada.

If we look at 10.28, this talks about "prescribed by law" and you'll see it says "law" can be any number of things but it "must be adequately accessible to the public and that the law must be formulated with sufficient precision to enable those subject to it to regulate their conduct," drawing on relevant overseas cases, and a good example is given towards the bottom of the page of the Ontario Court of Appeal and what I call the Ontario censorship case, so it's *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583. Now that was a case that allowed censorship to be undertaken in a very broadly expressed statute. I think it was just called the Censorship Act and if you looked at the Censorship Act you would have no clue about what criteria were to be applied by the censors other than that they had a power to censor. So, in other words, a power was conferred, a discretionary power, obviously that power had to be exercised consistently with section 2(b),

I think it is of the Canadian Charter, but the Ontario Court of Appeal quite rightly in that case said: “But that's not good enough. You can't rely on us the Judges through judicial review to correct any error of the censors. Laws like this in order to meet the prescription by law prescribed by law standard actually have to do the work.”

And that theme comes through at the bottom of the paragraph 10.28, if you see the last two sentences: “It's important to note that this position … It does not say that a censorship law cannot be passed,” so it's three sentences: “Rather in essence it sends the matter back to the legislature. The legislature has not yet done *its* job which is to make law, to prescribe limits. It is that that the Court is asking it to do.” In other words, what the prescription by law, a purpose served by it is to say sometimes your architecture, the way in which you do things, the way in which you go about writing it, is inadequate. 10.29 –

KÓS J:

I mean for my part I wouldn't go that far. It seems to me you are saying to Parliament: “This is what you’ve done. It does not meet this test. Over to you.”

MR BUTLER KC:

Yes, yes, and particularly now because we’re not Supreme Law Bill of Rights anymore, you're quite right about – I agree with that reformulation, recasting, so you're quite right about that. 10.29 talks about the burden and then 10.30 talks about what the test – how the test is and how it works. I would definitely ask you to have regard to that.

In terms of onus being on the Crown, I'll just remind your Honours in the Human Rights Act that is very clearly cast on the Crown. Section 92F(1) does that. It's a very clear allegation of onus. And then I've made reference to *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88 and to *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, [2016] 1 WLR 1505 as being cases which are helpful on the issue of in accordance with the law and the approach to proportionality and then *Miranda* is particularly helpful on the prescribed by law standard and I've made reference

to the selection of section 7 reports that was in the hand up at page 11. I'm not going to take you to those because I've already, through the hand up, told you why I think they might be helpful to you, the adoption of the *Oakes/Hansen* approach, the structuring of the analysis undertaken by the Attorney leading to a conclusion.

I'm now over the page with my road map, so I've already reiterated the point made in *Fitzgerald*, and I noticed a couple of times yesterday I was able to note down roughly the time when there was a particular exchange. I've done my best to be faithful in my reproduction of what the exchange was and the time, just again to help your Honours if you want to go back to the transcript and see where the exchange took place. I think a particular purpose of section 5 is this purpose of culture of justification and that theme has been picked up in the judgment of Justice McLachlin, as she then was, in the *RJR-MacDonald* case at 128, 129. Limits must be “demonstrably justified, based on “evidence or established truths”, not “mere intuition” or “deference to Parliament’s choice.” So that at least advances some of the thinking or some of the basis, your Honour, that I was making reference to when I was responding to your comment to me earlier today and this was regarded as being a bottom line by Justice McLachlin.

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So then turning to the reasonableness test. I say that in deciding what tests to apply to assess the unreasonableness of a statute, or reasonableness or unreasonableness, generally the *Oakes*/*Hansen* substantive tests are adequate and appropriate. I've given you the hand up with the overseas approaches, which have slightly different formulations but relevantly, I think it’s fair to say, don’t capture radically different ideas. So the things you should be looking for are very much shared, and of course that’s no surprise because however you express the factors or criteria will be based on precedents such as that found in Europe, Canada, views expressed by the Human Rights Committee under the ICCPR, and they all tend towards similar formulations of the sorts of factors you are to consider. And why do we have, what is the purpose, standing back what is being sought through these guidelines,

frameworks, phrases. One, I suspect one reason why people like to state, the Court's like to state them as *tests* to be followed, is to achieve consistency and provide guidance for the lower Courts, and that's a perfectly sensible and orthodox approach of a higher court.

WINKELMANN CJ:

So the difficulty people have experienced with *Hansen* is because it does more than simply include the proportionality test, it has the statutory interpretation up the top and people are confused by it.

MR BUTLER KC:

They are, yes. But I think when you look at this, the approach to the reasonableness aspect, and also on the dicta on prescribed by law, I think *Hansen* broadly gets it right, and when you look at how the majority and minorities, because Justice Blanchard obviously dissented on the issue of reasonableness, what you see is that the phrases that have been used really did help distil and focus the attention of the Court on what's going on here in the evaluative exercise that was undertaken. Broadly speaking, Justice Blanchard, as I read it, felt that the measure, the reverse onus, achieved sensible and appropriate public policy outcomes, in light of the material that was available, and the majority felt, no, you could achieve those public policy goals with a less onerous onus. But none of the Judges, as I read the case, were saying, gosh, we can't be doing this.

So what the test is trying to achieve is consistency. Now the reason I'm just dwelling on these things for a moment is because I would hate to find myself in the position of saying to the Court, because I don't think it would be right to do that, just throw it all in the bin and just say, hey, it's always law, law's context is everything and, you know, you don't need to think about these phrases, because I think if you're down in the Tribunal, or the High Court, having something that gives you a sense of more or less certainty about how you should think about tackling these issues, is very important, as it is for the parties, for litigants to know what they need to be testing on. What should they be looking for.

O'REGAN J:

I think in *Moncrief-Spittle* the idea that a less structured approach was appropriate was partly because of the nature of the decision-maker.

MR BUTLER KC:

Yes.

O'REGAN J:

But it was also significantly the nature of the decision itself.

MR BUTLER KC:

Correct.

O'REGAN J:

So even if a Court had been making that decision, as the Court had to eventually, it was still appropriate to take the less structured approach.

MR BUTLER KC:

Yes it was, and I think it's a recognition of the fact that in an environment like the environment within which the decision had to be made, to pretend that one could recreate it as a situation which things could be undertaken at a leisurely pace, examining all possibilities, that's just not a test that is realistic in the real world in which that decision had to be made. In other words, to hold a decision-maker to a standard that simply didn't make sense in that particular context would be judging somebody, with the benefit of hindsight, in a way that's just not realistic. The person would turn around and say, well how am I ever meant to do that. Now what it doesn't mean, this is the important thing I think for the future order, doesn't mean that in a future case where there might be more lead in time, threats to particular protests and events that are going to take place, that the Court might say, well you know what, we kind of told everybody what to expect, or how things should be balanced in *Moncrief-Spittle*, and over time we get more experience and we would expect people to have a template or a way of thinking, information available depending on the time that's available. Does that make – even if you're not agreeing, does that make sense

in terms of how it is you might adapt the application of the test to the context being the environment at the time, the nature of the decision-maker, those sorts of things.

WINKELMANN CJ:

Well every time we make a sentencing decision we're doing a mini Bill of Rights Act.

MR BUTLER KC:

That is correct.

WINKELMANN CJ:

So I think the Court had that in mind in *D* when we said that there's not a full proportionality, not an *Oakes* proportionality approach required.

MR BUTLER KC:

That's right.

GLAZEBROOK J:

It doesn't mean it's a lesser approach either, which the –

WINKELMANN CJ:

But it doesn't mean it's a lesser approach.

MR BUTLER KC:

That, I think, again if the Court had an opportunity to really – because that point does come through very strongly, the Court couldn't have said it in a sense more strongly.

WINKELMANN CJ:

Mmm.

MR BUTLER KC:

But I think repetition would assist. Can I give an analogy?

So one of the things post *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA), so *Moonen*, when *Moonen* came out, *Moonen* was a bit of a revolution in many ways. But *Moonen* then had to be applied by Bill Hastings and his team. I think Bill was the Chief Censor at the time. By the -

WINKELMANN CJ:

I think it might have been before him. Anyway, carry on. He's not that old.

MR BUTLER KC:

Yes. Then by the off – by the appeal board, the Film and Literature Board of Review. So one of the things that was interesting is those organisations chose to adopt the structured quite detailed section 5 approach to considering censorship decisions, as did for example the Broadcasting Standards Authority, so I don't know whether any of you sat when you were in the High Court on an appeal against a BSA decision, but if you did you will see that the BSA does the evaluation and then works through section 5. So that's an administrative decision, but those administrators were able to adapt, work with and work within, a section 5, a structured section 5 analysis more or less immediately, perhaps expediently because they felt they had to. But over time they'd been able to make it work.

So what I'm trying to say is some time – it's not always going to be the case that an administrator's not able to give effect to a more structured approach like a *Hansen* approach.

WINKELMANN CJ:

Specialist administrators.

MR BUTLER KC:

Correct, might well be able to achieve it. Or, in the Courts in the right case, because Courts are used to having structured decision-making, so – but always want to come back and say the purpose of this –

WINKELMANN CJ:

Well we're specialist administrators of the law, aren't we?

MR BUTLER KC:

You are, quite. I'm glad you said it. I didn't quite want to go there. But that is the point. But what you, what Courts always emphasise is having gone through the structure, and this is why the analogy with the Sentencing Act is such an apt one, and I didn't want to move away without drawing on it, is the Courts always say having gone through the steps, the stages, we've got to do this, as I understand it, you do the stand back and say overall, does this feel right at the end. So there is that element of assessment or evaluation that takes place. It's not an unthinking application of the relevant provisions in the Sentencing Act and that's, I think, is the sort of thing I'm trying to say about the approach to *Hansen*/*Oakes* test. Broadly speaking, it's a good test. But as La Forest J said in *RJR-MacDonald,* to treat them rigidly and apply them rigidly, that's not exercising judgement, with an "e" or evaluation, and ultimately whether something does or doesn't pass muster under section 5 is an exercise of evaluation and judgement, just like in sentencing.

But coming back to my point, the reason why we still articulate things like a test, as if they're a test, is to achieve consistency for the ants like me who are trying to run around, try and make the system work on a daily basis. Transparency, so making people go through those stages does help transparency, and that's why I put in front of you the Attorney-General reports because attorneys have consistently stepped through those in a way of identifying possible changes.

Now the reason I wanted and also to show you those reports is, you'll see that for example, if you look at the last one that I gave you which is the Attorney-General's report on income, the Taxation (Income Tax Rate and Other Amendments) Bill, not, I know an auspicious titled Bill, and not one that I can see, and I do see a few stifled yawns coming out the minute I put up taxation.

WINKELMANN CJ:

I thought it was – oh.

MR BUTLER KC:

But what's really interesting about this, this was the provision whereby the rich listers were going to have all of their information gathered up. Section 17GB, I think it was, is what was going to insert into the Tax Administration Act 1994 I think it was going to be.

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Yes, so you see summary, Taz can you just go down. So clause 33 of the Bill inserts proposed section 17GB into the Tax Administration Act, and the idea was that you were going to have to cough up all your information to assist the Commissioner to develop "for a purpose relating to the development of policy for the improvement or reform of the tax system."

So let's just stand back. So the idea is that the State has got the power to come to you, your accountant, and say to you, hey, you're going to cough up everything you've got. We don't suspect anything about you. We're not using, we don't want information to assess you for tax. What we want to know is how well is the tax system working and in order to be able to do that we'd like to see what your effective tax rate is that you're paying, so please provide us with the all the information we want. So quite a big chunky power I'm sure you'll accept in terms of section 21 of the Bill of Rights and what have you.

If we go down and we track, if we can go right down to the bottom of it please Tas. So you see the conclusion, your Honours will have time to go through. "I have concluded that clause 33 of the Bill… inconsistent with the right to freedom of expression, and the right to be secure against unreasonable search and seizure…" as it's written. But then the Attorney goes on to say: "I consider that if the Bill contained a provision to ensure that information, provided in response… would not subsequently be admissible in proceedings against the person… would be consistent."

What ended up happening, your Honours, was that as a result of this report prepared by the Attorney, that is exactly what happened. So at a later stage of the policy development, of the development of the legislation, a clause was

inserted to reflect this issue that the Attorney had picked up. So I just wanted to use this report to say to you that these are not just arid exercises and tick box. The Attorney identified this issue through the policy exercise, said here's a solution and the solution is adopted. What I'm trying to you is it's through the process of working through the steps, the structured examination provided for by *Hansen* and such like, you can see for yourselves, that helped throw up the issue, identify what the issue was and then identify here's a solution potentially, and that was adopted. That, to me, is the system, that's the Bill of Rights working, it's the shared project.

So just looking through the road map I think I have dealt with what I need to deal with in terms of the reasonableness test, other than to ask you to quickly look at, not now, but if you could just put a little "X" around the reasonableness test and just go to paragraph 34 of my written submissions at a later point, I'll be grateful.

On burden, I've taken you to the relevant part, so I don't feel I need to take you to that, other than to note that a wide range of legislative materials and others can be adduced to discharge the burden. I've given you that table which shows you the sorts of evidence we're talking about. I make reference to *Miranda*, so *Miranda* was about the Terrorism Act. One of the things that the Supreme Court looked at there was the very many reviews that had been prepared. There was a requirement for annual reviews of the Terrorism Act undertaken by, I can't remember whether it was Lord Carlile, but somebody equally worthy, and those reports were used by the Supreme Court to say, well look, when we look at these reviews of the legislation the reviewer is pretty clear that legislation of this sort is very necessary, with the benefit of detailed consideration of how it's been deployed at times. So that's just another example of the sort of, you know, that was a statutory requirement and then a report was prepared by the reviewer, which I understand was under the command and so went to the House of Commons. So quasi-parliamentary material.

In terms of prescribed by law, so in the hand up I've indicated that prescribed by law involves a range of elements reflecting rule of law considerations.

I've given you a citation to *S and Marper v United Kingdom* (2008) 48 EHRR 1169, GC, which in turn was cited in *Beghal*. I think this has come up, so it's just on your screen, and you'll see that while the *White Paper* described the understanding of what prescribed by law meant as at 1985, drawing on *Malone*, you'll see that the understanding now about, in accordance with law, goes further than that, and you've got that reference to *S and Marper*.

WINKELMANN CJ:

What about in a situation where there isn't clear – people are administering the law – well, this is off-point and I don't think we've got time to describe it – but just in general administration and it comes up that a freedom of expression right has to be limited by something else, but there's no regulatory or statutory framework. Is "prescribed by law" then possibly the international law, the recognised limits?

MR BUTLER KC:

So where I say "prescribed by law" kicks in in an instance like that is let's say it's a power that interferes with freedom of expression in a way that is not at the core of it, so contrasts with my Ontario censorship law. Let's say, I don't know, it's a professional regulatory statute and there's various powers to direct certain things and the power is used to suppress or, I don't know, limit somehow freedom of expression in some way or other. You might say in that instance, well, look, the power is available because we should interpret powers, you know, liberally or whatever, in accordance with whatever, generously in terms of the Legislation Act. But "prescribed by law" requires that provision to be read at least in accordance with the principles of common law which read down narrowly, not to be taking away rights, et cetera, et cetera, and you would use section 6 to also read down and achieve an outcome that is consistent with the Bill of Rights.

So in many cases what you would be doing is you would be saying, look, prescription by law can be achieved by the Judges doing the work, a bit like what was suggested by the Solicitor-General yesterday. But in other cases it's simply not good enough to say: "Leave it to the Judges." That's why I gave you

the example of the Ontario censorship law. Yes, you could say, well, the Judges will always fix it up afterwards on a judicial review or an appeal, but is that really appropriate in the context of a censorship law? No. Why? Because the point of a censorship law is not simply to censor but to give people good notice of what will be censored, how it will be censored, what criteria will be taken into account as part of the censorship exercise.

GLAZEBROOK J:

Well, or the other thing it does it is assume everything comes before the Court, doesn't it?

MR BUTLER KC:

Exactly. Correct.

GLAZEBROOK J:

And, of course, it doesn't because people have to administer things.

MR BUTLER KC:

And, of course, it doesn't. Exactly where I – thank you, your Honour, Justice Glazebrook, and that's where I was going to. I was pausing to then say and, of course, that just assumes that the Court should be the forum in which all of this should be worked out. Well, depending on the right and the situation, that is not a fair burden to place on the citizen.

WINKELMANN CJ:

Well, even in this case, some things are being worked out by parole, aren't they – by the Chief Executive?

MR BUTLER KC:

Correct, correct.

GLAZEBROOK J:

In terms of – I'm just asking where you put things like the ability to have things reviewed, the ability of appeal. Do you put them in "prescribed by law" or do you put them in "proportionality" or both?

MR BUTLER KC:

Both. Yes, both.

GLAZEBROOK J:

And, of course, that doesn't necessarily apply in all cases either but…

MR BUTLER KC:

That's right, yes.

WINKELMANN CJ:

Right.

MR BUTLER KC:

Okay, so I…

WINKELMANN CJ:

I'm looking at the time, Mr Butler.

MR BUTLER KC:

Yes, me too, desperately. So I'm moving on to the next page. So the self-executing provisions versus discretion conferring provisions in a DOI context. I regard that as an unhelpful distinction because it's suggested as if it's a categorical distinction between the two. So once you're in the area of self-executing provisions you approach it one way. When you're in the area of discretion conferring provisions you're in another.

My Ontario censorship example is a good example. That confers a discretion. The censors don't have to do anything. They can censor material. That's fully and wholly discretionary. It's a discretion conferring provision.

But –

WINKELMANN CJ:

Can I ask – I don't think – oh, carry on.

MR BUTLER KC:

But there's a fundamental flaw with the design, with the architecture of the law. You can't save it from a DOI by simply saying: "Leave it to the Judges." In some cases you can.

WILLIAMS J:

Well, if it's a bare discretion going to a core right, you would say you can't.

MR BUTLER KC:

I would. Yes, I would, broadly, yes, I would.

WILLIAMS J:

So the question is in the middle ground where you've got some navigation lights. That just becomes a question of degree.

MR BUTLER KC:

That's correct, Sir. That's correct, and that is the –

WILLIAMS J:

Well, we've got some navigation lights here.

MR BUTLER KC:

Again, I'm not getting caught between the parties. You'll have to decide whether you've got navigation lights or not, or sufficient navigation lights for a right as important as this.

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The point that was made by Justice Kós earlier, of there being 323 ESOs and not applications and not – none declined, again I don't know the – I've no

reason – I'm sure that's right, is what I'm trying to say. Let's work on the basis that's right. That rather suggests that nobody's seeing much discretion there, that there's not many brave judges who once persuaded about the existence of the threshold are reminded to decline the granting of the order. So that might suggest, well, the legislation is not sufficiently clear as to direct judges as to the existence of the discretion. Why is not clear? Because it doesn't actually tell them when they can decline to exercise, to make an order. So it inadequately prompts the discretion so as to speak.

WINKELMANN CJ:

Does the area in which, because you haven't really addressed the Solicitor-General's submission I think or I may have missed it.

MR BUTLER KC:

Mhm.

WINKELMANN CJ:

That we can't really deal with these things, I think the words that he used in the cases is "in abstracto".

MR BUTLER KC:

In abstracto. So yes, why don't I deal with that. Of course you can deal with things in abstracto. The question becomes whether any particular case is an appropriate one in which to undertake the in abstracto exercise. So let's go to the yes, of course you can, and then let's consider the no, when you shouldn't.

So first of all, the Attorney does it. His is done prospectively based on the provisions of the Bill. So his assessment is done prospectively and in abstracto. There's no facts in front of him of a particular case. There are scenarios or paradigms that the Attorney can work with, but no Attorney has said I can't undertake this exercise in a sensible way, and that's why if you look at the reports you will see, lots of them are sensible. It makes sense. You can say oh yes, I can see why that assessment was made, first of all.

Second of all, can judges do it? Yes they can. So for example under the South African and Irish constitutions, among many others, the Germans are the same, you get post enactment pre-promulgation abstract review of legislation. So under Article 26 of the Irish Constitution, one of the few prerogatives the President has is to decline to sign a bill that has been passed by the Oireachtas on the basis that the President is concerned that the provisions breached the Constitution. Then that matter is referred to the Supreme Court which considers the matter, without any particular facts before it, and makes a conclusion as to whether the bill is or is not constitutionally sound. It's done that on not many occasions, I think about 20. Terrorism legislation for example, housing legislation and rent control, all those sorts of things. So – and same with the South Africans. They've done it. There's plenty of articles on, if you need any, on that type of review if you need references to them.

So can judges do it? Yes they can do it. So the issue comes down to should you, in any particular case, do it? I think that's a fair question to ask. Sometimes you might just conclude, look, we're not comfortable making a DOI without particular facts in front of us. How will we do that? We'll do it through practice, through cases that come before the Court where the Courts below say look, this is just too abstract, we really don't have enough to work with. It might be too abstract because look, we can't actually identify how it's going to impact any particular individual, and without really understanding impact we can't assess harm. If we can't assess harm to your right then we can't really engage in the evaluation that is critical in an exercise like this.

I thought about abstract review. Another example of course is Canada. Of course, how did I forget? So under Canada, both the federal Attorney, I think its federal Attorney and the provincial Attorneys are allowed to refer to the Supreme Court any question of constitutional – any constitutional question. The Charter consistency of many legislative provisions have been referred to the Supreme Court and to provincial courts under that constitutional question referral power. So it's not – you see why I'm saying, there's nothing unorthodox about it from a judicial perspective. It always comes down to whether it's appropriately done in a particular case.

So you should reject, what I'm saying is, so to the Attorney's proposition put by Madam Solicitor that you shouldn't be doing abstract DOIs, you must reject that I say.

WINKELMANN CJ:

So this point really sits up under this is the Court should be doing what the Court should be doing and the Attorney-General should be doing what the Attorney-General should be doing –

MR BUTLER KC:

Yes.

WINKELMANN CJ:

– and you reject the notion that this is not what the Court should be doing?

MR BUTLER KC:

Correct. So I'll skip over discretionary powers, other than you see where I've written "see hand up" in the box –

WINKELMANN CJ:

So can I just ask Mr Butler, have you had a chat, when are you planning on finishing?

MR BUTLER KC:

Well I am –

WINKELMANN CJ:

I have another commitment at five. The commitment is sitting at the back of the courtroom. I'm speaking to a class.

MR BUTLER KC:

Right, well as I said I'm only an intervener so I'm conscious that I need to leave it to the parties.

WINKELMANN CJ:

Well, I mean, how long do you think you'll be, Mr Keith? I assume not long on the cross-appeal because haven't we covered most of it?

MR KEITH:

No, Ma'am, not long. I don't think I gave you a number of minutes before and then I –

WILLIAMS J:

And you don't have a number of minutes.

MR KEITH:

No, I'd expect to be very fast anyway. I've got three main points. Perhaps 15, 20 minutes subject to questions which I never want to discourage.

WINKELMANN CJ:

And Mr McKillop?

MR MCKILLOP:

I fear I have rather a lot more, having the obligation of replying on the appeal and also dealing with the cross-appeal and there's rather a lot of material that's come up that requires a response. So, I mean, looking at the amount that I have written down, I could talk for an hour but I'll obviously try not to.

WINKELMANN CJ:

Well perhaps we might just have –

WILLIAMS J:

Think about it?

WINKELMANN CJ:

Shall we just –

WILLIAMS J:

Give it some thought. Yes.

WINKELMANN CJ:
What does “yes” mean?

WILLIAMS J:
I thought you were suggesting we’d have a chat?

WINKELMANN CJ:
Oh, yes, we might just adjourn for a couple of minutes and have a chat about what we do. Yes, we’ll take a five minute break.

COURT ADJOURNS: 3.27 PM

COURT RESUMES: 3.33 PM

WINKELMANN CJ:
We’re going to be very hardnosed. You have 10 minutes and Mr Keith has 15.

MR BUTLER KC:
Thank you, your Honours, all right. Can I choose then what I spend my 10 minutes on, or do you want to tell me what you want to hear from me?

WINKELMANN CJ:
Well it's the man condemned to death, you get to choose the last 10 minutes.

MR BUTLER KC:
All right, thank you. Well my last meal then or how I will approach it is this. I don’t need to talk about the discretionary powers box. I don’t need to talk about DOIs being discretionary but should only be rarely withheld. The reasons are set out in the submissions and I'm comfortable with what's in the box.

The form of DOI I'll take one minute. When you're answering or trying to figure out what the purpose of the form of order is, you go back to what is the purpose of a DOI. It's to vindicate the right and to inform Parliament. I've given you the standing orders which illuminates what Parliament will do with the benefit of the debate kicked off by a DOI. I just remind you that in the New Zealand context,

you are not striking down a statute and that makes all the world of a difference when you're looking at the overseas provisions where in a supreme law constitution context you are striking down a statute. It is reasonable in Ireland to expect the Supreme Court to take out a red pen and identify exactly which provision it is striking down because the rest of it stays, you need to know. You're not quite in the same situation. The most important thing I say for the Court is to clearly articulate "there is a problem Houston" and what is the nature of the problem. In other words don't get caught up in technicalities. It's about effective communication, not arid technical drafting. It may be that on occasions you need to make a declaration in respect of the whole of an Act or parts of an Act.

In the supplementary materials I've given you an example from Ireland, *Blake v Attorney-General* [1981] IESC 1, [1982] IR 117 (Parts II and IV of Rent Restrictions Act 1960) were just all struck down because they were inextricably linked. The whole things go, big line, and that was the right message to send to Parliament and what Parliament then did was it created a new scheme.

Right, so I will talk about on the second to last page, Crown conduct of DOI litigation because I feel that is something I can assist the Court with and I have some supplementary materials.

GLAZEBROOK J:
I thought you'd been through, just looking quickly, most of this already.

MR BUTLER KC:
Super, so then I should just quickly talk then to aspects of it, if I can touch on that, and then I'll have been well within 10 minutes unless the Court has something they want to ask me.

So I have provided you with materials, if you look at that box, as to AG duty to defend or provide evidence. What I'm referencing there is a South African Constitutional Court case, *Khosa v Minister of Social Development* in 2004, paragraph 18, this was the challenge to social security legislation which

excluded permanent residents, in this particular case, the people were Mozambiquans. They challenged it as being discriminatory and, unbelievably you might think, nobody turned up to defend the legislation. The Court, as you can imagine, was not much amused because under the South African system the Constitutional Court has to confirm any challenge to legislation and I would commend to you paragraphs 18, 19, 19 in particular: "Any challenge to legislation, whether national, provincial, or local, is important. National legislation does not belong to a particular minister or department. It is the collective expressed will of Parliament. Declaring legislation invalid..." here I say declaring legislation to be inconsistent with the Bill of Rights. I know it's a grade down but it's still very important in our constitutional system "… can have grave implications for our constitutional jurisprudence" et cetera. "Even in those cases where the view is taken that there is nothing to be said in support of the challenged legislation, a court, in order to exercise the due care required of it when dealing with such matters, may well require the assistance of counsel."

I have also included in the supplementary materials a useful article by then Professor Huscroft, now obviously Justice Huscroft, of the Ontario Court of Appeal. He comments on the risks of the sort that your Honour and Justice Williams raised with me in the exchange about the political nature and why does he need to send strong messages, and I agree with the real world examples that Professor Huscroft gave of how important it is to ensure that legislation is defended by the Attorney and clearly done so on a non-political, I'm not saying anything political happened here, it didn't, on a non-political basis but it's right for the Court to expect the Attorney to come along and provide evidence and material in support of legislation and I have also included the Attorney-General of Canada guidance on that.

I say further down there is a pattern of conduct here. I'm not meaning that in a bad way. I'm just saying, for example, in *Hansen's* case the Crown turned up only at the Supreme Court level saying: "Hey, look we've got a whole pile of legislative materials we'd like to put in front of you and some affidavits and this Court said you can't, it's too late" and was expressed, I think, you know, pretty sharply "you know we shouldn't be the first to get this kind of material." So it's

from as far back as *Hansen* the Court has said: “If you're going to be arguing justification you need to be thinking about providing material in support.” So it's not a new phenomenon this issue, *Make It 16, Chisnall*.

1540

Then all I was trying to do was to contrast that say in *Noort*’s case, one of the very first Bill of Rights cases, there was extensive affidavit evidence filed by the Crown and by the appellant in that particular case, as to the way in which the right to counsel could work with a breath alcohol testing regime, and it’s referred to in those places I've given you the page references relied upon by the Court of Appeal in finding a way in which that right could work within the scheme.

Then of course there’s Lecretia Seales case, it was a DOI case. People think of it as being an interpretation case but it was also very much a DOI case. 36 witnesses, 51 affidavits, all of that done in seven weeks.

Under the heading of “what should have been done” I just wanted to reemphasise a point that was put by one of your Honours yesterday to the effect of, well – oh it was your Honour the Chief Justice, you know, without material or at least a proposition saying, well, where do limits begin and end, where do justified and unjustified limits begin and end, had we known what it is we’re seeking to avoid. Quite. That’s why the Crown has got to say, here’s where the boundary is. The dialectic process involved in a hearing, well of course Sharp and everybody’s view, but at least for the purposes of pleading and such like we ought to have that.

In this particular case, as I understand it, and I make reference further down to the pleadings, the notice, the amended notice of opposition, so if you look in the last page, the middle of, begins: ”SG has accepted that Crown contributed procedural confusion, see it’s pleadings.” If you look at the pleadings. The pleadings don’t mention anything about construction, available constructions. The pleadings do refer, at 5.1 to the effect that if evidence is advanced by the Department of Corrections as to statutory thresholds being met, that’s the qualifying threshold being met, then that should be okay. What

it said was those thresholds are set at a level that reflect and is commensurate with BORA rights. The ensuing orders then are properly made. So I think that's as close as I could discern in the pleadings to a statement that, look, it's reasonable because the thresholds are set so high. But it doesn't make reference to discretion, that's the important point, so on the pleadings you would not know that the Crown was relying on the word "may" to achieve consistency with the Bill of Rights.

The last two points in the 10 minutes you gave me I want to raise are about minimal impairment and the choice of legislative model. So minimal impairment is inherently comparative. That was from your Honour Justice Kós, and I say that when you look at the cases that bears it out. In the *Hansen* case, referenced when the section 5 exercise of minimal impairment was being considered, "another method" is the phrase that was used at paragraph 126 and paragraph 217. The word "alternative" was used.

In *Oakes* alternative measures available to the legislators when they made their decisions.

In *MacDonald*, Iacobucci J criticised the Crown because the options that were considered as alternatives during the policy process were withheld from the factual record. What the Judge was saying was you don't give us the alternatives if they're not on the factual record you're hampering our ability to undertake our constitutional task.

The *White Paper* paragraph 10.34 indicates that it was expected that you'd look at overseas systems, can you just pull it up please Tas, some of which will presumably show the existence of a different model, 10.34. You see where it says: "Another category of extrinsic evidence will be useful…". Useful to do what? "… information about the state of law in other countries. The fact that a law similar to that under attack exists in the United Kingdom… would tend to show that a law can be justified in a free and democratic society… This evidence would not… be decisive. A judgment is to be made of the New Zealand situation and of the particular reason which gives rise to the

legislation, but the comparative material would often be suggestive." And one of the things comparative material can be suggestive of is alternatives, and that's not me raising something in a kind of theoretical way.

If you look at the Attorney-General's section 7 report on the ESO Amendment Bill 2009, which Taz is bringing up – Ms Haradasa's bringing up here now, paragraph 22, you'll see that the then Attorney, Mr Finlayson, says: "It would appear to be possible for the imposition of restrictions amounting to long term detention to be achieved in a rights consistent way through use of the preventive detention …or through amendment to the Sentencing Act 2002 to allow courts to impose an extended parole period… This is broadly the scheme which was adopted in Canada." My point being here is the Attorney himself, not working with the model in the legislation but saying, you know what, there's other ways of doing it, not just this way.

Then the last point simply is in terms of models, I've given you examples of where the successful challenge, whether in a constitutional system or a DOI system has been to the scheme. Examples are *R v Big M Drug Mart Ltd* [1985] 1 SCR 295. So that was the Lord's Day Act, which was the day of the Sunday closing day. The whole thing was set aside. Not because it might not be a good idea to give workers a day of rest, but rather because the Act, the model, the Act was based on a flawed model being religious observance. Bang, gone. Didn't work with Parliament's model. Let's work within the parameters of a religiously inspired day off, let's work with that. No, it said the model is fundamentally flawed and out it goes, gone.

Same is true of the *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 case, a model for dealing with people smuggling, if I remember rightly. *Blake*, rent control. *Blake's* a really interesting case. Short, but just shows you again how you look at a model and say just, it cannot work it's just fundamentally flawed, and there are alternatives that are available.

So your Honours, those were the points that I'd wanted to cover. If I could commend you to read other aspects of the hand up I'd be most grateful.

WINKELMANN CJ:

Well thank you Mr Butler, we've been greatly assisted.

MR BUTLER KC:

I think my friends have wanted a moment to clear – are you happy to –

WINKELMANN CJ:

We're happy to sit here while you do that, yes.

MR KEITH:

No, Ma'am, I think time being of the essence I'd rather just –

WINKELMANN CJ:

Okay.

MR KEITH:

I can be pretty efficient. I might ask Ms Haradasa if she doesn't mind bringing up the occasional thing but I doubt we're going to have much time.

WINKELMANN CJ:

I'm sure she'll be confident to do that.

MR KEITH:

I did used to share an office across from Dr Butler and he's still very, very messy. Three quick points then in the cross-appeal and this is digesting a large amount of material so it does not entirely follow the sequence in the submissions but it does cover all of the cross-appeal points.

The three points, just to signpost, one is if one accepts, and it has been accepted, that these measures constitute penalties, what does that mean for the other criminal process and related rights in the Bill of Rights Act? In particular sections 25 and 26(1), which we have relied upon, but also arbitrary

detention section 22 and I will come very briefly to anything more we have to say about 22, a little more to say about 25, 26(1).

Second the other rights relied upon, sections 9 and 23(5), the right against disproportionately severe or cruel treatment or punishment and the right to treatment with dignity while in detention. We say those are engaged, and the reason why is that as set out in these two statues, people who are subject to what are conceded to be punitive orders are people suffering from mental disorders. They have behavioural disorders, they must lack empathy, those sorts of things. That is on the face of the statute, and so we say those rights very clearly are engaged, in particular the prospect that someone committed, under the Public Protection Orders Act could be detained for the rest of their life if their risk is not diminished, even though the relevant offence was far less. One could commit a qualifying offence, receive a relatively limited sentence and yet end up in Matawhāiti or in the adjoining prison until one is, I think, the Court said so incapacitated that one no longer poses a risk.
1550

That, in my submission, is a cruel and disproportionately severe treatment, essentially akin to, or worse than *Fitzgerald*. It is not just a third strike. It is a life sentence for a crime that did not attract a life sentence.

Third point, and I'll come to the body of these because I think I've got 13 minutes left, is why we say it is not artificial, unlike the Court of Appeal, to make findings under each of these rights as well as already made under section 26(2).

On the, what I've described as the "criminal process rights" but it's a catch-all, it includes arbitrary detention, first up, in terms of finding this to be arbitrary, you've already heard a great deal from me and some more from my learned friends about what amounts to arbitrary detention. The most straightforward authority is *Fardon*, the United Nations Human Rights Committee finding that continuing to imprison someone after they have served their sentence is in breach of Article 9 ICCPR, and that is very high authority that this Court should follow. The Crown has given no reason why it should not, and in particular and

noting some comment about the fact that Article 5 of the European Convention on Human Rights is somewhat differently phrased, and I will actually use my learned friend for the Commission's little table in a moment, but the short point, and maybe that's actually a good time to bring it up, this is the very front of the horizontal hand up, the digest of relevant rights provisions, so the right against arbitrary detention is on page 2 at the foot. Our right is very simply put, "right not to be arbitrarily arrested or detained". The third column, or fourth column, that is European Convention on Human Rights, and that does, as it's said, enumerate permissible grounds for detention, Article 5(1)(a) through (f).

I don't want, particularly given the time I've got, to get into quibbling about whether or not Article 5 can be translated to section 22. The shorter point, the point for this Court and the answer to any such quibbling, is Article 9 does not, is not so qualified, and we have in *Fardon* and also in general comment 35 of the UN Human Rights Committee, a clear statement that to continue to detain a person after they have served their sentence is arbitrary.

I'll also, without taking your Honours to it, page 13 of the cross-appellant's written submissions, the Working Group on Arbitrary Detention finding detention on the basis of a disorder to be arbitrary. So that is…

GLAZEBROOK J:
Sorry, I didn't quite catch…

MR KEITH:
Sorry, Ma'am, I'm going a bit too fast.

WINKELMANN CJ:
What were you just saying? I didn't catch it either.

MR KEITH:
I was just saying page 13 of the cross-appeal submissions and I'm still under section 22 of the Bill of Rights Act. The simple point made there, and this is with reference to a decision of the United Nations Working Group on Arbitrary

Detention, not quite so eminent as the Human Rights Committee but still significant, what we have here is a scheme that is premised upon a behavioural or personality disorder, and what we have is the Working Group on Arbitrary Detention saying that holding on to someone was discriminatory and punitive based on disability. That would be permissible if someone was being treated, if they were in a care regime, they're not, and that is what follows. I should say in that context the concept of disability is, in an international human rights context, any impairment that prevents full, or limits, prevents or limits full and effective participation in society. That's the definition given in the Convention on the Rights of Persons with Disabilities.

KÓS J:

I presume your short point here is that this is not like private law litigation where you only need to get to the damages by one route.

MR KEITH:

Yes.

KÓS J:

The importance here is that the number of breaches that are not shown to be justified are material to our advice to Parliament in relation to inconsistency.

MR KEITH:

Yes, Sir, and that's going to be my third general point about why it's not artificial. My analogy, but it probably betrays the sorts of work I do, is it's not like judicial review. You don't need to knock the decision over on one ground when others might surprise –

WINKELMANN CJ:

I don't know that anyone would have any difficulty with that proposition.

MR KEITH:

Good.

WINKELMANN CJ:

I don't know if the Solicitor-General will be submitting that it's artificial either.

MR KEITH:

Well the Court of Appeal did say it was artificial to look at other rights when you'd already got to 26(2) and wasn't that the real mischief.

KÓS J:

That's a private law approach.

WINKELMANN CJ:

Yes I think, I don't think anyone on the –

MR KEITH:

Well I'm happy if your Honours think so.

GLAZEBROOK J:

Well it may be unnecessary in a particular context if it doesn't add anything I guess.

MR KEITH:

Mmm.

WINKELMANN CJ:

But the point that Justice Kós made must be correct.

MR KEITH:

Yes, I was –

WINKELMANN CJ:

That when we're making a declaration of inconsistency then the rights that are identified as problematic in terms of the legislation should be identified.

MR KEITH:

Yes Ma'am.

GLAZEBROOK J:

It's no point fixing up one of those if in fact you're still going to fall foul of all of the other –

MR KEITH:

No, and I'll, if I can, come to a little bit more about that but a very little bit, in light of what the Court has indicated. What I was keen just to do and what the cross-appeal is all about and what we are trying to do under some time limit is just explain why the rights are engaged. That's been done to some extent in the written submissions but I'm trying to do it more succinctly and to the point here.

WINKELMANN CJ:

Yes.

MR KEITH:

So that was arbitrary detention. In terms of section 25 rights, the criminal process rights, again, United Nations Human Rights Committee, General Comment 35, paragraph 14, which I won't take your Honours to, but holding that continued imprisonment of someone after the end of their sentence on some pretext of public safety is "criminal punishment without applicable protections".

I also refer the Court to *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 which is in the Crown bundle, paragraph 17, holding that this is a process which requires the presumption of innocence and, as Mr Ellis said first thing this morning, the very first paragraph in *Pori*, what that judgment is about is imposing imprisonment without charge or sentence, and I say that is why section 25 is engaged.

Last of the criminal process rights, and this one I do find curious in the decisions of the Court below. Section 26(1), as you will be able to see from the front page of the Human Rights Commission hand up, it's the right against retroactive penalty. It's actually got "retroactive penalty" in the heading, which is possibly

a clearer thing than the wording of section 26(1) in particular. It's a bit of an odd bit of drafting. But what we have, and this is explicit on the face of both Acts, section 107C(2) of the Parole Act, section 3 of the Public Safety (Public Protection Orders) Act, these apply to people who committed their offence whenever, regardless of whether it was before or after the enactment – to the entry into force of either Act. In my submission it's a very simple proposition. If one is going to add another penalty, and it's been conceded to be a penalty to someone who was not liable to that penalty at the time they committed the offence, then section 26(1) is necessarily engaged.

One point, and it's in our submissions I think at page 7, the *R v Mist* [2005] 2 NZLR 791 case, an early decision of this Court, held that it was not open to – it was not possible to impose preventive detention on a sentenced person – on a convicted person who was too young for young preventative detention when they got it, when they committed the offence, had through, I think, two trials become old enough and for his pains was now subject to that said the Crown. This Court did not agree by reason of the retrospective provision. This legislation and the reference is in our submissions at page 14. This legislation was specifically enacted to target people who were too young to receive preventive detention, so it is exactly a retrospective sentencing exercise.

WINKELMANN CJ:

What page of the submissions is it?

MR KEITH:

Page 14, Ma'am, is that, at least I –

WINKELMANN CJ:

This is your 9 September cross-submission?

MR KEITH:

9 September, yes.

WINKELMANN CJ:

Page 14. Is in the in the footnote?

MR KEITH:

There is an exceedingly long and slightly mis-formatted, sorry, footnote. Halfway down is the reference to *Mist* and to the relevant Cabinet paper.

1600

KÓS J:

Not sure I see it.

MR KEITH:

Sorry, Sir?

KÓS J:

Page 14?

MR KEITH:

Page 14 of the cross-appellant's submissions, halfway down the footnote. Not the supplementaries.

KÓS J:

Right.

MR KEITH:

It's about 10 lines down in the footnote.

WINKELMANN CJ:

In the September 2022 submissions, 9 September. Have you got those?

KÓS J:

Well, I do but I can't –

O'REGAN J:

Anyway, it doesn't matter. We can –

KÓS J:

We'll find it.

MR KEITH:

All right. So that was all I had to say about section 26(1). Second group of rights, sections 9 and 23(5), it's not an issue that these two, well, I don't think it's disputed these two Acts are premised upon a behavioural disorder and yet we are not treating them as disordered people. You've heard an awful lot from us already on that.

The simple point, and I will refer your Honours to pages 7 to 8, footnotes 19 to 20, of the cross-submissions, what you have there on the face of the Act, and that for the reasons we talked about earlier is what the Court must judge, there was, for example, a proposal by Margaret Wilson, then Attorney-General, to supplement the report by Christopher Finlayson, I think a couple of years earlier, that one should look at other ways of managing things – that's in footnote 19 – but also the Legislation Advisory Committee specifically recommending that there be rehabilitation included in the objects of the Act. It wasn't. Then at footnote 20 – and just got two points to make on this, almost out of time – footnote 20, the Corrections Act in fact makes more expansive provision for rehabilitation and release, and if your Honours can look at the table at the end of the cross-appeal submissions, this is really what we say. It is not about the fine detail of *Ilnseher*, although that is an extremely useful example of what is feasible, what can be done, but the two columns, the fourth and fifth columns in this table, so the IDCCR and the MH(CAT) are care, treatment and rehabilitation regimes, and just to pick up on something Justice Williams was saying to my learned friend Dr Butler earlier, Mr Butler rather, it's not just that there's involuntary treatment, it's that the entire statutory scheme of a therapeutic act is quite different. It puts the person and their care at the centre and it gives them rights and it imposes obligations on the people caring for them. That is not what the two Acts we have impugned here do.

So in terms of the section 9 and section 23(5) point, but also more generally, that is the problem. It's not that one can have a punitive component, and I don't

really understand the Crown position on section 26(2), if anything preventive is now a punishment that means so are these Acts when they commit people. There should be no punitive component. If it looks like a penalty it has no place in a civilised regime for dealing with behavioural disorders. It's certainly not one compliant with any of these rights.

WINKELMANN CJ:

Are you happy with the threshold being severe disturbance and behavioural function, or do you say that it should be like *Ilnseher*?

MR KEITH:

I think whichever way one gets there we're dealing with something that is a behavioural disorder that poses a risk to the person or the community. That's the standard threshold for detaining or restricting someone. So I don't think how it's phrased is going to make much difference and I don't think one can ramp up the level of risk and say: "Well as long as we're only pursuing these people we can justify a punitive regime." That doesn't make any sense at all.

WINKELMANN CJ:

I asked because in *Ilnseher* they placed significance to the fact there was a requirement for a diagnosed mental disorder.

MR KEITH:

Yes, well we do have health assessors and so on under these Acts as well so I…

WINKELMANN CJ:

That's enough.

MR KEITH:

Yes. I think I've got everything on rights. Just to come back to the point that your Honours already have. So we agree that – I think the Court has my point that one can't just point to one right. It's not a private law case, it's not a narrow or judicial review. But there's also a more important point, and this is my last,

subject to the Court, no one pretends that these are straightforward problems to resolve. I suspect everyone involved in this proceeding or most of us has had professional dealings with people who are exceedingly dangerous and possibly we worry about what they may do to us personally. But it's a hugely difficult social problem but we know that the point of the human rights analysis is not only to say this is a standard beyond which the Parliament should not go, it is also to point to how you can do it humanely, lawfully, rights compliantly, consistent with the ICCPR. We can look at these other regimes and see that these two Acts are crude instruments. They are not the right tools. We all, or many of us, spend some time trying to make them work, trying to do something better with them and can see some of the anguish that judges have gone through too.

But in terms of the declaration of inconsistency jurisdiction, I think I said yesterday afternoon, the authority of that comes from how the Court is able to express and explain its conclusions and, if it is able to say there is a better way or there are alternatives that have not been put off the table that are rights compliant, that are more humane, that still work, then that is the best answer to legislation. That's the best step forward if we're looking at larger freedom or a culture of justification, or however one wants to put the aim of the human rights enterprise, that is what it is. It is not a dry recitation of the limits of particular rights or even dissents in the European Court, but simply this problem is hard but it could be solved better.

I think those are all the submissions I had on the cross and I'm grateful to the Court. I think I'm about two minutes over.

WINKELMANN CJ:

Thank you.

MR KEITH:

Thank you, your Honour.

MR MCKILLOP:

Where to begin? I am – I thank my friend for his short presentation. It's much appreciated and I will attempt to distil things as closely and cleanly as possible. It may mean that I don't take the Court to documents but that I say the reference for the sake of the transcript so that we can get through everything that I'm trying to say.

WINKELMANN CJ:

Thank you. If you just give us an overview of where you're going to take us that will probably assist us in absorbing it quickly, Mr McKillop.

MR MCKILLOP:

Yes, I'm just going to start with a few anchoring points and then I'm going to talk broadly about the framing of the objective of the regimes by my learned friend, Mr Keith, and how we say that framing approach was wrong and I'll talk about that in respect of both the justification arguments and arbitrary detention. I'll touch on a few points that came up in oral submissions. Firstly the therapeutic guarantees in the PPO Act, then the alleged inflexible aspects of the regimes, I will cover the 12 month IM limit which her Honour Justice Glazebrook was concerned to hear more about as well as the other points raised by Mr Edgeler and then I'll have a very brief amount to say on the cross-appeal rights themselves. There's really not too much to add to the written submissions.

1610

So to start I want to anchor what I'm about to say around these two points and the first is the simple submission that the phrase "DOI jurisdiction" is somewhat unhelpful we say because it leads us to think JR of Parliament, at least there is a short line between the first thought and the second, and obviously what we say that there is the ability to declare the law, the declaratory judgment powers. That's a very basic point but I'm hopeful that the phrase "DOI jurisdiction" could be scrubbed from our minds and we can return to saying that the DOI is a remedy.

WINKELMANN CJ:

Well, I don't think you'll be able to control us to that extent, Mr McKillop.

KÓS J:

It seems to be a distinction without a difference, frankly.

WINKELMANN CJ:

I don't think you should be wasting your time on that.

MR MCKILLOP:

Sure. Well, I'm trying to scrub it from my mind.

WINKELMANN CJ:

Thank you for sharing that with us.

MR MCKILLOP:

The second point is, to return to the pleading, Mr Chisnall's pleading was in the form of an interlocutory application filed in the course of the PPO and ESO application that was made in respect of Mr Chisnall. Much of what I'm going to say relies on the Court understanding the limits of this pleading so I want to show you what the claims are. So we've got paragraphs 1 to 2 which are about section 13(1) of the PPO Act and how that is said to be inconsistent with 26(1) and 26(2). The same format is repeated in respect of the ESO power at 107I of the Parole Act, and paragraphs 4 and 5.

Then we have a grab-bag of other rights and the claim is that the manner and method of obtaining information and the making of a public protection order, that's paragraph 6, or an ESO, which is paragraph 3, is inconsistent with all of these rights.

Then we have the grounds on which they are sought. The first paragraph there is really to say that Mr Chisnall is someone who is at risk of coming under these regimes, and the rest of grounds are simply, essentially saying that each of the

rights mentioned above would be unjustifiably limited if such an order was made.

That's the extent of the application and I just want to go to that to call the Court's attention to what isn't there because it's important. You don't see a claim being advanced about the treatment available to Mr Chisnall under the regimes being insufficient, either due to limits on the treatment provisions in the regimes or the actual application of them in reality, and you don't see any attempt to set out any alternative. Clinically –

GLAZEBROOK J:
He just says they're inconsistent, doesn't he?

MR MCKILLOP:
He says that they're inconsistent.

GLAZEBROOK J:
It wouldn't matter how well he was treated.

MR MCKILLOP:
Yes, that's right.

WINKELMANN CJ:
Are you really taking us any further than the in abstracto argument yesterday, Mr McKillop?

MR MCKILLOP:
No, what I'm – no, and –

WINKELMANN CJ:
Were you just trying to put some flesh on it?

MR MCKILLOP:

No. The reason that I come to this is because we – the process of this litigation was a learning experience for all of us. We didn't know what we were doing at various points of this. This was the –

WINKELMANN CJ:

Well, I don't think we should beat ourselves up about it too much, any of us, because actually it was a strange thing, wasn't it, to have to deal with a DOI in the context of an application for an ESO and a PPO?

MR MCKILLOP:

Yes.

WINKELMANN CJ:

And also it's not so cataclysmically flawed the whole process that we can't deal sensibly with it.

MR MCKILLOP:

No, no. Yes, I'm not saying that it's not possible for the Court to enter a judgment of some kind on whatever issues have been raised. What I'm saying is that the Crown responded in a proportionate way to the pleading that was before it. Now I have to obviously acknowledge that the Crown knew perfectly well that there'd been policy processes that underlay the development of the ESO and PPO regimes and that there was the consideration of alternatives through those. All of that evidence has been put before the Court and relied on in the justification arguments at various points to the extent appropriate, but I raise this because we sought a two day hearing before Justice Whata and the sorts of issues that we – the sorts of issues and the extent of defence of the regime that it seems to be alleged that the Crown should have embarked on at this point, would really be more like a six week hearing. So I'm not saying it to be glib or anything, I'm saying it because the Court dealing with the issue of what is required in a pleading is actually very important to the course that these proceedings take, and the amount of effort that the Crown has to put into defend them, especially when it's a set of regimes which might have a few hundred

provisions. They work themselves out into – it's not just courts that make that limit rights under them, it's –

WINKELMANN CJ:

Yes, and so we referred us to the practice, the UK practice note.

MR MCKILLOP:

Yes, and I also just want to note on that front that the – that it's always been argued, contrary to I think what Mr Keith was suggesting earlier, that justification falls to be determined on a case by case basis. That's certainly what we argued before Justice Whata, and it, in fact, forms really much of the core of the reasoning of his Honour in that judgment.

GLAZEBROOK J:

When I said the argument seems to have changed it was really the argument that says this is justifiable because of the high threshold no matter whether it's case by case or any other way.

KÓS J:

Yes, although interestingly that turns out to be paragraph 5.1 of the statement of defence so it actually was the original argument. It seems to have –

GLAZEBROOK J:

Well exactly. It just doesn't seem to have come through here.

KÓS J:

– you know gone and then returned.

MR MCKILLOP:

I'm not sure if it ever went or if it simply receded in importance but –

KÓS J:

The thing is I can't quite understand, Mr McKillop, why we are here spending so much time on the pleadings.

WINKELMANN CJ:

No, we've been through them and through them.

MR MCKILLOP:

Well it's important in my submission as an anchoring point but it's the last point I wanted to make so…

KÓS J:

I mean at the end of the day it's a point to be made perhaps either to the Attorney or Parliament as to an outcome if a declaration is made as to process but we're still left with the burden being on you to provide justification if there is an inconsistency.

MR MCKILLOP:

Yes, yes, and –

KÓS J:

And none of this relieves you of that burden.

MR MCKILLOP:

No, I completely accept that but what I'm saying is it's important to have in mind the scope of pleadings when it comes to the minimal impairment part of the *Oakes* analysis and the duty of the Crown to bring evidence about the extent to which alternatives need to be explored through evidence.

WINKELMANN CJ:

Well I mean the issues are pretty plain in this case I would have said, so it's not a surprise to you what has been said against you so I don't understand why we're spending so much time on it.

MR MCKILLOP:

Well I'm saying that –

WINKELMANN CJ:

Although you've been through the whole mill, is that the point, you were in he lower Courts Mr McKillop?

MR MCKILLOP:

I'm not trying to tell a tale of woe about myself, I'm trying to –

WINKELMANN CJ:

No, I'm saying you're bringing to bear your – I wasn't suggesting that Mr McKillop, I'm trying – you're bringing to bear your experience but…

MR MCKILLOP:

And I'm saying that this issue of the alternative clinically focused regime was one that emerged through submissions, that that was the focus, and not through pleadings and I'm additionally –

WINKELMANN CJ:

It actually emerged through your policy papers too, didn't it?

MR MCKILLOP:

Yes, and I'm saying that there was a wide range of things considered in the policy papers and just which ones we should have taken, we should have amassed arguments about, it's not entirely clear. So what I'm saying is that we'll be assisted –

WINKELMANN CJ:

So you're saying the pleadings are important?

MR MCKILLOP:

Yes, I'm saying the pleadings are important and this is exactly the same position that the Courts came to through the Human Rights Review Tribunal jurisdiction as well.

WINKELMANN CJ:

Well can you give us some detail as to what you say they should encompass because –

GLAZEBROOK J:

Well especially if the argument is nothing can justify this. You can't surely expect a pleading to say nothing can justify it but these are a whole lot of things that you might have thought about it, none of which would have justified it?

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MR MCKILLOP:

Well that's a – I mean that's a very difficult – I think your Honour hits on something that's very, very difficult which is what is the burden to respond to an extremely broad argument? Do – is there –

GLAZEBROOK J:

Well isn't the response to put forward that it's justified, and any evidence in respect of why other alternatives wouldn't work, why this was the only one, why, in any event, it's consistent. I just don't quite understand what you expect the pleadings to do in terms of somebody who says this is just inconsistent per se.

MR MCKILLOP:

Well it's the extent to which alternatives can be flagged up. Where it's not something which is readily apparent –

WINKELMANN CJ:

You're tending to shift the onus onto the applicant in that circumstance there aren't you? Because isn't it really for the Attorney to say, well, this is the societal objective that this limitation serves and this is the only feasible alternative?

MR MCKILLOP:

Yes, but I'm saying when it comes to considering alternative systems, which don't exist, it's very difficult to come up with and dismiss every single one. So it

is going to be helpful to have some sort of flagging of where things are going to go.

WINKELMANN CJ:

So can you be concrete about what you say we should be suggesting?

MR MCKILLOP:

Well, this is really why we – this really gets back to why we say that the case has been grounded in a set of facts, a real or a feasible set of facts, is so useful and important because it allows us to work through the way that a regime would apply to Mr Chisnall and find those points of concern and then we're able to have meaningful arguments about them. What's happened instead here is that in this apex court, this is when things raised for the first time, like the 12-month limit on IM, on an ESO with IM. The fact that Mr Chisnall can't have a goldfish was mentioned in the first hearing by my learned friend Mr Edgeler.

WINKELMANN CJ:

Well, I mean that's not going to decide the case against you, I can tell you.

MR MCKILLOP:

No, no, I know. But there is, well, yes. I mean if you have to justify the institutional nature of a PPO residence, and all of its various default rules, and any ability to derogate from them those are important arguments that it would be helpful to have flagged. I wanted to just refer to the – I don't have the pinpoint reference, or even the full case reference, but *Atkinson* in the Court of Appeal where the Court was very clear in the Human Rights Review Tribunal jurisdiction that the Crown had to be properly appraised of the case that it had to meet, and that was in a jurisdiction which starts off in a relatively informal way through the making of a complaint to the Human Rights Commission in the mediation process.

WINKELMANN CJ:

Right, well I mean you've got about 30 minutes left.

MR MCKILLOP:

Yes.

WINKELMANN CJ:

So I leave to you as to how you use it but I think we've got your point about in abstracto.

MR MCKILLOP:

Yes, yes. The objective of the regimes is the next point I want to make. My learned friend, Mr Keith, has tried each time my friend talks about it to describe the purpose of the regimes as being public safety, and I just want to refer to the transcript of the first hearing where my friend said, this is at page 117, well we don't have to go to it, but that one – well okay – one can't engage in a circular exercise of saying, well, the legislation does what Parliament set out to do, and that is itself the object. One must look at what its practical purpose is. I think that's an uncontroversial starting point, and saying that protection of the public is that practical purpose. I say that it's not a legitimate starting point, that it's a very broad statement of the objective and that when it comes to justification we are stuck in that analysis with the objective that Parliament has gone out to achieve.

WINKELMANN CJ:

Well what is the purpose?

MR MCKILLOP:

Well it's about a particular group of – it's about dealing with re-offending risk from a particularly high risk group of –

GLAZEBROOK J:

Well that's not –

WINKELMANN CJ:

To protect the public.

GLAZEBROOK J:

– that can't be right. It's dealing with the risk of re-offending by a particularly high – I might have not caught that. What did you say?

MR MCKILLOP:

I think we may have just said the same things in reverse but it's about dealing with the risk of re-offending by a –

GLAZEBROOK J:

Risk of re-offending, thank you.

WINKELMANN CJ:

High risk group of people.

MR MCKILLOP:

By a high risk group of people at the end of sentence.

WINKELMANN CJ:

So isn't the purpose public protection?

WILLIAMS J:

Well you say it's narrower than that and calling it public protection makes it sound a little glib.

MR MCKILLOP:

We make that –

WINKELMANN CJ:

Well if it's not that, then it's just detaining people.

WILLIAMS J:

Anyway, you've got 30 minutes so we'll shut up and you talk.

MR MCKILLOP:

I say that the purpose is it's necessary to define the purpose carefully to ground your analysis in Parliament's actual purpose and describe it as tightly as possible. Public protection is a very broad way of describing the purpose of a bunch of different things. This limits rights because it has this particular kind of public protection purpose and for that, and I won't take the Court to this, but the reference is the *RJR-MacDonald* case. I'll tell you the bundle. It's appellant's authorities, tab 48, and the example given by Justice McLachlin in that case at paragraph 144, her Honour notes that it "is the objective of the infringing measure" that you assess. If you state it too broadly, its importance can be exaggerated and the analysis compromised and she goes on to note the, it's up on the screen now, to note the objectives of the various interferences with rights in a much more precise way. Now –

KÓS J:

Well what's wrong with the statutory expression –

GLAZEBROOK J:

That's what I was just going to ask you.

KÓS J:

– of the objective in section 4 of the Act, the PPO Act, which says: "The objective of this Act is to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences."

MR MCKILLOP:

I say there's nothing wrong with that at all. It's the view of a purpose being this very broad idea of just public protection per se that I'm concerned with.

WINKELMANN CJ:

Well you're really concerned then that the importance of it not be overstated by selling it too broadly?

MR MCKILLOP:

Yes, but we'll – these regimes aren't going to achieve public safety but they stand a chance of achieving this goal.

WINKELMANN CJ:

Aspect of it?

MR MCKILLOP:

Yes. It's also important for how we engage with justification, it's important for how we engage with the arbitrary detention point. The justification point is about there being a therapeutic alternative available that would also achieve public safety, and we've obviously noted – so I'm trying to make this as efficient as possible – we've also…

WINKELMANN CJ:

Sometimes it's helpful to tell us where you're going to land and then we can, you can take us, how we're going to get there.

MR MCKILLOP:

Yes.

WINKELMANN CJ:

It's general advocacy advice.

MR MCKILLOP:

Yes. I mean I really want to make three points about minimal impairment and why the Crown says that it wasn't obliged in this case to bring evidence exploring beyond what it made available, the alternative regimes. The alternative regime put forward by my friends, the therapeutic regime which I'm not really sure what the exact parameters of that would be, but nonetheless, and the first is that, as I've said, it's a re-offending risk focused goal here. This is targeting a population of people who have been the subject of a determinate sentence of imprisonment. They've had the access to therapeutic programmes

to the extent possible within the Corrections system but they remain a risk at the end of that sentence.

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Secondly, it is coming back to the pleadings point that the Crown has something that it can grab onto in the pleadings about knowing that it should bring this evidence, about whatever this putative therapeutic regime would be rather than some other one. It's not feasible, and the Crown ought not, in my submission, be taken to task for not exploring and dismissing every alternative possible system. I also wanted to note that the alternatives aren't always – well, I just want to note something about the particular cases that your Honour, Justice Kós, drew on yesterday when talking about alternatives and what the Crown duty would be. *Hansen* was…

GLAZEBROOK J:

Just before you do that, in respect of this there are regimes overseas and case law overseas which say some of these things can be done, some of them can't. What really was to stop the Crown actually looking at those cases and drawing conclusions from it in terms of what might be acceptable and might not be?

MR MCKILLOP:

There wasn't anything stopping the Crown. The question is what the Crown's obligation was at the time and –

GLAZEBROOK J:

Well, maybe the Crown's obligation is actually to look at the jurisprudence round the world in respect of these type of regimes and the Bills of Rights that might be engaged.

MR MCKILLOP:

Well, yes, I mean this really all comes back to the pleadings point and the Attorney-General's burden bullet point.

GLAZEBROOK J:

Well, it's nothing to do with pleadings. It's the duty of the Crown to justify.

MR MCKILLOP:

Yes, I was saying that it's both, and at this stage –

GLAZEBROOK J:

I'm sorry, I've probably got a non-litigator's view of pleadings and the use of them, and I do recognise that in some instances they can be useful, but –

WINKELMANN CJ:

Just to focus your mind, Mr Butler took us to the *White Paper* which contemplated that the government would, with this new rights focus, the government would look around the world at alternatives, and are you saying that you eschew any notion that when there is an application challenging the rights-consistency legislation the Crown should front up in some way? Are you saying they should be passive and allow the challenger to identify the alternatives or what are you saying?

MR MCKILLOP:

Well, the Cabinet paper and regulatory impact statements about these schemes assessed five alternatives for New Zealand's system and they looked at Canada, the UK, Scotland, US, Australia. So it was a –

WINKELMANN CJ:

So the job was done. It did the job.

MR MCKILLOP:

It did that job. The question is what on the basis of what we were presented with through this pleading were we meant to go to court and defend? Were we meant to get even more evidence about every single system? Were we meant to figure out the parameters of this therapeutic alternative that I'm still not sure that I fully understand? It just isn't clear.

WINKELMANN CJ:

All right.

WILLIAMS J:

You're saying that you had an interlocutory application in the most abstract form in the context of an actual review of a PPO and all of a sudden this is bigger than Ben-Hur?

MR MCKILLOP:

Yes, yes, and we had a two-hearing on it and from what we've discussed that really should have been – I mean missed a trick if that's the obligation.

GLAZEBROOK J:

Well, the Crown did want it split off.

MR MCKILLOP:

Yes, yes, yes.

GLAZEBROOK J:

But it could be split off.

WILLIAMS J:

Missed that one too.

GLAZEBROOK J:

Yes, but I mean leaving that aside, you did actually have a particular person.

MR MCKILLOP:

Yes.

GLAZEBROOK J:

And if the argument was that this is going to be therapeutic then at least some evidence or a bit more evidence about what this detention would look like would seem an obvious thing.

MR MCKILLOP:

Yes, and I think that that's precisely why we come back to the fact of splitting it, being such a poor idea, and that bringing these with at least some sort of, some actual or reasonable hypothetical fact pattern, is going to focus the argument when you're talking about two big regimes and all of their putative applications. That's the point.

O'REGAN J:

But Mr Butler referred us to the Human Rights Review Tribunal jurisdiction. I mean the cases there seem to take three, four, five weeks.

MR MCKILLOP:

Yes.

O'REGAN J:

So was it that big a surprise that you needed to do something more extensive?

MR MCKILLOP:

Yes, well, it was a certainly a new point. It's certainly a new jurisdiction in the High Court. There's a particular structure of argument that is inherent to discrimination cases though where you would have a regime of some kind that someone wants into. That's the normal claim. Some sort of benefit that they're missing out on, and you have a few – and the reasonable alternatives are pretty easy to identify. It's let us in, how much does that cost, what would the implications of that be, or don't have the regime, sort of glibly, I guess, referred to as the levelling up and levelling down. So it's always very easy to identify alternatives in that jurisdiction, I would submit, not necessarily always the same ease with other rights.

KÓS J:

Where does any of this take us in terms of what we must now do? There is an evidential shortfall on the Crown's part. History doesn't fill that or alleviate your burden.

MR MCKILLOP:

Well, we're interested in learning about future cases. Obviously, we've been very open in acknowledging that we would do things differently given the time over, but –

WINKELMANN CJ:

There may or may not be an evidential shortfall because we do have all of the legislative fact material and we have to consider that carefully because there is reasoning processes disclosed there as to how our choice is made.

MR MCKILLOP:

Yes, yes, absolutely. I guess I'm saying the evidential shortfall is the division from Mr Chisnall's particular case and how this regime ends up applying to him.

On the point of the legislative fact evidence, I don't think we went to, we went to the Cabinet papers in the first hearing but I would recommend the regulatory impact statements as being very good summaries which are also in the bundles.

I want to now just address the arbitrary detention argument, hopefully quickly. This is the point that people who are said to pose no lesser risk are not subject to the scheme simply because they've not offended before, in the cross-appeal submissions, and that this is arbitrary and discriminatory. To that we say it's not discriminatory to devise a scheme that treats convicted offenders differently from other people with similar characteristics. There's no ground of discrimination based off criminal conviction.

The second point is that we say the precondition of proven serious offending and a determinate sentence of imprisonment provides a quite rational entry point to a scheme such as this. A realised risk, in my submission, is, as Justice Glazebrook has noted, in every actuarial tool I've ever seen, a major determinant of future risk.

The eventual return of these offenders to the community means efforts are made throughout a sentence to assess their risk and needs and provide suitable

treatment, and it's through that process that Corrections can identify those offenders who are eligible for a post-sentence order, the extent to which their risk is thought to persist, and make an application before the person is released, providing that continuity of prevention of harm and treatment that is needed.

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The alternative, which again it's hard to grapple with exactly, but some sort of system unlinked from prior offending, is a speculative one, in my submission. It would need to involve some sort of screening mechanism to identify people that impose an equivalent risk to those identified under this. Perhaps most troublingly, in my submission, it would –

GLAZEBROOK J:

Can I just – my understanding that the major aspect of this was it's just arbitrary because it's effectively double jeopardy and double detention. That was the most simple aspect of that argument rather than it being discriminatory because they would say probably if you were locking up people who hadn't been done before then you were offending against the presumption of innocence and all of those other matters.

MR MCKILLOP:

Yes, so I've moved off of the discriminatory point, that's a discrete point, and I was moving on to the under-inclusivity point, and I think that that is about you – with respect, I think that my understanding of it's exactly Mr Chisnall's submission that under-inclusivity, e.g., not taking a civil regime approach and having a broader entry point, was something which led to arbitrariness. Now the points that your Honour has just started making, I would also submit are reasons why the alternative actually runs the risk of being arbitrary. It's significantly restricting liberties of, you know, people who have these sorts of behavioural difficulties without the element of risk being realised it starts getting at the core that – well it's the minority report point, as has been mentioned a few times, gets at the core of our –

GLAZEBROOK J:

I think you might have misunderstood. I think their first point is that it's arbitrary to detain somebody after they've finished a sentence that's been imposed, and that's just per se arbitrary.

MR MCKILLOP:

Right.

WILLIAMS J:

Except for treatment.

GLAZEBROOK J:

Well except if it's because –

WILLIAMS J:

Treatment is the point, yes.

GLAZEBROOK J:

Yes.

MR MCKILLOP:

Well I hadn't appreciated that to be the position but obviously if that is the position then it's obviously opposed. The –

GLAZEBROOK J:

I mean it's the same point as the section 26(2) point but –

MR MCKILLOP:

Yes, it's just really a different expression of it and, I mean, that's really to say that it's inherently illegitimate as a purpose.

WILLIAMS J:

That's right, yes.

MR MCKILLOP:

And that's the blue-eyed babies point so, I mean, obviously there are extreme cases where there may be inherently illegitimate purposes but I say this is not one of them.

There's a few – okay, a very quick point, I'll just tell you the reference to the transcript is page 189, line 13, this is where my learned friend Mr Edgeler said that the management plans for how a prisoner would be prepared for eventual release and successful reintegration into the community had no equivalent in the PPO Act. That was not right. There is the same or functionally identical language found in the PPO Act and the reference for that is section 42(3)(c).

Now I'll address the inflexible, alleged inflexible aspects of the regimes. The first is the 12-month limit on IM, the second is the issue Mr Edgeler raised about prohibited items within PPO residences in the first hearing, such as live pets, that's the goldfish example, and cigarettes. So I'll deal with those in turn. Starting with the IM limit, obviously you have our written submissions on that. We've said we admit that effectively it does, when it comes to the point of that 12-month limit being exhausted, then that does limit the ability of the Judge considering a PPO or ESO to make this in-between order, the most strict ESO. The point really is that this has arisen for the first time and we would have been able to bring specific evidence about this point but this has never been flagged to the Crown except in response submissions in our apex court. The only available evidence about this is in the Cabinet papers and suggests actually that – it suggests that IM might be limited because it might be more expensive than PPOs to administer, which doesn't seem to be the reality, but I can't show you any evidence about that.

KÓS J:

What's the reference please?

MR MCKILLOP:

That is 304.0831.

GLAZEBROOK J:

Are you saying there was evidence and, if so, what would it have been –

MR MCKILLOP:

Well there's evidence that goes –

GLAZEBROOK J:

– and it's been –

MR MCKILLOP:

There's evidence that goes the other way from what I understand to be the actual current position on cost and there's also the potential to bring evidence about how…

GLAZEBROOK J:

It's just that it has been adjourned for quite some time and if there was evidence, I'm not sure why there wasn't an application to bring it, I mean, we mightn't just been very keen on it but we have had an adjournment for a long time.

MR MCKILLOP:

Yes, well appreciated that the proper position is not to bring you fresh evidence for the first time in the final court but that would be another point of guidance I suppose. The –

GLAZEBROOK J:

Well it should be avoided but if – and if it wasn't adjourned then maybe but…

MR MCKILLOP:

The evidence I suppose will have addressed things like the impacts of a privacy – of close monitoring on someone over a prolonged period of time and I can't really take the point any further.

On the prohibited items, I just wanted to note that those two examples that my learned friend Mr Edgeler gave in the first hearing are ones which are in a list

of prohibited items but there is the capacity for a residence manager to make rules that permit people to possess prohibited items under various conditions. Sorry, did I say – I'm not sure I said the – did I say the section number, section 119 of the PPO Act. And on Mr Edgeler's point that standard conditions can only be suspended for special conditions, we say no that section 107O of the Parole Act, which is –

WINKELMANN CJ:

I think we already covered that with him.

MR MCKILLOP:

Yes, yes, yes, but my point is that can apply to standard as well as special conditions.

WINKELMANN CJ:

Yes, we covered that with him.

MR MCKILLOP:

Okay. The final points then I want to raise are about there's been something made of the Attorney-General's 2009 view that, this is a section 22 arbitrary detention point, that authorising the imposition of further detention when a sentencing court is declined to impose preventive detention is inherently disproportionate and therefore arbitrary. The way that the ESO and PD has worked in practice, I don't want to rehearse it all in great detail, but I'm sure the Court will be aware that the availability of an ESO at the end of a sentence is one of the factors that Courts take into account when deciding whether to impose PD as part of the principle of preferring a determinate sentence over an indeterminate sentence if possible. The Court –

WILLIAMS J:

I guess that submission is buoyed. It could be a lot worse, isn't it?

MR MCKILLOP:

I wouldn't characterise it that way.

WILLIAMS J:

But that's really what you're saying?

MR MCKILLOP:

Well I'm saying that – what I'm really getting at is that judges are looking at the way that these regimes interplay and preferring to do the less stringent sentence.

WINKELMANN CJ:

But what are we to –

WILLIAMS J:

Well the lesser of two evils.

WINKELMANN CJ:

But what are we to do with that in this context?

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MR MCKILLOP:

Well it's about – the point is to really just bring attention to the dangers of abstract reasoning in the Attorney-General's reports, versus how this actually works out.

WINKELMANN CJ:

Okay, all right.

WILLIAMS J:

Well I guess you're saying this may – the 323, is it, may actually be a good sign because how big a bite is that out of the PD population.

MR MCKILLOP:

Well I can't say absolute numbers.

WILLIAMS J:

No you can't say that but you're putting the proposition, right?

MR MCKILLOP:

I'm, yes, and –

WILLIAMS J:

Don't assume, you're saying?

MR MCKILLOP:

Yes.

KÓS J:

So are you arguing that we've got the Canadian approach without actually having the Canadian legislation?

WINKELMANN CJ:

No he's not. He couldn't possibly argue that.

MR MCKILLOP:

Well –

KÓS J:

Seems to be fringing on that.

MR MCKILLOP:

Not quite.

KÓS J:

No.

MR MCKILLOP:

I'm saying that because there's nothing done by the sentencing court to pre-emptive – to say, well, but I'm making an ESO. That just has to come into force if you're still like this in 10 years or whatever. So it's not – we made a submission in the courts below that having an ESO as an available consequence of your sentence on the day that you commit the offence indicates

that it actually isn't a second penalty, but that was rejected at both levels and I'm not –

WINKELMANN CJ:

Your just – your argument is utilitarian effectively. It may be pretty tough on the people who have these ESO and PPOs but just think about all the people who don't have the – have a preventative detention sentence imposed because of the prospect that things don't work out well.

MR MCKILLOP:

Somewhat utilitarian but I also just want to, I also want to note that this is the – this has been the preference of courts. This is the attitude that courts have taken to second, to knowing the ESO is a second penalty since –

WINKELMANN CJ:

Were you saying that's how it's operating in practice and so therefore you can see that there is a societal benefit to it?

MR MCKILLOP:

Since *Belcher*, knowing it's a second penalty, courts have preferred to impose that second penalty or note that it's available to avoid the, what I guess is seen as the big bad of PD.

WINKELMANN CJ:

Yes, we've got the point.

MR MCKILLOP:

Finally, I just want to note that our point about the presumption of innocence being clearly engaged is engaged within *Mosen* which we rely on for various points and that's at footnote 30 in *Mosen*. It simply really recites our submissions here but I'm just calling it to the Court's attention because it's the most recent authority about the presumption of innocence rights being relevant to the ESO. That's a new authority since the subs were filed.

GLAZEBROOK J:

It sounds like an important point and I just haven't got what the point is, so perhaps you need to –

MR MCKILLOP:

Perhaps we can go to – the point is about criminal process rights and how they apply. This is one of the cross-appeal grounds.

GLAZEBROOK J:

Yes.

MR McKILLOP:

Criminal process rights and how they apply to ESO applications. The – perhaps we can scroll up to where 30 is referred to in the text. This is responding to the presumption of innocence being quite clearly engaged because the Court's being asked to predict whether future offending would be committed, and the Court is doubting that, I would submit, the *Mosen* footnote. So that's why I refer the Court to that.

WINKELMANN CJ:

So your – and I think Ms Jagose also referred to this, the fact the Courts are attempting to calibrate the test to give the most rights-consistent interpretation, and you're saying that also shows them weighing in criminal process rights.

MR MCKILLOP:

No, I'm saying this shows them doubting that criminal – that these criminal process rights are relevant to the ESO.

WINKELMANN CJ:

Ah.

MR MCKILLOP:

Because of the analogy with sentencing that has always been drawn, much like the analogy that your Honour drew earlier. The final point I want to make is –

GLAZEBROOK J:

I just don't quite – so where does that get you? Are you saying it's wrong to look at the presumption of innocence or right to look at it, or irrelevant, or –

MR MCKILLOP:

It's not relevant to the exercise of an ESO.

GLAZEBROOK J:

Not relevant. So the –

MR MCKILLOP:

I don't – this is contained in our written submission.

GLAZEBROOK J:

No, that's what I thought the submission was.

MR MCKILLOP:

Yes.

GLAZEBROOK J:

But I couldn't quite understand it when you were making it so.

MR MCKILLOP:

Sorry about that your Honour. I just wanted to refer your Honour to the most recent version of this – the most recent expression of this debate. I just want to go down to paragraph 72 of *Mosen*. This is my very, very, very last point and it's just to show that the Court here is applying what it calls, and this is obviously a sort of theoretical exercise, it's applying a strong justification approach which is – that which has emerged since the *Chisnall* DOI judgment and I just really wanted to point out here the comfort that the Court shows with the justification exercise for a limit on the second penalty right and this really reflects what your Honour – what the Chief Justice said earlier about courts doing many BORA exercises every day when they sentence and this is a similar level of comfort with the balancing of interests shown here. The Courts have found themselves,

including the Court of Appeal, with a DOI judgment about the entirety of the regime but still as we see from section 72, think they're obliged to only make rights-consistent orders and that's really why we're here. That disjunct between the Court of Appeal's DOI judgment and still looking for justified outcomes, it's hard to – I don't think courts know what to do with the current DOI judgment so the Court's guidance on that would be appreciated. I'm done. I apologise for going right to the wire.

WINKELMANN CJ:

That's all right. We put you under a lot of pressure Mr McKillop in terms of time so thank you very much for managing to cover the ground on that and hopefully Mr Keith's got – hopefully there's almost no reply.

MR KEITH:

Nothing arising at all, Ma'am. We're all very grateful for the way the Court has dealt with –

WINKELMANN CJ:

Excellent. You know how to please your audience.

MR KEITH:

Prudent at least, Ma'am.

WINKELMANN CJ:

Well thank you very much counsel for your submissions. We will take some time to consider them and let you have our judgments, judgment in due course, I'm not anticipating multiple.

COURT ADJOURNS: 4.57 PM