NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 67/2020
[2021] NZSC 131

BETWEEN	DANIEL CLINTON FITZGERALD Appellant
AND	THE QUEEN Respondent

Hearing:	23 February 2021
Further submissions:	19 March 2021
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Arnold JJ
Counsel:	K F Preston and D A Ewen for Appellant M F Laracy and Z R Hamill for Respondent A S Butler, R A Kirkness and S W H Fletcher for Human Rights Commission as Intervener
Judgment:	7 October 2021

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed. The proceeding is remitted to the High Court for re-sentencing.

SUMMARY OF RESULT
(Given by the Court)

[1] The Court has unanimously dismissed Mr Fitzgerald's appeal against conviction and, by a majority, allowed his appeal against sentence.

[2] This case concerns the application of the "three strikes" regime in circumstances where the resulting sentence on conviction for a third strike offence under s 86D(2) of the Sentencing Act 2002 is so disproportionately severe as to breach s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The appeal raised two primary issues. The first was whether, notwithstanding the three strikes regime, the sentencing Judge retained a discretion to discharge the appellant without conviction under s 106 of the Sentencing Act. The second, which arose during the hearing in this Court, was whether s 86D(2) of the Sentencing Act could be interpreted as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would breach s 9 of the Bill of Rights and New Zealand's international obligations.

[3] The appeal against sentence is allowed on the basis of the second issue. Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ agree that the appellant's sentence of seven years' imprisonment went well beyond excessive punishment and would shock the conscience of properly informed New Zealanders, and was therefore so disproportionately severe as to breach s 9 of the Bill of Rights.[1] Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ are also agreed that this right is not subject to reasonable limits under s 5.[2] They have held that Parliament did not intend, in enacting the three strikes regime, to require judges to impose sentences that breach s 9 of the Bill of Rights and New Zealand's international obligations.[3] They consider it possible, and thus necessary, to interpret s 86D(2) so that it does not require the imposition of sentences that would breach s 9.[4]

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1 At [79]–[81] per Winkelmann CJ, [239] per Glazebrook J and [167] per O'Regan and Arnold JJ. William Young J agrees that the sentence imposed was contrary to s 9: at [283].

2 At [38] and [78] per Winkelmann CJ, [241] per Glazebrook J and [160] per O'Regan and Arnold JJ.

3 At [123] and [128]–[130] per Winkelmann CJ, [247] per Glazebrook J and [203] per O'Regan and Arnold JJ.

4 At [139] per Winkelmann CJ, [250] per Glazebrook J and [219] per O'Regan and Arnold JJ.

[4] Glazebrook, O'Regan and Arnold JJ have held that in the rare cases where the maximum sentence produced by s 86D(2) would breach s 9, an offender should be sentenced in accordance with ordinary sentencing principles.[5] Winkelmann CJ agrees that the ordinary sentencing principles will apply, but considers that s 86D(2) adds a sentencing principle that recidivism by those caught by the regime is to be viewed as very serious and worthy of a stern sentencing response.[6]

[5] William Young J is of the view that the language, scheme and purpose of the three strikes regime do not allow for the interpretation reached by the majority.[7] He would construe s 86D(2) as not being subject to any exception.[8]

[6] As to the discharge without conviction issue, all members of the Court have dismissed the appeal against conviction. Glazebrook, O'Regan and Arnold JJ have held that in the rare cases where s 86D(2) will not apply because the maximum sentence required under it would breach s 9 of the Bill of Rights, a discharge without conviction will be available as part of the usual suite of sentencing options, including in this case.[9] They have found it unnecessary for the purposes of the appeal to determine whether a discharge without conviction is available where a third strike sentence does not breach s 9.[10]

[7] Winkelmann CJ considers that the discharge without conviction jurisdiction is available for offenders found guilty of a third strike offence, applying the usual principles for the exercise of that discretion, whether or not the resulting sentence would breach s 9 of the Bill of Rights.[11] However, she acknowledges that usually, third strike offending viewed in its overall circumstances will place it outside the category of case where a discharge without conviction would be appropriate.[12] She has found that the present case comes very close to being one in which a discharge

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5 At [252] per Glazebrook J and [231] per O'Regan and Arnold JJ.
6 At [137]–[138]. Glazebrook, O'Regan and Arnold JJ disagree: see [252], n 366 per Glazebrook J and [231] per O'Regan and Arnold JJ.
7 At [324]–[329].
8 At [330]–[332].
9 At [245] per Glazebrook J and [236] per O'Regan and Arnold JJ.
10 At [245] per Glazebrook J and [237] per O'Regan and Arnold JJ.
11 At [99]–[100].
12 At [106].

would be appropriate, and might have been such a case, were it not for public safety concerns.[13]

[8] William Young J is of the view that the power to discharge without conviction is not available where the three strikes regime applies because the regime imposes a minimum sentence,[14] and that even if it were available, a discharge would not be appropriate in this case.[15]

[9] Based on the conclusion of the majority,[16] the matter is remitted to the High Court so that the appellant can be re-sentenced in accordance with ordinary sentencing principles, taking into account his significant mental health issues.

[10] The reasons of the Court for this result are given in the separate opinions delivered by:

REASONS

WINKELMANN CJ

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13 At [107].
14 At [308].
15 At [318].
16 At [252] per Glazebrook J and [231] per O'Regan and Arnold JJ.

Introduction

[11] The Sentencing Act 2002 was amended in 2010 to incorporate a "three strikes" regime, providing mandatory sentencing for certain categories of repeat offenders. The appellant, Mr Fitzgerald, was sentenced under s 86D(2) of the Sentencing Act for a "third strike" offence under that regime.[17] It is common ground between the parties that the sentence imposed was in breach of s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights), which affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. It is common ground that the appellant's sentence was disproportionately severe compared to the seriousness of the offending. The issue on this appeal is whether the sentencing Judge was bound by the three strikes regime to impose that sentence, or whether the Bill of Rights itself required otherwise.

[12] The meaning and effect of s 6 of the Bill of Rights lies at the heart of this appeal. The appellant contends the Judge was not bound to impose the maximum sentence – that he retained a discretion under s 106 of the Sentencing Act, interpreted in light of the Bill of Rights, to discharge the appellant without conviction in order to avoid the breach of s 9. During the hearing of the appeal, this Court raised an alternative argument on which it invited and received submissions – that the relevant three strikes provision within the Sentencing Act should, again by virtue of s 6 of the

[17] *R v Fitzgerald* [2018] NZHC 1015 (Simon France J) [HC judgment].

Bill of Rights, be restrictively interpreted as subject to a limitation that it does not require the imposition of a sentence in breach of s 9 of the Bill of Rights.[18]

[13] The Crown acknowledges an interpretation of s 86D(2) that accommodates and upholds s 9 of the Bill of Rights is highly desirable. It says that, were such an interpretation reasonably available, this Court would be bound to apply it. And because the absence of a rights-consistent interpretation leads to an intrusion on a fundamental right, it also accepts that only the clearest of words can prevent a rights-consistent interpretation being applied. However, the Crown says that a rights-consistent interpretation of s 86D(2) is not available because of the clear statutory language and statutory purpose. It also says that using s 106 to defeat the application of s 86D(2) would override the clear statutory purpose of the three strikes regime and create perverse outcomes. And in any case, the clear wording of s 106 excludes the exercise of the discretion to discharge without conviction in this case.

[14] The Human Rights Commission | Te Kāhui Tika Tangata (the Human Rights Commission) sought leave to intervene on this appeal on the ground that the appeal raises issues of general principle and importance bearing upon human rights. Leave was granted.[19] We were greatly assisted by the written submissions and oral argument we heard from the Human Rights Commission.

The offender and the offence

[15] The appellant suffers from long-standing and serious mental illness, which began when he was aged 15, over 30 years ago. He has been admitted at least 13 times to mental health facilities, but has otherwise been treated in the community. He suffers from schizophrenia and substance (drug and alcohol) abuse. He has a history of paranoid delusions and auditory and visual hallucinations, and needs ongoing mental health care. These health issues have led to difficulty in sustaining accommodation.

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18 Leave to appeal the decision of the Court of Appeal (*Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 (Clifford, Collins and Goddard JJ) [CA judgment]) upholding the original sentence was granted in *Fitzgerald v R* [2020] NZSC 119 [Leave judgment]. The approved question was whether the Court of Appeal was correct to find that s 106 of the Sentencing Act 2002 does not apply to the appellant.

19 *Fitzgerald v R* SC 67/2020, 3 December 2020.

[16] On 3 December 2016, the appellant approached two women walking along Cuba Street, Wellington. He grabbed one of the women by both her arms, pulled her towards him and told her he wanted to kiss her, before trying to kiss her mouth. She moved her head so that the kiss fell on her cheek. The appellant was convicted of indecent assault in respect of this conduct.

[17] The appellant also assaulted the second woman. She tried to pull the appellant off her friend, and in response the appellant grabbed the second woman by her arms and pushed her backwards towards a nearby wall, holding her for a moment before letting her go. The appellant was convicted of assault for this conduct.

[18] The overall incident lasted a moment or two, but was distressing nevertheless. The victim of the assault, who had been subject to past trauma, provided a victim impact statement in which she described the continuing emotional impact of the assault.

[19] Although, as described by the sentencing Judge, the kiss fell "at the bottom end of the range" for an indecent assault,[20] this nevertheless counted as the appellant's third strike for the purposes of s 86D of the Sentencing Act, the provisions of which I come to shortly.

[20] The appellant's prior strike offences were also indecent assaults. The first, the most serious, occurred in 2012. The appellant knocked the victim to the ground and, when her skirt rode up through the fall, fell on top of her, burying his face in her buttock area and placing his hands there as well. In 2015, the appellant slapped the buttocks of three women in close succession as they walked past. He received a sentence of 11 months' imprisonment for the 2012 offence and a sentence of four months' imprisonment for the 2015 offending.

The three strikes regime

[21] The three strikes regime was introduced to the Sentencing Act by amending legislation, the Sentencing and Parole Reform Act 2010. This amending legislation

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[20] HC judgment, above n 17, at [21].

underwent a number of significant amendments during its passage through the House of Representatives. Most relevantly, at the Bill's introduction, the three strikes regime was to apply only when an offender was sentenced to a determinate sentence of imprisonment of at least five years, or to an indeterminate sentence (a sentence of preventive detention or life imprisonment) for qualifying offences. While the Bill was in select committee stage, Cabinet agreed to remove this threshold of five years' imprisonment, so that the regime would apply upon conviction for certain "qualifying offences" regardless of the sentence received.[21] Nevertheless, throughout the passage of the Bill, the responsible Ministers[22] explained that it would be legislation targeted at the "worst repeat violent and sexual offenders".[23] This was consistent with the Bill's explanatory note, which said that the "purpose of the Bill is to create a three stage regime of increasing consequences for the worst repeat violent offenders".[24]

[22] Notwithstanding this purpose, the final legislation is expressed in terms broad enough to capture those who commit offences which are relatively minor and yet fall within the definition of "serious violent offence". This case is an example of that. The offence of indecent assault falls within the Sentencing Act definition of a "serious violent offence".[25] The latter is defined by reference to offence provisions in the Crimes Act 1961, rather than by reference to the seriousness of the conduct involved in the particular offending.

[23] As to how the regime operates, when first convicted of a "serious violent offence" (defined in the Sentencing Act as a stage-1 offence), an offender is sentenced in the ordinary way but receives a "first warning" about the operation of the three strikes regime.[26] If, after that first warning, an offender is convicted of another "serious violent offence", that offence counts for the purposes of the regime as a

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21 The other significant change made at this stage was the sentence the court must impose upon conviction of a third strike offence: originally this was life imprisonment, but it was reduced to being the maximum term of imprisonment for the particular offence.

22 As the Bill was progressing, responsibility for the legislation shifted from the Minister of Justice to the Minister of Police and Corrections.

23 (18 February 2009) 652 NZPD 1421 per Hon Simon Power; and (4 May 2010) 662 NZPD 10674 per Hon Judith Collins.

24 Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at 1.

25 Sentencing Act, s 86A definition of "serious violent offence", para (12).

26 Section 86B. The offender must also have been 18 years of age or older at the time of the offending for the offence to qualify as a stage-1 offence: see s 86A definition of "stage-1 offence", para (b)(ii).

stage-2 offence.[27] I refer to it as a second strike, the expression commonly used. On a second strike (other than for murder), the judge must give the offender a final warning about the consequences of committing a further qualifying offence.[28] The offender is sentenced in the ordinary way, but if they are sentenced to a term of imprisonment, the judge must order that the offender serve the full term without parole or early release.[29]

[24] If the offender then commits a further "serious violent offence", s 86D of the Sentencing Act applies to what is treated as a stage-3 offence.[30] This is the stage of the three strikes regime with which this appeal is concerned and I set it out in material part:

> **86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment**
>
> (1) Despite any other enactment,—
>
> (a) a proceeding against a defendant charged with a stage-3 offence must be transferred to the High Court when the proceeding is adjourned for trial or trial callover under section 57 of the Criminal Procedure Act 2011 or, as the case may be, in accordance with section 36 of that Act, and the proceeding from that point, including the trial, must be in the High Court; and
>
> (b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.
>
> (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
>
> (3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.
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> …

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27 Section 86A definition of "stage-2 offence".
28 Section 86C(1).
29 Section 86C(4). As to the implications of the no-parole rule for sentencing, see *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49.
30 Section 86A definition of "stage-3 offence".

[25] On its face, s 86D(2) requires that if, after receiving the final warning, an offender is convicted of a further "serious violent offence" (other than murder), the High Court must sentence the offender to the maximum term of imprisonment prescribed for that offence. Section 86D(3) further provides that the court must also order that the offender serve the sentence without parole, unless satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.

Discharge without conviction

[26] Section 106 of the Sentencing Act provides in material part:

> **106 Discharge without conviction**
>
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
>
> (2) A discharge under this section is deemed to be an acquittal.
>
> …

[27] Section 107 provides the threshold for such a discharge, the "gateway through which any discharge without conviction must pass".[31]

> **107 Guidance for discharge without conviction**
>
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

Sentencing of Mr Fitzgerald in the High Court

[28] In the High Court, Simon France J rejected an application to discharge the appellant without conviction for the simple reason that by its terms, s 106 did not apply where the court is required to impose a minimum sentence.[32] The Judge said that s 86D(2) required him to impose a sentence of seven years' imprisonment.[33]

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31 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [8].
32 HC judgment, above n 17, at [11] and [13].
33 At [17].

[29] The Judge had before him several reports setting out the appellant's mental health history and addressing his mental health condition. In a report prepared for the Court, Dr Rosie Edwards, an assessing psychiatrist, expressed the view that the most appropriate course of action would be to deal with the appellant under s 34(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) – the appellant would be "best placed in a rehabilitation unit rather than an acute unit under an In-patient Mental Health Act order".[34] That disposition was only available upon a conviction, but the mandatory sentence that flowed from the appellant's conviction under the three strikes regime precluded it. Dr Edwards recorded her observation that the appellant was becoming more unwell in prison, requiring additional medication to manage his condition.

[30] The Crown conceded it was manifestly unjust to order that the sentence be served without parole. The Judge agreed. He said that the indecent assault was at the bottom end of the range of seriousness, so that, standing alone, and leaving aside any aggravating features of the offender, the offending would not attract a jail term.[35] The Judge also said that while the appellant's mental health condition was not at a level that provided a defence, there was nevertheless a link between it and his impulsive offending.[36] He observed that the appellant appeared to be developing some insight into his offending, avowing an intention to desist. The Judge considered that the possibility of parole provided an incentive to maintain that insight.[37]

[31] However, Mr Fitzgerald has since been declined parole. As Collins J in the Court of Appeal noted, the Parole Board's decision to decline parole in June 2020 stemmed from Mr Fitzgerald's continued need for psychological rehabilitation.[38]

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34 This report was dated 25 August 2017 and was prepared for the purpose of assisting the Court as to whether the appellant was unfit to stand trial.

35 At [21].

36 At [22]. Four reports were filed under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) during the course of proceedings in the High Court, outlining the mental health history I have set out above. The report writers expressed the opinion that the appellant was fit to stand trial and ruled out a defence of insanity. The appellant was considered to have a mental disorder within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

37 At [26].

38 CA judgment, above n 18, at [138].

Court of Appeal

[32] The appellant appealed both conviction and sentence, arguing again for a discharge without conviction. Following the hearing, the Court of Appeal invited submissions on whether it could and should make a declaration that s 86D(2) is inconsistent with the Bill of Rights. Ultimately, it declined to do so because the issue only arose in response to an inquiry from that Court; the appeal would need to be segmented so that the issue could be determined by the Full Court of the Court of Appeal; and in any case, a declaration of inconsistency would be of no real benefit to the appellant.[39]

[33] By a majority (comprising Clifford and Goddard JJ), the Court of Appeal upheld the High Court's decision. All Judges agreed that a seven year sentence was manifestly unjust and grossly disproportionate in this case and was therefore inconsistent with the s 9 right not to be subject to such punishment.[40] The majority thought it likely that the three strikes regime is also inconsistent with the right under s 19 of the Bill of Rights to freedom from discrimination on the grounds of disability, as those who are unable to regulate their behaviour in response to warnings will be disproportionately exposed to severe consequences.[41] However, the majority agreed with the High Court Judge that s 106 of the Sentencing Act had no application under the three strikes regime.[42]

[34] Collins J dissented. While, in his view, s 86D(2) could not be interpreted consistently with s 9,[43] s 106 could. He said that where there are two interpretations available, the more Bill of Rights-consistent one should apply, so that the proviso to s 106 should be construed to only exclude the jurisdiction to grant a discharge where the offence provision itself requires the imposition of a minimum sentence.[44] Moreover, to give s 106 this meaning would not subvert Parliament's intention as Parliament should not be presumed to have intended sentencing that breached s 9.[45]

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39 At [89]–[90]. Leave to appeal to this Court on that issue was declined.
40 At [43] per Clifford and Goddard JJ and [131] per Collins J.
41 At [45].
42 At [75].
43 At [117].
44 At [111] and [125]–[126].
45 At [116] and [128].

Nor did it add an unintended safety valve to the three strikes regime, because that regime is only engaged following a conviction. According to Collins J, this interpretation simply allowed s 106 to continue to operate as intended, unaffected by the three strikes regime.[46]

[35] Having concluded that a discharge without conviction was available, Collins J found that the direct and indirect consequences of conviction for Mr Fitzgerald were out of all proportion to the gravity of his offending.[47] Thus, Collins J would have allowed the appeal and discharged the appellant without conviction.[48]

The Bill of Rights

[36] Because the application, operation and effect of the Bill of Rights is central to the issues on this appeal, I begin my analysis with a discussion of its provisions and some of the case law that touches upon their operation. The long title of the Bill of Rights states that it is an Act:

> (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

[37] Part 1 of the Bill of Rights (ss 2–7) contains the general provisions applying to legislation which engages the enacted rights. The scheme is as follows. Section 2 affirms the rights and freedoms contained in the Bill of Rights. By virtue of s 3(a), the Bill of Rights applies to acts done by each of the legislative, executive and judicial branches of government.[49] Sections 3 and 6 (the latter discussed below) are the provisions with the most direct application to the judicial branch of government.

[38] Section 5 provides that the rights and freedoms affirmed are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This provision efficiently brings into the Bill of Rights the limits

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46 At [129].
47 At [139].
48 At [141].
49 It also applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law: s 3(b).

on the affirmed rights and freedoms that are recognised as reasonable limits in the International Covenant on Civil and Political Rights (ICCPR)[50] and in the common law. However, some rights are so fundamental that no limit can be justified – it is common ground that s 9 is one such right.[51]

[39] Section 4 makes clear that, notwithstanding ss 3 and 5, the Bill of Rights is not supreme law – the courts cannot decline to apply any provision of any enactment, and cannot hold any provision to be impliedly repealed, revoked, invalid or ineffective, by reason only that the provision is inconsistent with any provision of the Bill of Rights. Parliament is therefore able to legislate in breach of the affirmed rights and freedoms, and if it does so, the courts must apply that law.

[40] Section 6 contains a direction for the judiciary when undertaking its constitutional function of interpreting legislation:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Commentators sometimes suggest that ss 4 and 6 pull in different directions.[52] But I do not consider that they do. Section 4 affirms Parliament's right to legislate inconsistently with the Bill of Rights, notwithstanding ss 3 and 5. Section 6 is an instruction to the judiciary as to how to interpret Parliament's legislation. As the Human Rights Commission accepted at the hearing, ss 4 and 6 speak to the constitutional role of Parliament and of the courts in relation to legislation.

[41] The Bill of Rights is therefore a statute of constitutional significance, one which is "intended to be woven into the fabric of New Zealand law".[53] As a statutory bill of rights, even if not supreme law, the Bill of Rights is to be given a generous interpretation – an interpretation suitable to give individuals the full measure of the

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50 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

51 See below at [43], [78] and [116].

52 See, for example, Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [7.9.1].

53 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.

enacted fundamental rights and freedoms,[54] and one which renders the rights practical and effective,[55] comprehensible beyond the ranks of judges and human rights academics.

[42] In applying and interpreting the Bill of Rights, it is important also to reflect that the Act has common law, statutory and international antecedents.[56] In particular, it must be remembered that its enactment fulfils, in part, New Zealand's obligations under the ICCPR, which New Zealand has ratified.[57] In this case, for example (and as I come to later), a breach of the s 9 right also entails a breach of art 7 of the ICCPR.[58] If an ICCPR right is violated in New Zealand but not remedied in this jurisdiction, then New Zealand will be in breach of its international obligations and international remedies are available.[59]

[43] Although the Bill of Rights has a relatively simple statutory scheme, its application has caused difficulty, in particular in defining the relationship between ss 4 and 6, ss 5 and 6, and between s 5 of the Interpretation Act 1999 and s 6 of the Bill of Rights. Because of the Crown's concession in this case that s 9 is an illimitable right – that is, there is no justification for an intrusion upon it – I put the issue of s 5 of the Bill of Rights to one side when addressing the following issues as to the application of the Bill of Rights which are relevant to this appeal:

(a) What is the relationship between the s 6 direction and other possible meanings? In particular, what role does s 5 of the Interpretation Act play in the s 6 interpretive exercise?[60]

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54 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328 per Lord Wilberforce, cited with approval in *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J; and *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268 per Cooke P.

55 *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [25] per Elias CJ and [103] per Tipping J.

56 *Noort*, above n 54, at 270 per Cooke P.

57 New Zealand ratified the ICCPR on 28 December 1978.

58 See below at [75]–[77].

59 New Zealand ratified the Optional Protocol to the International Covenant on Civil and Political Rights on 26 May 1989, which provides an individual complaints mechanism for Convention breaches.

60 Section 5 of the Interpretation Act 1999 is soon to be replaced by s 10 of the Legislation Act 2019 (which, at the time of writing, has not yet come into force).

(b) Just how far should a court go in the interpretive exercise to find a rights-compliant interpretation?

Relationship between the s 6 direction and other possible meanings

[44] The effect of s 6, particularly when read alongside ss 3, 4 and 5 of the Bill of Rights, as well as s 5 of the Interpretation Act, was the subject of extensive discussion by five Judges of this Court in *R v Hansen*.[61] The majority's approach has since been most commonly cited by way of the six-step test proposed by Tipping J:[62]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[45] It is not clear from the judgment whether step one includes consideration of the s 6 direction. There is some suggestion in Tipping J's reasons that it does,[63] but logic suggests it does not – otherwise no purpose would be fulfilled by step five.

[46] However, it is important to note that the majority in *Hansen* did not regard their approach as prescribing a methodology that applies in all circumstances. Blanchard J recognised that "[t]he Bill of Rights does not mandate any one method or sequence of

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61 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

62 At [92].

63 Tipping J says that the "initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament": at [89].

application for applying and reconciling ss 4–6 in a given case".[64] Tipping J said his approach was suitable for the sort of case then before the Court, where there were two conceptually distinct meanings at issue, but might not be appropriate in other circumstances.[65] McGrath J felt that the *Hansen* methodology would "generally" be the most appropriate way of applying ss 4, 5 and 6.[66]

[47] Since *Hansen*, various commentators have argued that there is a lack of clarity in the majority's six-step test[67] and uncertainty as to when it is to apply.[68] In this case, however, no issue arises under s 5. There can be no limits placed upon the s 9 right that could be counted as reasonable. I do not, therefore, propose to apply the *Hansen* methodology in this case, but rather address myself to the statutory framework of ss 3, 4 and 6.[69]

[48] Taken on its own, in a case such as this, s 6 is naturally read as creating a starting presumption that a rights-consistent meaning should be given to enactments where the application of that enactment to a particular case engages the affirmed rights and freedoms, in the sense that it touches upon those rights and freedoms. And it makes clear that a rights-infringing interpretation is to be avoided where possible. This construction of s 6 is consistent with the rights-affirming and promoting purpose of the Bill of Rights, placing Bill of Rights-consistency at the heart of the statutory

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64 At [61].

65 At [93]–[94].

66 At [192]. Neither Elias CJ nor Anderson J adopted the majority's stepped methodology. Elias CJ considered that the steps suggested by the majority would set up a soft form of judicial review of legislation and would distort the interpretive obligation under s 6 from preferring a rights-consistent meaning, to preferring a meaning consistent with the rights as limited by s 5. She said that if an enactment "can" be given a meaning consistent with the New Zealand Bill of Rights Act 1990 [Bill of Rights], s 6 dictates that it must be given that meaning – s 5 does not form part of the interpretive inquiry: at [6], [13] and [15]. Anderson J was also of the view that s 5 does not have an interpretive purpose or effect, as this function is served by s 6: at [266]. Moreover, since *Hansen*, this Court has said that the six-step methodology does not apply to the exercise of statutory powers: *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [101]–[102] per Winkelmann CJ and O'Regan J and [259], n 361 per Glazebrook J.

67 See, for example, Paul Rishworth "Human Rights" [2012] NZ L Rev 321 at 330; and Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59 at 84.

68 See, for example, R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 518.

69 See *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33] for an example of this approach.

interpretation process.[70] For this reason, I see s 6 as the central provision and the starting point for the interpretive task where the application of an enactment to a particular case engages the affirmed rights and freedoms.[71]

[49] What of the relationship between s 6 of the Bill of Rights and s 5 of the Interpretation Act, the latter of which focuses the interpretive task upon text and statutory purpose? Another way of characterising s 6 is that it is a direction to the courts that they should presume a statutory purpose that the application of the enactment that falls to be construed does not breach the affirmed rights or freedoms, unless the language of the statute clearly excludes that possibility. On this approach, s 6 reconciles readily with s 5 of the Interpretation Act in the sense that s 5 is allowed its usual operation. Where legislation engages an affirmed right or freedom, by reason of s 6, one of the purposes to which s 5 of the Interpretation Act directs the court is Bill of Rights-consistency. But where the language is clear enough to exclude the possibility of a rights-consistent purpose and effect, s 5 of the Interpretation Act applies to give effect to the remaining (rights-inconsistent) text and purpose.

[50] The latter proposition also flows out of and is consistent with the s 4 direction that the courts cannot decline to apply any provision or enactment and cannot hold any provision to be impliedly repealed, revoked, invalid or ineffective, by reason only that the provision is inconsistent with any provision in the Bill of Rights.

[51] There has been some debate as to the relationship between s 6 and the principle of legality. The latter is a common law principle of statutory interpretation which exists independently of the Bill of Rights, to protect and uphold certain rights and values that the common law has identified as fundamental or as having a constitutional nature. Although it operates to protect the rights and freedoms affirmed in the Bill of Rights, it is not displaced or confined by the Bill of Rights.[72] As a common law

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70 Of course, an interpretation that recognises and gives effect to reasonable limitations upon a right is a rights-consistent interpretation. Again, however, that issue is not addressed in these reasons as it does not arise on the facts.

71 I therefore disagree with William Young J's view that s 4 is the starting point for the court in its interpretive task: see below at [292].

72 Bill of Rights, s 28. The principle of legality therefore continues to protect common law rights which are not duplicated by the Bill of Rights, such as the right to privacy and the right not to be deprived of property without compensation.

principle it continues to develop, as seen in recent decisions of the United Kingdom Supreme Court[73] and the decision of this Court in *D v New Zealand Police*.[74]

[52] In *R v Secretary of State for the Home Department, ex parte Simms*, Lord Hoffmann described the principle of legality in the following terms:[75]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon [the exercise of this power] by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[53] The operation of this principle was apparent in *D v New Zealand Police*, in which the majority of this Court endorsed the statement that Parliament cannot abridge fundamental rights and freedoms by general or ambiguous words. The majority found that parliamentary materials suggesting a rights-infringing purpose were insufficient to abridge those rights and freedoms, in the absence of express words in the statute or a necessary implication arising from the words of the statute.[76]

[54] Debate in New Zealand has tended to focus upon whether s 6 is simply a statutory embodiment of the principle of legality which operates in the same manner, or whether it goes further.[77] Similar debates have occurred in the United Kingdom in

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73 See, for example, *J v Welsh Ministers (Mind intervening)* [2018] UKSC 66, [2020] AC 757; and *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491. See also the discussion in Jason NE Varuhas "Conceptualising the Principle(s) of Legality" (2018) 29 PLR 187.

74 *D v New Zealand Police*, above n 66.

75 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

76 *D v New Zealand Police*, above n 66, at [77]–[82] per Winkelmann CJ and O'Regan J, with whom Ellen France J agreed: at [159].

77 See, for example, Geiringer, above n 67; *Brookers Human Rights Law* (looseleaf ed, Brookers) vol 1 at [BOR6.10]; and Paul Rishworth "Human Rights in the Common Law Tradition" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 61 at 73–74.

respect of s 3(1) of the Human Rights Act 1998 (UK), which, while modelled on New Zealand's s 6, is expressed in slightly different language:

> **3 Interpretation of legislation**
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[78]
>
> …

[55] Clearly, s 6 incorporates aspects of the principle of legality in relation to the affirmed rights and freedoms, in that courts applying it will proceed on the basis that clear words are needed if legislation is to be construed as abridging fundamental freedoms.[79] Just as with the principle of legality, it is the language of the statute which must be clear enough to exclude the possibility of a rights-consistent purpose and effect – it is not enough that parliamentary materials might suggest this.

[56] But the s 6 direction is not simply a statutory embodiment of the principle of legality. It requires that when the courts undertake the interpretive exercise, they must presume a rights-consistent purpose. Section 6 therefore mandates a more proactive approach to interpretation – proactively seeking a rights-consistent meaning. Hence, as Jason Varuhas recognises, the interpretive principle contained in rights-charters such as New Zealand's Bill of Rights is distinct from the orthodox formulation of the principle of legality in that it allows for "reading down otherwise clear statutory language, adopting strained or unnatural meanings of words, and reading limits into provisions".[80]

[57] It may be, therefore, that in some cases s 6 will go further than the principle of legality. As I come to, in this case I consider that it does.[81] However, not much is to be gained from seeking to fully define the relationship between the principle of legality and the s 6 interpretive direction for the purposes of this appeal. The critical issue in

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78 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

79 See, for example, *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 (CA) at [82] per Elias CJ; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 712 per Gault J, and the authorities cited at n 77.

80 Varuhas, above n 73, at 202.

81 See below at [139].

respect of s 6 is its effect and application. And since this case was argued by all parties in reliance upon s 6, I therefore address the issues on that basis.

Just how far should the courts go to find a rights-consistent meaning?

[58] The next issue that arises is how far the courts should go in striving for a rights-consistent meaning. The answer is to be found in a conventional analysis of ss 4 and 6. I start with s 6, which is where the interpretation process should start. The rights-consistent meaning must only be possible – it need not be the most likely meaning or even a likely meaning. In *Hansen*, "possible" was construed as meaning *reasonably* possible.[82] I have concerns that reading in the word "reasonably" imposes a limitation which does not appear in the text and is also unnecessary, as the Act itself provides all necessary limits on the s 6 process. The word "reasonable" also tends to have perambulatory meaning – one person's strained but available meaning is another's unreasonable meaning. However, if the word means no more than "tenable", as Tipping J suggests in *Hansen*,[83] I am content with it, since that is consistent with the words of s 6 itself: a meaning that "can be given".

[59] Section 6 makes clear that it must be possible to arrive at the rights-consistent meaning *through the process of interpretation*. This is familiar territory for courts. It is the courts' constitutional function to interpret and apply legislation enacted by Parliament, and the courts have a range of common law techniques to assist with this. Which of these techniques is appropriate in any given case may vary depending upon the nature of the right and upon the nature of the breach that is sought to be avoided. The Bill of Rights operates differently depending on the type of rule in question and the problem it poses to the right at stake. Professor Janet McLean makes this point as follows:[84]

> Much depends on how one characterises the problem with the rule — whether it is under-inclusive, over-broad, whether it is itself a justified limit on the rights or whether it is pernicious in all of its applications. Interpretative techniques will vary according to the diagnosis. Moreover, the rights themselves vary greatly — some are themselves more rule-like, while others

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82 *Hansen*, above n 61, at [90]–[92] and [158] per Tipping J, [252] per McGrath J and [289]–[290] per Anderson J.

83 *Hansen*, above n 61, at [158], n 191.

84 Janet McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ L Rev 421 at 430.

> invite evaluative judgements in determining their meaning. All these factors interact to determine the operation of the Bill of Rights in a particular case.

[60] Section 4 sets the outer limits of what is possible – the meaning arrived at cannot amount to a refusal to apply the enactment, and nor can it amount to treating the enactment as invalid, ineffective, impliedly repealed or revoked.

[61] Reaching a meaning different to the plain or ordinary meaning is a conventional outcome of statutory interpretation, where that is necessary to correct errors in statutory expression and to achieve clear legislative purpose.[85] To use the words of Cooke P, there is a "general principle of statutory interpretation that strict grammatical meaning must yield to sufficiently obvious purpose".[86]

[62] "Reading in" and "reading down" provisions in order to align with parliamentary purpose are two closely connected and commonly employed techniques of statutory interpretation.[87] Courts have long "read down" broadly expressed statutory powers and provisions so as to align with the purpose of the legislation,[88] including by "reading in" significant qualifications.[89] In *R v Wall*,[90] for example, the Court of Appeal considered s 26 of the Misuse of Drugs Amendment Act 1978, which read:

> Where a private communication intercepted in pursuance of an interception warrant or an emergency permit discloses evidence relating to any offence other than a drug dealing offence, no evidence of that communication, or of its substance, meaning, or purport, shall be given in any Court.

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85 Carter, above n 68, at 401–406.

86 *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA) at 17. For example, in *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2012] NZSC 69, [2012] 3 NZLR 799, this Court read the word "or" in s 69N(1)(c)(i) of the Employment Relations Act 2000 to mean "and", to achieve what must have been Parliament's intended result and to avoid redundancy and contradiction. In *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA), the Court of Appeal departed from the ordinary meaning of a provision by reading a privilege conferred on a patent attorney under the Evidence Amendment Act (No 2) 1980 as also conferred on the client, in line with clear parliamentary purpose. The Court said that "[o]nce satisfied that Parliament intended to confer privilege on both patent attorneys and their clients … the Court should strive to arrive at a meaning which gives effect to that intention": at [28]. A literal reading of the provision would have deprived it of its purpose.

87 For a discussion of statutory interpretation techniques of "reading in" and "reading down", see McLean, above n 84, at 431–439.

88 See, for example, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030; and *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

89 See the discussion in Carter, above n 68, at 418–422.

90 *R v Wall* [1983] NZLR 238 (CA).

In that case, an interception had revealed evidence of a drug dealing offence inextricably intertwined with evidence of another offence. On a strictly literal interpretation of this provision, the evidence would have been inadmissible. Cooke J, writing for the Court, said that this "could not represent the intention of Parliament", as the basic purpose of the Act was that evidence of drug dealing may be obtained by lawful interception warrants.[91] If the purpose of the legislation was kept at the forefront, then the implicit meaning of the provision could be easily identified: "[b]y necessary implication the last words of the section are subject to the qualification 'Except in any criminal proceedings for a drug dealing offence'".[92]

[63] Courts have read into the process for the exercise of statutory powers mandatory considerations, such as New Zealand's international obligations.[93] Most relevantly for present purposes, they have read in qualifications to statutory provisions in order to uphold fundamental common law values,[94] for example by reading statutorily created procedural regimes as subject to certain common law procedural protections, such as the requirements of natural justice and the right to legal representation.[95]

[64] The case *Drew v Attorney-General* is one such example, concerning a provision that empowered the making of regulations "prescribing the procedures for the hearing of … complaints" regarding the discipline of inmates.[96] The Court of Appeal read down the broad words of this provision so as to interpret it as not authorising the making of a regulation which could result in hearings before Visiting Justices being conducted in a manner contrary to the principles of natural justice.[97] The Court reached this conclusion "applying common law principles of construction,

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91 At 240.
92 At 241.
93 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [91]; and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.
94 See also the discussion of *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC) and *Cropp*, above n 69, in the reasons of Arnold J at [212]–[213] and [182]–[184] respectively.
95 See, for example, *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [118]–[120]; and *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [66]–[67]. See also *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA); and *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326.
96 *Drew*, above n 95, at [27].
97 At [66].

guided by the principles of natural justice",[98] and said that the same outcome would have been reached applying s 6 of the Bill of Rights.[99]

[65] As I come to later, these techniques of "reading in" and "reading down" have been used by courts in the United Kingdom to qualify statutory provisions that engage a right or freedom protected by the Human Rights Act, in accordance with the s 3(1) interpretive obligation.

[66] There is, of course, a line to be drawn between what is legitimate interpretation and what is illegitimate judicial amendment of a provision. Just where this line lies is a question of constitutional significance. The most obvious limit on s 6 comes by way of s 4, as I mentioned above at [60] – the rights-consistent meaning must not entail a refusal to apply the legislative provision. In *Zaoui v Attorney-General*, McGrath J said of this limitation:[100]

> Section 4 precludes the Court from reading the legislative text in a way which nullifies it or is so inconsistent with the statutory purpose as to do violence to its scheme.

In *Hansen*, Tipping J said that "s 6 must not be used as a concealed legislative tool. The Courts may interpret but must not legislate."[101]

[67] Assistance as to appropriate limits to the s 6 interpretive exercise can be found in the United Kingdom cases applying s 3(1) of the Human Rights Act. As discussed by Lord Rodger in *Ghaidan v Godin-Mendoza*, reading in or reading down a provision to reach a rights-compliant interpretation will be illegitimate if that interpretation is inconsistent with the scheme of the legislation or with its essential principles.[102] This

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98 At [67].

99 At [68].

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

101 *Hansen*, above n 61, at [156] (footnote omitted).

102 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [121]. It has been suggested that the application of these principles in *Ghaidan* and other early cases may have been a high-water mark in the approach to s 3(1) in the United Kingdom: see, for example, Adam Wagner and Gideon Barth "Judicial Interpretation or Judicial Vandalism? Section 3 of the Human Rights Act 1998" [2016] JR 99 at [11]. However, *Ghaidan* is still treated as the leading case, and the approach it sets out continues to be applied (see, for example, *Gilham v Ministry of Justice (Protect intervening)* [2019] UKSC 44, [2019] 1 WLR 5905 at [39]–[40]).

idea was later summarised by Lord Bingham in a subsequent decision, who said that a rights-compliant interpretation would not be possible if:[103]

> … such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, … or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation.

[68] To express this another way, and in terms of the New Zealand legislation, the purpose of the enactment, as gleaned from the words of the enactment itself and the statutory context, may mean that the rights-compliant interpretation is not possible without disapplying the legislation in question in some way, which s 4 precludes.

[69] Another recognised limitation is where the rights-consistent interpretation imposes on the court a task beyond its institutional competence. Thus, courts in the United Kingdom have been reluctant to rely on s 3(1) in cases involving complex questions of social policy which the courts are ill-equipped to decide, and which should be left to Parliament.[104] The Crown seems to suggest that such a limitation might be relevant for the purposes of this appeal, as it says that a rights-consistent interpretation would require the Court "to create its own approach to sentencing in the context of an otherwise tightly codified subpart of the Sentencing Act".

[70] The applicability of the United Kingdom approach to s 3(1) in the New Zealand context was the subject of quite full discussion in *Hansen*. Tipping J was satisfied that the United Kingdom approach, which "appears at times to have been construed as mandating a judicial override of Parliament", was not appropriate in New Zealand.[105] McGrath J said that although the language of s 3(1) and s 6 was "not materially different",[106] there was "undoubted difference between the meaning given to the provisions by the Courts of the two jurisdictions", due, he thought, to "the different constitutional contexts in which the similar broad language is interpreted".[107]

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103 *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264 at [28] (citations omitted).

104 Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at 924; and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21, [2003] 2 AC 467.

105 *Hansen*, above n 61, at [158].

106 At [243].

107 At [244].

[71] On the other hand, Elias CJ said that despite English authority for the view that s 6 is weaker than its United Kingdom equivalent,[108] she was "unable to accept that there is any material difference" between the two models.[109] She considered that the limits set out by the House of Lords in *Ghaidan* were equally appropriate under the New Zealand Bill of Rights.[110] Anderson J also considered it difficult to distinguish between the two provisions, "whether in terms of essential meaning or in terms of relative potency".[111]

[72] For my part, I agree with Elias CJ and Anderson J that the framework principles as to the *limits* of s 3(1) in the United Kingdom are equally applicable in New Zealand. Having said that, I do not suggest that every case decided in the United Kingdom will be a useful precedent for what is possible in New Zealand for the purposes of the s 6 interpretive exercise. That case law has been developed in the very particular circumstances of the United Kingdom. New Zealand, with its own constitutional history and custom, must develop its own Bill of Rights jurisprudence.

[73] In summary, therefore, s 6 is a powerful interpretive obligation that complements and strengthens the use of common law purposive interpretive techniques together with the principle of legality. But meanings reached by way of s 6 must still be arrived at through the process of interpretation. Where the language of a provision is clear enough to exclude the possibility of a rights-consistent meaning, s 4 requires the courts to give effect to the rights-inconsistent meaning.

Section 9 of the Bill of Rights

[74] In terms of the analysis set out above, it is first necessary to identify the right or freedom engaged. Here, it is s 9 of the Bill of Rights.

[75] Section 9 is a domestic expression of New Zealand's pre-existing obligations under international law. Article 5 of the Universal Declaration of Human Rights provides: "No one shall be subjected to torture or to cruel, inhuman or degrading

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108 Referring to *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at 67–68; *Ghaidan*, above n 102, at [44]; and *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 (HL) at 374.

109 At [13].

110 At [25].

111 At [287]. Blanchard J did not comment on the issue.

treatment or punishment".[112] This wording was then copied across into art 7 of the ICCPR.

[76] The key difference between art 7 of the ICCPR and s 9 of the Bill of Rights is that s 9 prohibits "disproportionately severe" rather than "inhuman" treatment or punishment. However, the distinction is of no significance, as was acknowledged by Blanchard J in *Taunoa v Attorney-General*:[113]

> [176] It is therefore apparent that "disproportionately severe", appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances. Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called "inhuman" in the sense given to that term in the jurisprudence under art 7 of the ICCPR.

[77] In that same case, Blanchard J said the term "disproportionately severe" was included in s 9 to:[114]

> … catch behaviour which does not inflict suffering in a manner or degree which could be described as cruel, and cannot be said to be degrading in its effect, but which New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion.

Elias CJ opined that the Canadian test of "whether the punishment prescribed is so excessive as to outrage standards of decency" was appropriate in considering the application of s 9.[115] Tipping J preferred a test to the same general effect, but which defines "disproportionately severe" conduct as being "conduct which is so severe as to shock the national conscience".[116]

[78] Limits on s 9 cannot be reasonably justified.[117] In the case of disproportionately severe treatment, any proportionality inquiry will have already

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112 *Universal Declaration of Human Rights* GA Res 217A (1948).
113 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
114 At [172].
115 At [92] (footnote omitted).
116 At [289].
117 United Nations Human Rights Committee *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) at [3]; *Taunoa*, above n 113, at [77] per Elias CJ; and *Hansen*, above n 61, at [65] per Blanchard J and [264] per Anderson J.

taken place in determining whether that right is breached, leaving nothing additional for s 5 to do.[118]

[79] In this case, it is common ground that the imposition of a sentence of seven years' imprisonment for the appellant's offending meets the high threshold of disproportionately severe punishment for the purposes of s 9, whether that threshold is expressed as "so out of proportion to the particular circumstances as to cause shock and revulsion", "so excessive as to outrage standards of decency", or as "conduct which is so severe as to shock the national conscience". As noted, the sentencing Judge found that the indecent assault was at the bottom end of the range and that, standing alone, and leaving aside aggravating features of the offender, it would not attract a jail term.[119] He also found that the offending was contributed to by the appellant's significant mental health issues, for which he requires "constant mental health input".[120]

[80] The Court of Appeal also unanimously found that s 9 had been breached.[121] The majority said it was "profoundly unjust" that Mr Fitzgerald was being punished more severely when his mental health condition had rendered the deterrence rationale underpinning the three strikes regime largely inapplicable.[122] In their opinion, the appellant "should be receiving care and support in an appropriate facility, not serving a lengthy term of imprisonment"; and in these circumstances:[123]

> … a sentence of seven years' imprisonment goes well beyond excessive punishment, and would in our view shock the conscience of properly informed New Zealanders who were aware of all the relevant circumstances including Mr Fitzgerald's mental disability.

[81] I agree with the findings of the Court of Appeal on this point. The sentence was disproportionate in its severity to the offending for which it was imposed. That disproportion existed in both the length and nature of the sentence.

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118 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 249.
119 HC judgment, above n 17, at [21].
120 At [22].
121 CA judgment, above n 18, at [43] per Clifford and Goddard JJ and [131] per Collins J.
122 At [34(c)].
123 At [43].

[82] The three strikes regime foreclosed the possibility of taking the appellant's mental health, clearly linked to the offending as the sentencing Judge had found, into account as a factor mitigating the sentence to be imposed. It also foreclosed the opportunity to place the appellant in a rehabilitation unit under s 34(1)(b)(i) of the CPMIP Act, as Dr Edwards recommended, rather than sentence him to imprisonment.[124]

Section 106 of the Sentencing Act

Argument on appeal

[83] It is common ground that s 86D(2) does not in its own terms exclude the operation of s 106 of the Sentencing Act, since it operates only on conviction. I agree with the lower Courts that is so. For the sake of completeness, I note s 86I, which provides:

> **86I Sections 86B to 86E prevail over inconsistent provisions**
>
> A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

The same point applies to this section. If no conviction is entered, s 86D(2) is not engaged and so there is no inconsistency which s 86I might address.[125]

[84] On appeal, counsel for Mr Fitzgerald argues that Clifford and Goddard JJ's construction of the phrase "any enactment applicable to the offence" in s 106 is wrong because s 86D applies to an offender who has had the requisite warnings; it does not apply to "the offence". In other words, s 86D is directed toward the status of the offender and not the particular statutory offence. It does not, therefore, prescribe a minimum sentence for the offence. There is no minimum sentence for the offence of indecent assault. Counsel also argues that there is nothing to suggest that, in passing the three strikes law, Parliament intended to restrict the ability to seek a discharge

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[124] It may be that the three strikes regime did not foreclose the possibility of the appellant being sentenced to imprisonment but detained in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act under s 34(1)(a)(i) of the CPMIP Act. But this was not raised by counsel as an option during sentencing, so was not considered in the Courts below and was not argued before us.

[125] CA judgment, above n 18, at [48].

without conviction – s 106 was not amended when the three strikes regime was added to the Sentencing Act, and s 86D itself does not preclude the application of s 106.

Analysis

[85] Section 106 is not the provision in the Sentencing Act that is directly implicated in the acknowledged breach of s 9 – that provision is s 86D(2). The question therefore arises: does the s 6 interpretive principle have any role to play in deciding whether the s 106 jurisdiction is available where the entering of a conviction triggers the three strikes regime?

[86] I start with the proposition that s 106 of the Sentencing Act is a rights-enhancing provision – it empowers a court to discharge rather than convict an offender, where satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[126] As the Human Rights Commission submits, it is one means (of several) by which Parliament has given effect to the right not to be subjected to disproportionately severe punishment.[127] The focus of the case law as to the application of s 106 is not usually on s 9 of the Bill of Rights, as discharges without conviction are frequently given where the consequences of conviction could not be said to meet the s 9 threshold.[128] However, given the role that s 106 plays in the Sentencing Act as set out above, its purpose must extend to preventing grossly disproportionate punishment which amounts to a breach of s 9. I am satisfied that the interpretive principle therefore does apply to require that s 106 be interpreted, if it can be in an individual case, so that it is available to avoid punishment, consequent upon conviction, which would amount to a breach of s 9.

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126 See [27] above.

127 For example, Andrew Butler and Petra Butler note that s 8(h) of the Sentencing Act, which requires a court to take into account any particular circumstances of the offender that mean a sentence would be disproportionately severe, "effectively incorporates s 9 of [the Bill of Rights] into the sentencing process": Butler and Butler, above n 52, at [10.14.10]. Section 106, which comes into play if "the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence" (s 107), does the same. Other examples include the court's obligation to impose "the least restrictive outcome that is appropriate in the circumstances" under s 8(g), and the direction that a cumulative sentence of imprisonment can only be imposed if the resulting total period of imprisonment is not "wholly out of proportion to the gravity of the overall offending": s 85(2).

128 For example, it is often the consequences of conviction on the offender's employment or personal life that is the focus of these inquiries, which would tend not to engage s 9. See, for example, *Flavell v Ministry of Social Development* [2015] NZHC 214.

[87] Also relevant in construing s 106 is that it is part of the basic architecture of the Sentencing Act. It predates the addition of the three strikes regime. The discretion under s 106 was not ousted by the amendments that brought in the three strikes provisions, although that would have been simple to achieve. Given the fact that s 106 is part of the basic architecture of the Act, that it is a rights-enhancing provision, and that it was not displaced by the three strikes regime, s 106 should not be read down to accommodate that regime.

[88] The majority of the Court of Appeal accepted that s 106 was able to be read as referring to minimum sentences for the offence rather than for the particular offending, but saw strong contrary indications to that meaning in the wider legislative context and in s 106's legislative history.[129] It therefore favoured giving the proviso in s 106, "unless by any enactment applicable to the offence the court is required to impose a minimum sentence", an interpretation that limited the category of cases falling within the jurisdiction of s 106.

[89] As to legislative context, the majority noted that s 107 asks whether the consequences of a conviction would be out of all proportion to the gravity of the offence. This showed, it said, a plain focus on the particular offence committed by the particular offender. It would be odd, the majority said, if the "offence" referred to in s 107, the gateway provision for s 106, differed from the "offence" referred to in s 106.[130]

[90] I agree that when read in context, the word "offence" is used in s 107 to mean the particular offence committed by the offender in all the circumstances. Nevertheless, there is difficulty with an analytical approach that turns upon ascribing a particular and fixed meaning to the word "offence", when it is clear that the meaning of that word within the Sentencing Act is context specific. For example, s 106(1), the very provision which confers the discretion to discharge, opens with the words "[i]f a person who is charged with an offence is found guilty … ". The word "offence" here is clearly a reference to the statutory offence – for example, an offence under s 135 of

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129 CA judgment, above n 18, at [54].
130 At [55].

the Crimes Act – and not a reference to offending which is a third strike offence.[131] Just how important context is to the meaning of the word "offence" is evident in Clifford and Goddard JJ's own interpretation of s 106, which entails giving that word two different meanings within the very same sentence of that provision.

[91] The majority of the Court of Appeal also referred to s 11 of the Sentencing Act, which provides that a court must, before entering a conviction, consider whether the offender may appropriately be dealt with in a number of ways, including discharging the offender without conviction.[132] The Court attached significance to the fact that s 11(2) goes on to provide that such consideration of those alternatives is not mandatory where:

> … any provision applicable to the particular offence in this or any other enactment provides a presumption in favour of imposing, on conviction, a sentence of imprisonment, a sentence of home detention, a community-based sentence, or a fine …

The Court considered that "provision applicable to the particular offence" was also to be read as a provision applicable to the particular offending, thus reinforcing a clear legislative intent that all minimum sentencing regimes should sit outside the s 106 discretion.[133]

[92] Even if the Court of Appeal's reading of s 11(2) is correct, I do not agree that this supports the broader reading of the s 106 proviso. If the phrase "particular offence" was intended to refer to the particular offending rather than the statutory offence, then it is a phrase Parliament could have used in s 106 to describe the exclusion.

[93] The Court of Appeal also relied upon the legislative history of s 106, tracing it back through various statutory predecessors and attaching significance to the meaning earlier Court of Appeal decisions had given to similar minimum sentence provisos.[134] It noted that the precursor of what is now s 106 appeared for the first time as s 42(1)

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131 Another example is s 85 of the Sentencing Act, in which the word "offence" is used in multiple different senses within the one provision.

132 Section 11(1)(a).

133 CA judgment, above n 18, at [58].

134 CA judgment, above n 18, at [59]–[71].

of the Criminal Justice Act 1954, which conferred a discretion on magistrates to discharge a defendant charged with a summary offence without conviction "unless by any enactment applicable to the offence a minimum penalty is expressly provided for". This exception was expanded to apply to all courts by way of s 19 of the Criminal Justice Act 1985, the immediate precursor to s 106:

> **19 Discharge without conviction**—(1) Where a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction unless by any enactment applicable to the offence a minimum penalty is expressly provided for.
>
> (2) A discharge under this section shall be deemed to be an acquittal.
>
> …

[94] The Court of Appeal addressed the meaning of s 19 in *R v Eteveneaux*.[135] In that case, Mr Eteveneaux had been found guilty of driving while disqualified, and was facing his second conviction for the offence. Section 84(2A) of the Criminal Justice Act 1985 provided that where a person was convicted of that offence twice within four years, the court was required to order that the motor vehicle involved in the second offence be confiscated unless to do so would result in extreme hardship to the offender or undue hardship to any other person. On appeal, Mr Eteveneaux's counsel argued that s 84(2A) was not a minimum penalty for the purposes of s 19, as it did not apply to the "offence simpliciter", but rather to the particular offending. The Court said:[136]

> … we read s 19 as referring to the particular offence, ie the specific offence committed, which was driving while disqualified in circumstances covered by s 84(2A). The actual offence committed by the appellant had the mandatory consequence of confiscation flowing from it. While the offence of driving while disqualified does not of itself necessarily involve confiscation, the offence committed by the appellant did.

Thus, the Court found that the confiscation order was a minimum penalty for the purposes of s 19, and as a consequence, a conviction had to be entered: there was "no room for the exercise of the Court's power to discharge without conviction under s 19".[137]

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135 *R v Eteveneaux* (1999) 16 CRNZ 601 (CA).
136 At [10].
137 At [14].

[95] I do not, however, consider *Eteveneaux* assists in the interpretation of s 106 of the Sentencing Act. First, the Court in *Eteveneaux* did not address itself to s 6 of the Bill of Rights. Its failure to do so was not surprising, since the particular application of s 19 did not engage s 9 (or any other affirmed rights or freedoms), so that the Court was not required to undertake the s 6 interpretive task.

[96] Secondly, I am satisfied that the decision's effect should be limited to the predecessor legislation, in circumstances where the desire to negate the effect of *Eteveneaux* explains the current form of s 106. To expand on this point – when s 106 was originally introduced as cl 95 of the Sentencing and Parole Reform Bill 2001, it contained an exception that precluded discharge where an enactment provided for a minimum penalty.[138] It was therefore in a form materially identical to s 19 of the Criminal Justice Act 1985. If enacted in this form, it would have carried forward the effect of the *Eteveneaux* decision. However, the Justice and Electoral Committee recommended that a minimum penalty provision should not prevent courts from discharging without conviction, as the court should be able to do so while also imposing a penalty – such as disqualifying a drink-driver while also discharging without conviction.[139] Following that recommendation, the wording of s 106 was changed at the Committee of the Whole House stage to refer to a "minimum sentence" rather than a "minimum penalty".[140]

[97] This amendment was therefore intended to broaden the circumstances in which a discharge without conviction was available, an effect achieved because the Sentencing Act distinguishes between orders and sentences – a "sentence" begins at the stage of a fine or reparation; anything less than this is an order.[141] As counsel for the appellant acknowledges, the language used to create this change was imprecise and does not give much hint at what it was supposed to achieve. But its effect, based on the legislative history, of allowing the court to discharge offenders without

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138 Sentencing and Parole Reform Bill 2001 (148-1), cl 95(1).
139 Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 21.
140 Sentencing Bill 2001 (148-3A), cl 95.
141 Sentencing Act, s 10A.

conviction even where an offence requires the court to make a particular order, has been broadly accepted.[142]

[98] Another aspect of s 106's legislative history is relevant. At the time s 106 came into force, there were no minimum sentences applying to a particular offender or offending, only those applying to a statutory offence. And even then, the Crown notes that the exclusion of s 106's jurisdiction related to only a very narrow band of offences – treason[143] and certain types of piracy.[144] These minimum sentences applied to the category of offence, not to the offender or the particular offending. While acknowledging that it is a principle of statutory interpretation that enactments apply to circumstances as they arise,[145] this context is relevant as it assists with understanding the purpose of the proviso, and, in particular, it supports the appellant's argument that it was not directed at minimum sentences applying to a category of offender or particular offending.

[99] The consideration which weighed most heavily with the majority in the Court of Appeal was the concern that giving the exclusion the narrow meaning argued for by the appellant would allow an "end run" around s 86D(2), by creating an exception to that provision in circumstances where the legislature expressly chose not to include a safety valve.[146] The simple answer to this is that s 86D(2) does not apply until a conviction is entered. I agree with Collins J, who wrote in his dissenting reasons that this approach to s 106 does not involve engrafting a safety valve into s 86D, but rather allows s 106 to apply as Parliament intended: as a standalone provision unaffected by the generic three strikes regime.[147] It also recognises, as I

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142 See *Police v Stewart* (2004) 22 CRNZ 35 (HC) at [29]–[34]; *Waight v New Zealand Police* HC Auckland CRI-2006-404-465, 24 May 2007 at [24]–[28] and [38]–[39]; and *Kairau v New Zealand Police* HC Wellington CRI-2005-485-154, 9 December 2005 at [10]–[11].

143 Crimes Act 1961, s 74(1).

144 Crimes Act, s 94(a). Immediately prior to s 106 coming into force, there was also a mandatory sentence of life imprisonment for murder under s 172 of the Crimes Act, but the Sentencing Act replaced this provision with its current form. Thus, s 106 was not directed to this offence.

145 Interpretation Act, s 6 (soon to be replaced by s 11 of the Legislation Act, which, at the time of writing, has not yet come into force).

146 CA judgment, above n 18, at [53]. At the Committee of the Whole House stage of the Sentencing and Parole Reform Bill 2009, the Opposition proposed inserting a safety valve in the clause that became s 86D(2), in the form of the words "unless the Court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order". This proposed amendment was rejected: (18 May 2010) 663 NZPD 10926.

147 At [129].

come to, that Parliament's focus was on recidivist offenders committing very serious violent offences – people who will usually be outside the purview of the s 106 jurisdiction.

[100] To conclude on the point, the text of s 106 allows for the narrow and rights-consistent reading of the exclusion from the jurisdiction to discharge without conviction urged upon us by counsel for Mr Fitzgerald and the Human Rights Commission. Section 6 requires me to adopt that meaning if it is possible. There is nothing in the broader legislative context or purpose which suggests that giving the provision this meaning would be inconsistent with the essential nature and purpose of the provision, or with the essential scheme or principles of the broader Act, including the three strikes regime.

Should the appellant be discharged without conviction in this case?

[101] The existence of the jurisdiction is one thing – whether it should be exercised in any particular case is another. The Crown submits that a discharge without conviction would not, in the absence of s 86D(2), be an appropriate outcome for the appellant, notwithstanding the low-level nature of his offending and his underlying mental health difficulties. His proclivity to offend, which the Crown says is no doubt linked to his mental health challenges, gives rise to public safety considerations. The Crown argues that absent his mental health conditions, another short term sentence of imprisonment would likely have been the least restrictive outcome appropriate in the circumstances. His mental health considerations suggest a sentence with a health-based focus, such as a disposition order under s 34(1)(b)(i) of the CPMIP Act, may otherwise have been appropriate in this case, and was indeed recommended in the report obtained under s 38 of that Act. The Crown also warns against the application of s 106 as a curative to the effects of s 86D, on the basis that wherever s 86D produced a sentence in breach of s 9 of the Bill of Rights, the courts' only alternative would be to discharge without conviction.

[102] The appellant and the Human Rights Commission urged upon us that the discretion could be exercised in accordance with the usual principles that have been developed to guide s 106 discharges, relying upon the reasoning of Collins J's dissent.

[103] As explained, the test for whether a discharge without conviction can be granted under s 106 is found in s 107.[148] The general approach that has developed as to the application of s 107 involves the sentencing judge carrying out a three-step process:[149]

(a) identifying the gravity of the particular offence, taking into account all aggravating and mitigating factors of the offending and the offender;

(b) identifying the direct and indirect consequences of conviction; and

(c) considering whether those consequences are "out of all proportion" to the gravity of the offence.

[104] Although it is the case that the fact that an offence is serious is not sufficient in itself to preclude the exercise of the s 106 discretion,[150] as a matter of logic, the more serious the offending, the less likely it is that a discharge without conviction will be granted.[151]

[105] There is some force in the Crown's caution against using the s 106 discretion to cure the difficulty that the three strikes regime has created, thereby distorting the basic architecture of the Sentencing Act. This architecture is built around purposes of the Act which include accountability, deterrence, protecting the community and rehabilitation of the offender.[152] It also emphasises proportionality in sentencing in a variety of ways.[153] Prior to the three strikes regime, other provisions operated to prevent the imposition of disproportionately severe sentences which would breach s 9. This left s 106 to be used in cases of less serious offending – less serious when viewed alongside the overall circumstances of the offence and the offender.

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148 See above at [27].

149 See *Scott v R* [2019] NZCA 261 at [79]; and *Prasad v R* [2018] NZCA 537 at [11].

150 See Geoffrey G Hall *Hall's Sentencing* (looseleaf ed, LexisNexis) at [SA107.3]; and Jeremy Finn and Debra Wilson *Sentencing Law in New Zealand* (Thomson Reuters, Wellington, 2021) at [4.2.5]. Discharges without conviction have been granted in response to violent or sexual offending such as male assaults female and threatening to kill (*Prasad*, above n 149), indecent assault (*Marshall v Police* [2014] NZHC 2681) and assault with intent to injure (*R v M* [2014] NZHC 1848).

151 *Sloane v Police* HC Hamilton AP89/90, 20 August 1990 at 6.

152 Section 7.

153 See above at n 127.

[106] I do not consider that s 106 will usually be the appropriate methodology by which to avoid the unqualified application of the three strikes regime leading to a breach of s 9 of the Bill of Rights – usually, the offending, viewed in its overall circumstances, will place it outside the category of case where a discharge without conviction can be applied consistently with the principles and purposes of sentencing. But that will not necessarily be so – there may be cases where the offending is of a nature that a discharge without conviction is appropriate, and would involve no distortion of the architecture of the Sentencing Act, even at the third strike stage. These occasions are likely to be rare. But such is the breadth of the definition of "serious violent offence" that the possibility remains that the grounds for a s 106 discharge will be made out. The analysis leading to that conclusion is independent of whether the sentence resulting from the three strikes regime would be in breach of s 9. On this analysis, s 106 is allowed to operate as normal within the Sentencing Act.

[107] This case comes very close to being one in which a discharge under s 106 would be appropriate – indeed, it might have been such a case, were it not for public safety concerns. It is highly relevant to this application for discharge that convicting the appellant enables him to access the provisions of the CPMIP, through which those public safety concerns can be addressed.[154]

[108] However, I consider that in this case, avoiding a breach of s 9 is better secured through the interpretation of s 86D. This latter pathway avoids distorting the overall scheme of the Sentencing Act in that it better conforms to its overall principles and purposes.

Can s 86D be given a rights-consistent interpretation?

[109] During the hearing, we raised with counsel whether there was an alternative argument available, which applied a rights-consistent interpretation to s 86D.

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[154] Because s 34(1)(a) and (b) of the CPMIP do not *require* the court to impose the orders therein, these are not orders that the court could impose alongside a discharge without conviction under s 106(3)(c). While there are civil pathways into the regime created by the Mental Health (Compulsory Assessment and Treatment) Act, the Court would have no certainty that those pathways would be taken in respect of Mr Fitzgerald, and in any event the Court did not hear argument on this point.

Following the hearing, we issued a minute amending the grant of leave to add the following question:[155]

> … whether s 86D(2) of the Sentencing Act 2002 should be interpreted to be subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would constitute a breach of s 9 of the New Zealand Bill of Rights Act 1990 and New Zealand's international obligations

[110] We also gave counsel for the parties and the intervener an opportunity to be heard on this question.[156] Both the appellant and the intervener maintain that the breach of s 9 can be addressed through a s 106 discharge without conviction. But they argue in the alternative that it is possible, through ordinary methods of statutory interpretation, to read a proviso into s 86D(2) that the maximum sentence need not be imposed where the sentence would be in breach of s 9 of the Bill of Rights.

[111] The Crown submits that reading s 86D(2) as subject to s 9 nullifies the legislative text – in other words, the Crown says, it is so inconsistent with statutory purpose as to do violence to the legislative scheme. It argues that the words "despite any other enactment" should be read to include the Bill of Rights. That is consistent with the purpose of the three strikes regime, the essential elements of which are a mandatory direction to impose the maximum sentence, and the universal application of a rigid qualifying criterion, namely conviction for the commission of an offence listed in s 86A of the Sentencing Act. It is highly significant, the Crown argues, that discretion is built into other aspects of the regime to avoid manifest injustice, but s 86D(2) stands alone: upon conviction, the court *must* sentence the offender to the maximum term of imprisonment prescribed by the offence. The introductory clause simply reinforces the clarity of this direction: the court must do so "despite any other enactment", which clearly communicates that the direction allows no exception.

Analysis

[112] A rights-consistent reading of s 86D(2) requires reading in the words "except where to do so would breach s 9 of the New Zealand Bill of Rights Act 1990". As

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155 *Fitzgerald v R* SC 67/2020, 26 February 2021.

156 The parties and the intervener filed additional written submissions, but did not seek an oral hearing. The appellant also filed a memorandum on the issue of disposition should the appeal be allowed on this new ground.

discussed earlier, the reading down of an overbroad provision by reading in a proviso is an established method of statutory interpretation where that is necessary to achieve the clear statutory purpose or to protect or uphold fundamental rights or freedoms.

Text of the provision

[113] The first issue to address is the Crown's argument that the language of s 86D(2) makes clear that Parliament intended s 86D(2) to apply notwithstanding that the application might entail a breach of s 9 of the Bill of Rights. The Crown says that is the effect of the introductory words to s 86D(2), "despite any other enactment". It must be accepted that this expression is wide enough to encompass any Act of Parliament, or part thereof, including the Bill of Rights.

[114] But when deciding between this broad interpretation of s 86D for which the Crown contends, and a narrower one which would exclude the Bill of Rights from the enactments referred to, it must be recalled that s 6 requires a rights-consistent interpretation where that is possible. And there are several reasons here why the narrow meaning is both possible and to be preferred.

[115] It is relevant that the word "enactment" is defined in the Interpretation Act to mean "the whole or a portion of an Act or regulations".[157] It can therefore, for these purposes, include other provisions in the Sentencing Act. It is also worth noting that the same words, "despite any other enactment", are used to introduce both subss (1) and (2). In subs (1), which is concerned with which courts may sentence under s 86D, the other enactments are necessarily, as a matter of context, those which direct the court in which a proceeding will be heard – they are procedural in nature. In subs (2), which directs the imposition of a mandatory sentence, there is logic to reading those introductory words as being directed primarily at other provisions within the Sentencing Act which would require a lesser sentence to be imposed, such as the provisions discussed above which mandate proportionate sentencing outcomes. These introductory words are also likely directed at the provisions under the Crimes Act which specify the usual sentencing outcomes – for example, in the case of the appellant, were it not for s 86D(2) he would simply be "liable to imprisonment for a

[157] Interpretation Act, s 29 definition of "enactment".

term not exceeding 7 years" under s 135 of the Crimes Act. The words "despite any other enactment" demonstrate that s 86D(2) supersedes this.

[116] The presumption of rights-consistency (and therefore the conclusion that Parliament did not intend to exclude the Bill of Rights by way of the words "despite any other enactment") applies with particular force in this case for two reasons. First, the right in question is one in respect of which no permissible derogation has been recognised, either at international law or common law.[158] To impose a sentence in breach of this provision entails not only a breach of one of the fundamental rights running through the common law, and now embodied in the Bill of Rights, but also a breach of New Zealand's international obligations, as explained above. It follows that the presumption that statutes should be read, so far as possible, consistently with New Zealand's international obligations is also engaged.[159]

[117] Secondly, a related point is that the direction given by Parliament is to the judicial branch of government, and instructs judges as to how they must sentence. Sentencing for criminal offences is the constitutional role of the third branch of government – the judicial branch. Although, in New Zealand, Parliament is responsible for enacting laws of general application, including the Crimes Act and the Sentencing Act, it is the courts that are responsible for deciding the application of that legislation in the individual case. In the area of sentencing, this enables individual justice to be done, by weighing the nature of the offending, and the circumstances of the offence and the offender, when ascertaining the appropriate sentence.[160]

[118] In exercising the discretions conferred under the Sentencing Act, judges are bound by the Bill of Rights and must respect and affirm the rights and freedoms preserved there. That is the effect of s 3 of the Bill of Rights. Yet the Crown's

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158 See n 117 above.

159 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96], citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J.

160 This is reflected in the principles and purposes of the Sentencing Act. For a discussion of this traditional division of functions, see *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 237 per Richardson J.

argument entails the proposition that Parliament's purpose in enacting s 86D includes requiring judges, in exercising their responsibility to sentence offenders, to impose sentences which are so disproportionate to the gravity of the offending as to breach s 9 of the Bill of Rights.

[119] It is, of course, true that sentencing judges must respect the supreme law-making power of Parliament, a fact reflected in s 4 of the Bill of Rights. But in interpreting s 86D(2), judges must apply the s 6 presumption of rights-consistency. The courts will be very slow to conclude that Parliament wished to direct another branch of government to breach a right as fundamental as that affirmed in s 9, and in a manner that implicates that branch in a breach of New Zealand's international obligations. Rather than using general words, such as "despite any other enactment", Parliament must in some way address itself explicitly to the Bill of Rights.[161] I say explicitly because, for all the reasons outlined above, it is inconceivable that Parliament would leave to necessary implication a direction to the courts of the sort the Crown argues is entailed in s 86D(2).

[120] Contrary to William Young J's suggestion,[162] I do not consider Parliament must always explicitly address the Bill of Rights when it legislates inconsistently with protected rights and freedoms. As I have said,[163] the approach to interpretation will depend on the right engaged and the nature of the inconsistency to be avoided. It follows that my view as to the words that would be required in s 86D(2) to oust s 9 of the Bill of Rights does not amount to a manner and form requirement – rather, it is a conclusion based on the particular breach of the Bill of Rights dealt with in this case.

[121] To conclude on this point, the words "despite any other enactment" do not in themselves show that Parliament intended s 86D(2) to operate in breach of s 9, and do not preclude a proviso being read into s 86D(2) in accordance with s 6 of the Bill of Rights, if such a proviso could be shown to align with the underlying purpose of the provision and the wider three strikes regime.

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161 See the discussion at [52] above of *Simms*, above n 75.
162 See below at [329].
163 See above at [59].

Purpose

[122] As to the purpose of s 86D(2), it sits within the overall three strikes regime. The Crown is clearly right in its submission that the purpose of that regime, apparent from its text, is to incapacitate repeat offenders and to deter those who commit serious violent offences (as defined in the statute) from reoffending, through the certain knowledge that such reoffending will invariably be met with punishment of escalating severity. The mandatory and predictable nature of the regime is one of its essential features.

[123] I accept that this scheme does depend upon certainty of an escalating and predictable sentencing response, and is not intended to result in proportionate sentences. But it is quite another thing to accept that it has, as part of that purpose, elevated those objectives over the fundamental rights contained in s 9 of the Bill of Rights, and over New Zealand's international obligations. If anything, the overall three strikes regime exhibits Parliament's concern that sentencing judges not be required to impose punishment which would be manifestly unjust. The existence of the "manifestly unjust" safety valve provisions demonstrates Parliament's rights-consistent purpose – a statutory affirmation of the s 9 right.[164] While it is true that there is no similar safety valve provision in s 86D(2), parliamentary materials cast helpful light upon its intended operation.

[124] As noted above, it is the language of the statute which must be clear enough to exclude the possibility of a rights-consistent purpose and effect as directed by s 6 – it is not enough that parliamentary materials might suggest this.[165] In any case, as I set out below, those materials here are supportive of a rights-consistent purpose and of the meaning I have arrived at through the application of the s 6 direction.

[125] At the Sentencing and Parole Reform Bill's first reading, the Minister of Justice, the Hon Simon Power, said, "the Bill deals with two types of offenders: the worst repeat violent and sexual offenders and the worst murderers".[166] The Bill's explanatory note confirmed that the Bill was aimed at the "worst repeat violent

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164 See, for example, s 86D(3) of the Sentencing Act.
165 See above at [55].
166 (18 February 2009) 652 NZPD 1421.

offenders", using this phrase twelve times.[167] This very specific and narrow purpose was reiterated at every stage of the parliamentary process: in select committee,[168] second reading,[169] Committee of the Whole House,[170] and third reading.[171] In the Bill's third reading, the Hon Judith Collins, the responsible Minister for the Bill at that time, said:[172]

> Another issue that has been raised is the importance of the appropriate charges being laid by police. The Government is confident that the police have sufficient checks and safeguards in place to ensure that the appropriate charges are laid, particularly at the third stage of the regime. At stage three police will be referring all charges that qualify for the mandatory maximum penalty to the Crown solicitor for review, either pre-charge or by second appearance.

[126] ACT Party Leader the Hon Rodney Hide, a strong supporter of the Bill, was likewise confident that the Bill's safeguards were sufficient to ensure it did not overstep its purpose:[173]

> It is focused solely on the worst violent crimes; it is focused on the few offenders who repeatedly commit violent crime. Unlike the Californian law, people will not receive severe sentences under this law from conviction for relatively trivial offences. The offences on the qualifying list all represent serious crimes.

[127] The regime was therefore not intended to apply to those who did not repeatedly commit serious violent offences. The clear expectation was that if such offenders were incidentally caught by the regime, prosecutorial discretion would be exercised so as to avoid the gross injustice that the application of the regime would cause.[174] The issue

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167 Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note).

168 The Law and Order Committee said that the Bill was intended to target "the worst repeat violent and sexual offenders": Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 1 and 5.

169 The Hon Judith Collins said that the Bill had "two main purposes: to deny parole to repeat serious violent offenders and to offenders who are guilty of committing the worst murders, and to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious and violent offences": (4 May 2010) 662 NZPD 10673.

170 Ms Collins said that a third strike sentence is "meant to be a very serious penalty in all cases because the offender is continuing to commit very serious offences that victimise people": (18 May 2010) 663 NZPD 10922.

171 Ms Collins said that the purpose of the Bill was "to deny parole to repeat serious violent offenders and to offenders who are guilty of committing the worst murders, and to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences": (25 May 2010) 663 NZPD 11226.

172 (25 May 2010) 663 NZPD 11228.

173 (4 May 2010) 662 NZPD 10684.

174 However, I agree with William Young J that this solution is not satisfactory in light of rule of law considerations: see below at [326], n 411. Such concerns should have been addressed within the legislation rather than left to ad hoc administrative decisions.

of how the courts should respond in the event that this expectation was not met, and someone who was not a serious violent offender was captured by the regime contrary to Parliament's intention, was left unanswered.

[128] These parliamentary materials can therefore be read as indicating a purpose that the regime not be applied to occasion a breach of s 9. They suggest a purpose aimed at a kind of proportionality – with sentences only escalating to the maximum for offenders who, having been warned of the consequences, continue to violently offend in a serious way.

[129] This indicated purpose was carried through in the statutory language used to implement the regime. The three strike provisions begin with the subheading "Additional consequences for repeated serious violent offending". The sorts of offences which trigger the regime are labelled "serious violent" offences. Again, this language suggests that the regime was intended to apply only to those who repeatedly commit violent, serious offences, rather than to offenders such as the appellant.

[130] It is also critical to remember that to all of these indications of purpose must be added the purpose woven into this legislation by the Bill of Rights. As explained earlier, the effect of ss 3, 4 and 6 of the Bill of Rights is that s 86D(2) is presumed to have a rights-consistent purpose, unless the language of the statute clearly excludes that possibility. As I have found, a rights-consistent purpose is not so excluded.

[131] Should a proviso be read in, therefore, to secure this purpose of rights-consistency? As already discussed, the reading in of words to secure legislative purpose is an accepted common law method of statutory interpretation, and a method which has been used in the United Kingdom in the human rights context to achieve rights-consistency.

[132] United Kingdom jurisprudence of particular relevance to the present appeal is the Court of Appeal case *R v Offen*.[175] In that case, the Court was required by s 2 of the Crime (Sentences) Act 1997 (UK) to impose an automatic life sentence on a person convicted of a serious offence who had previously been convicted of another serious

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[175] *R v Offen* [2001] 1 WLR 253 (CA).

offence, unless exceptional circumstances justified not doing so. Thus, it was a "two strikes" regime. In a string of cases before the Court, it was argued that the interpretation of s 2 was affected by the interpretive obligation under s 3(1) of the Human Rights Act, in particular by the prohibition against inhuman or degrading treatment or punishment and the right to liberty. The Court said that the Human Rights Act would not be breached if the regime only applied to offenders who constitute a significant risk to the public. The s 3(1) interpretive obligation meant that the Court had to read this proviso into the "exceptional circumstances" exception.[176]

[133] In another case, *R v Waya*,[177] the United Kingdom Supreme Court read a provision requiring a court to make a confiscation order against a defendant who had benefited from criminal conduct as being subject to the qualification that the required order should not be made if it were disproportionate and therefore a breach of the right to peaceful enjoyment of possessions. Instead, the court should substitute this order for a proportionate order.[178]

[134] The Crown argues that the difference between this case and *Waya* is that in the latter, proportionality was a feature of the relevant legislative purpose, while "proportional sentence outcomes were patently not a purpose" of the three strikes regime, and therefore the two cases are not analogous. The passage relied upon by the Crown for this point appears in the reasons of Lord Walker SCJ and Hughes LJ for the majority.[179] In this passage, however, their Lordships say that it is necessary to read into a provision a requirement of proportionality in order to achieve a rights-consistent application of legislation, the purpose of which is removing from criminals the pecuniary proceeds of their crime. In other words, proportionality was not a feature of the scheme, but was, rather, read into it by the Court. *Waya*, therefore, is analogous to this case. Both cases concern legislation which does not explicitly provide for proportionality, and in both cases the court has been asked to read in a proportionality requirement for the sake of rights-consistency.

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176 At [97].
177 *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.
178 At [16].
179 At [21]–[22].

[135] In this case, the deterrence purpose of the three strikes regime requires the imposition of severe sentences which escalate predictably in a way which will, in many cases, lead to disproportionate sentences. But, as discussed above, it is not an essential feature of this scheme that sentences should be imposed that are so disproportionately severe as to amount to a breach of s 9. Reading in the exception this Court identified does not, therefore, nullify or disapply the underlying scheme, text or purpose of s 86D(2) or of the surrounding three strikes regime. Rather, as explained above, it gives better effect to the rights-consistent meaning and purpose the provision can be interpreted to have.

[136] The Crown also argues that reading in the exception would create an awkward problem for the courts, requiring the courts to construct their own sentencing approach. It asks, by way of example, if s 9 is engaged:

(a) does the court then sentence as if it were an "ordinary case", applying the full range of principles and purposes in the Sentencing Act (in other words, a proportionate sentence); or

(b) does the court go some way to meet the statutory purpose of s 86D(2), and attempt some degree of parity with "standard" third strike cases, by imposing very severe, but not disproportionately severe, sentences?

[137] It is to be remembered that the exception will only apply where the maximum sentence required to be imposed is disproportionately severe so as to breach s 9 of the Bill of Rights. Even in those cases, the courts will not be required to come up with their own sentencing policy and approach. The ordinary sentencing principles will apply – principles which require judges to assess severity and proportionality as part of every sentencing process.

[138] In that regard, where it applies, s 86D(2) adds a sentencing principle that recidivism by those caught by the regime is to be viewed as very serious and worthy of a stern sentencing response. Section 86D(2) emphasises the existing sentencing purposes of reducing the risk of harm to the community, holding the offender accountable for their offending, and of deterring the offender or others from

committing the same or similar offences.[180] For a stage three offender, that response will call for the maximum sentence, except where such a sentence is disproportionately severe so as to amount to a breach of s 9. The task of setting a sentence which applies these sentencing principles, but does not breach s 9, is not beyond the institutional competence of a sentencing court. The incorporation of the additional sentencing principle that recidivism by those caught by the regime is very serious and worthy of a stern sentencing response ensures that this interpretation does not disapply or nullify the three strikes regime. And of course it is to be noted that if the administrative safeguard involving the vetting by the Crown Solicitor of charges laid does what it was intended to do, there should be very few such cases.[181]

[139] I am therefore satisfied that s 86D(2) should be given this rights-consistent meaning and so should be read as subject to the proviso that a maximum sentence must not be imposed where to do so would entail a breach of s 9 of the Bill of Rights. William Young J makes the point that on the authorities, rights-protecting exceptions are only read into generally-worded provisions, and s 86D(2) is not a generally-worded provision.[182] Whether or not this is true in respect of cases applying the principle of legality, the s 6 direction mandates a more proactive approach to interpretation.[183] That this is so is evident in the English authorities cited above, such as *Waya*.[184]

[140] It follows from this conclusion that the sentencing Judge was not required by s 86D(2) to impose the maximum sentence for the offence, and in sentencing the appellant as he did, he proceeded on the basis of an error of law. The sentencing Judge is not, of course, to be criticised for this, given that the argument that has succeeded in this Court was not advanced before him.

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180 Sentencing Act, s 7(1)(a), (f) and (g). In the case of Mr Fitzgerald, as was pointed out by the Court of Appeal, the scheme of warnings and escalating punishment is unlikely to secure the sentencing purpose of deterrence, given the clear link between his offending and his mental health. Moreover, the purpose of protecting the community is, in regard to the appellant, likely to be best secured by a therapeutic, rather than punitive, response.

181 Although, as mentioned at n 174 above, I do not consider this a satisfactory safeguard in light of rule of law considerations.

182 See below at [327]–[328].

183 See above at [55]–[56].

184 *Waya*, above n 177.

[141] In the case of the appellant, as outlined above, avoiding a breach of s 9 required weighing the appellant's mental health as the principal consideration in sentencing. The appellant's offending was clearly linked to his mental health condition. The information before the Court at the time of sentencing suggested that imprisonment could worsen the appellant's condition.[185] And imprisonment has deprived the appellant of rehabilitative treatment for his illness – treatment which could have reduced the risk of reoffending.[186]

[142] It follows that I would dismiss the appeal against conviction, and allow the appeal against sentence.

Disposition

[143] This Court may either re-sentence the appellant or remit the case to the High Court for so doing.[187] Counsel for the Crown suggests either course is appropriate.

[144] Counsel for Mr Fitzgerald filed updating material in the form of a report from Dr Edwards, who recommended that Mr Fitzgerald would be best served as a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and that his likelihood of success in the community would be greatly improved by a period of time in the Regional Rehabilitation Service.[188] Dr Edwards also outlined very real difficulties in accessing that service, in terms of both bed availability and funding for care. Counsel for Mr Fitzgerald submit, therefore, that there are outstanding factual inquiries to be made before a satisfactory regime for Mr Fitzgerald's release can be established as part of the re-sentencing exercise. It follows, they say, that the most appropriate disposition order would be a remittal of sentencing to the High Court.[189] The Crown accepts that a disposition under the CPMIP Act would give effect to the

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185 As it happens, during the time spent in prison the appellant's condition seems to have stabilised.

186 Although, as discussed above, imprisonment may not have precluded the appellant from being detained in a hospital as a special patient under s 34(1)(a)(i) of the CPMIP Act: see n 124. As noted, we did not hear argument on this point.

187 Criminal Procedure Act 2011, ss 251 and 257.

188 No formal application to adduce updating material was made, but the report was filed without opposition from the Crown. Because the sentence appeal is successful, the Court must decide what orders to make. This updating material is of assistance in this regard and it is therefore appropriate for the Court to receive it.

189 Criminal Procedure Act, s 251(2)(c).

important sentencing principles of rehabilitation and community protection by allowing the appellant to access treatment under the Mental Health (Compulsory Assessment and Treatment) Act. The alternative would be, it says, for the appellant to be sentenced to time served, from which immediate release would follow.

[145] Given the public safety issues that are present in this case, and the need to conduct further enquiries as to a suitable regime for Mr Fitzgerald's release, I consider that the appropriate course is to remit the matter to the High Court for re-sentencing. This will enable the court to obtain appropriate and up-to-date information.

Result

[146] For these reasons, and those given by Glazebrook and Arnold JJ, the appeal against sentence is allowed. The proceeding is remitted to the High Court for re-sentencing. The appeal against conviction is unanimously dismissed.

O'REGAN AND ARNOLD JJ
(Given by Arnold J)

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Introduction

[147] The appellant challenges the sentence of seven years' imprisonment imposed on him under the "three strikes" legislation following his conviction on one count of indecent assault, his "third strike". There are two issues. The first is whether the Court of Appeal was correct to find that the courts' power to grant a discharge without conviction under s 106 of the Sentencing Act 2002 did not apply to the appellant (the

s 106 issue). The second is whether s 86D(2) of the Sentencing Act should be interpreted as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where the resulting sentence would breach s 9 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and New Zealand's international obligations (the s 86D(2) issue).

[148] Because of the view we take on the s 86D(2) issue, and its effect on the need to determine the s 106 issue, we will deal with it first. As we explain below, we consider that the s 86D(2) issue can be determined on the basis of long-standing and uncontroversial principles of statutory interpretation, in a way that upholds protected rights while maintaining the purpose of the three strikes legislation.

The s 86D(2) issue

[149] We begin with some brief background.

Background

[150] On 10 December 1948, the United Nations adopted the Universal Declaration of Human Rights.[190] Article 5 provides:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[151] On 23 March 1976, the International Covenant on Civil and Political Rights (ICCPR) entered into force.[191] Article 7 contained an identically worded prohibition to that in art 5 of the Universal Declaration.[192] New Zealand ratified the ICCPR on 28 December 1978.

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190 *Universal Declaration of Human Rights* GA Res 217A (1948).

191 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

192 Article 7 goes on to note that "In particular, no one shall be subjected without his free consent to medical or scientific experimentation". This is reflected in s 10 of the New Zealand Bill of Rights Act 1990 [Bill of Rights].

[152] On 26 June 1987, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment came into force.[193] New Zealand ratified it on 10 December 1989. Article 16(1) of that Convention provides in part:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. …

[153] Finally, on 28 August 1990, the Bill of Rights received the Royal Assent, coming into force 28 days later. One of the purposes of the Bill of Rights as set out in the long title was to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Consistently with that purpose, s 9 of the Bill of Rights provides:[194]

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

As can be seen, s 9 uses the phrase "disproportionately severe" in place of "inhuman" as appears in the international instruments, but otherwise the language is materially the same.

The three strikes regime produces a sentence that breaches s 9 of the Bill of Rights

[154] Consistently with the finding of the Court of Appeal,[195] the Crown accepts that the sentence of seven years' imprisonment imposed on the appellant under s 86D(2) of the Sentencing Act on his conviction for indecent assault constituted disproportionately severe punishment that breached s 9 of the Bill of Rights. In our view, that concession was properly made, given the nature and circumstances of the indecent assault and the appellant's background.

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193 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

194 As Elias CJ pointed out in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [72], a prohibition on "cruel and unusual punishments" has long been part of New Zealand law as a result of its incorporation of the Bill of Rights 1688 (Imp).

195 *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 [CA judgment] at [43] per Clifford and Goddard JJ and [131] per Collins J.

[155] In relation to the offence, Simon France J said when sentencing the appellant:[196]

> … the nature of the indecent assault is at the bottom end of the range. The actual act was a kiss on the cheek; the attempted act an unwelcome and undoubtedly traumatic attempt to kiss a stranger on the mouth. Standing alone, and leaving aside aggravating features of the offender, it would not attract a jail term.

[156] At the time of the offending, the appellant was 43 years of age and had an extensive criminal record, dating back to 1991. He had many convictions for offences such as shoplifting, disorderly behaviour and wilful damage as well as convictions for common assaults, obscene exposure and indecent assaults. He had been sentenced to numerous short terms of imprisonment, all but three of which were for six months or less. The exceptions were: (i) cumulative sentences totalling eight months' imprisonment for unlawfully taking a motor vehicle, possession of cannabis and shoplifting, imposed in early 2005; (ii) a sentence of eight months' imprisonment for burglary later in 2005; and (iii) a sentence of 11 months' imprisonment in late 2012 for one count of indecent assault (this was the appellant's first three strikes offence). The appellant received his second and final warning under the three strikes regime in early 2015 following his conviction on three counts of indecent assault, for which he received sentences of four months' imprisonment to be served concurrently. So, all of his offences under the three strikes regime were for indecent assault.[197]

[157] In their joint reasons in the Court of Appeal, Clifford and Goddard JJ described the appellant's personal circumstances as follows:[198]

> [1] Mr Fitzgerald has longstanding mental health issues and needs constant mental health care. For some 30 years he has suffered from schizophrenia, paranoid delusions and auditory hallucinations. He has possible frontal lobe deficits from head injuries. He has consistently been on medication, with varying success. His illness has been characterised by disturbed behaviour, disorganisation in his thought processes, delusional

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196 *R v Fitzgerald* [2018] NZHC 1015 [HC judgment] at [21] (footnote omitted).

197 For the sake of completeness, we note that the appellant had two convictions for indecent assault in addition to those that were subject to the three strikes regime. He was convicted of an indecent assault in 1998 and another in 2008 and was sentenced to six months' imprisonment on each occasion.

198 CA judgment, above n 195.

> beliefs and abnormal perceptual experiences. He has a long history of drug and alcohol abuse.

To this might be added the fact that he did not have any real support from family or friends.

[158] The three strikes regime is contained in ss 86A–86I of the Sentencing Act. The section that resulted in the appellant's sentence is s 86D(2), which provides:

> Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

In the absence of the regime, the appellant would not have received a sentence of seven years' imprisonment. It is likely, although not certain, that he would not have received a custodial sentence for the indecent assault, even taking account of his previous record, although he may well have received a custodial sentence for an assault against another victim on the same occasion.[199]

What is a "disproportionately severe" sentence for s 9 purposes?

[159] It is important to understand what the Crown's concession that the appellant's sentence breaches s 9 of the Bill of Rights entails. This Court discussed the meaning and application of s 9 in *Taunoa v Attorney-General*,[200] a case concerning the treatment of prison inmates who had been subjected to a behaviour modification regime. The question was whether their treatment breached s 9 and/or s 23(5) of the Bill of Rights (which requires that those deprived of liberty "be treated with humanity and with respect for the inherent dignity of the person").[201] While there were some differences between the Judges in that case, those differences related more to

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199 Simon France J sentenced the appellant to three months' imprisonment on that charge, to be served concurrently with his seven-year sentence: HC judgment, above n 196, at [18].

200 *Taunoa*, above n 194.

201 By the time the case reached the Supreme Court, the Attorney-General accepted the conclusions in the lower Courts that the behaviour modification regime was applied to all the inmates in breach of s 23(5) of the Bill of Rights and accepted the Court of Appeal's conclusion that the regime was applied in breach of s 9 of the Bill of Rights in respect of one of the inmates. The other inmates appealed to the Supreme Court against, amongst other things, the rejection by the lower Courts of the claim that their treatment also breached s 9.

application than to matters of substantive meaning. Five relevant points emerge from the case.

[160] First, the right recognised by s 9 is not susceptible to a "reasonable limits" analysis under s 5 of the Bill of Rights; that is, the right cannot be subject to reasonable limits demonstrably justifiable in a free and democratic society. Rather, the right is absolute. Anderson J had made this point in *R v Hansen*, asking rhetorically: "What free and democratic society could contemplate as reasonable the infliction of torture or cruel, degrading or disproportionately severe punishment?"[202] In *Taunoa*, Elias CJ described the s 9 right as "an irreducible requirement" – it cannot be derogated from, even in times of public emergency.[203] Blanchard J said that s 9 is "concerned with conduct on the part of the state and its officials which is to be utterly condemned as outrageous and unacceptable *in any circumstances*".[204] The Crown accepted in its submissions in the present case that s 9 is "an illimitable right to which s 5 [of the Bill of Rights] does not apply".

[161] Second, the Judges in *Taunoa* agreed that the particular element of s 9 at issue in the present case – the prohibition on disproportionately severe punishment – involves a high threshold.[205] As Blanchard J said, the phrase "disproportionately severe" must take its colour from the remainder of s 9 – the prohibitions of "torture" and "cruel" or "degrading" treatment or punishment.[206] So, a sentence which is simply

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202 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [264]. Blanchard J also said that the overarching right not to be tortured in s 9 was an absolute protection: at [65]. But see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) who consider that all of the rights set out in Part 2 of the Bill of Rights, including s 9, can be limited in terms of s 5: at [6.5.1]–[6.5.3]. See also at [10.15.1]–[10.15.9].

203 *Taunoa*, above n 194, at [77]. See also at [112] per Elias CJ: "[B]reach [of s 9] is a truly grave matter in any circumstances".

204 At [170] (emphasis added). See also at [297] per Tipping J that "it is appropriate and was probably intended that s 9 be reserved for truly egregious cases which call for a level of denunciation of the same order as that appropriate for torture".

205 See at [91] per Elias CJ, [174]–[176] per Blanchard J (referring to *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA) at 523), [288]–[289] per Tipping J and [339] per McGrath J. Henry J expressed his agreement with the substance of Tipping J's views as to the approach the courts should take to determining whether s 9 of the Bill of Rights has been breached in a particular case: at [382]–[383]. The Judges also agreed that the threshold for breaches of s 9 was higher than that of s 23(5): at [79] per Elias CJ, [170] per Blanchard J, [277], [285] and [288] per Tipping J, [339] per McGrath J, and [382]–[383] per Henry J (expressing agreement with Tipping J).

206 At [172] and [176]. Tipping J agreed with this: at [286]. See also at [280].

severe, disproportionate or manifestly excessive would not meet the test,[207] even though it might be the subject of a successful appeal against sentence – something more is required.[208]

[162] Third, the prohibition covers conduct that affects either or both of the physical and mental integrity of the person subjected to it.[209] Moreover, the effect of the challenged conduct on the particular individual involved (taking account of their particular vulnerabilities) can be relevant to the assessment of whether the challenged conduct is "disproportionately severe" within the meaning of s 9.[210]

[163] Fourth, despite the consensus that "disproportionately severe" is a high threshold, there were differences in the ways the Judges explained what the phrase meant. Elias CJ favoured an approach that has been applied by the Canadian courts, namely whether the conduct is so excessive as to outrage contemporary standards of decency.[211] By contrast, Tipping J expressed difficulty in accepting this test – "decency", he said, did not seem an apt concept in the circumstances.[212] Rather, the Judge considered that disproportionately severe conduct was conduct that was "so severe as to shock the national conscience". He explained:[213]

> This test achieves purposes which must be deemed inherent in a concept which is linked with torture and other cruel and degrading treatment. First, it emphasises that the standard is well beyond punishment or treatment which is simply excessive, even if manifestly so. Second, it introduces the notion of the severity being such as to cause shock and thus abhorrence to properly informed citizens. Third, the reference to the national conscience brings into play the values and standards which New Zealanders share.

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207 For example, Blanchard J considered that although two inmates, Messrs Robinson and Kidman, had been treated without humanity, in a way that did not respect their inherent dignity as persons, their treatment was not so extreme as to breach s 9: at [215]. Tipping J considered that while Mr Taunoa's treatment could be characterised as "severe", it was not "disproportionately severe" in terms of s 9: at [292].

208 See at [173] per Blanchard J.

209 At [77] per Elias CJ and at [282]–[283], [291] and [295] per Tipping J. See also generally at [153], [171] and [273] per Blanchard J.

210 At [291] per Tipping J (with whom Henry J agreed: at [382]–[384]) and [351] per McGrath J. Elias CJ said that a breach of s 9 did not require proof of demonstrated harm to the individual, because it is the treatment to which the adjectives "cruel", "degrading" and "disproportionately severe" attach: at [94].

211 At [91]–[92].

212 At [288].

213 At [289]. Tipping J said this test had the "same general effect" as the decency test.

[164] Blanchard J considered that "grossly disproportionate", also a formulation drawn from the Canadian jurisprudence, was the appropriate test.[214] He said:[215]

> … the words "disproportionately severe" must have been included to fulfil much the same role as "inhuman" treatment or punishment plays in art 7 of the ICCPR, and to perform the same function as the gloss of "gross disproportionality" does for s 12 of the Canadian Charter. There might not otherwise be a classification in s 9 to catch behaviour which does not inflict suffering in a manner or degree which could be described as cruel, and cannot be said to be degrading in its effect, but which New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion.

[165] Having discussed the relevant commentary in the White Paper preceding the enactment of the Bill of Rights[216] and the judgment of the High Court in *R v P (T129/92)*,[217] the Judge went on to conclude:

> [176] It is therefore apparent that "disproportionately severe", appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances. Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called "inhuman" in the sense given to that term in the jurisprudence under art 7 of the ICCPR.

McGrath J agreed with the conclusion expressed in this paragraph.[218]

[166] Fifth, a significant feature of the extracts from the reasons of Blanchard J and Tipping J just quoted is that each acknowledged the role of New Zealand values and standards in the assessment of what is disproportionately severe. Blanchard J explained that, while the application of s 9 to particular cases would be influenced by relevant overseas jurisprudence, there might be situations where a New Zealand court would consider it appropriate to require of New Zealand authorities a higher standard than might be required under, for example, the ICCPR.[219] Tipping J, with whom

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214 At [176].
215 At [172].
216 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.
217 *R v P (T129/92)* (1993) 10 CRNZ 250 (HC).
218 *Taunoa*, above n 194, at [340].
219 At [179]. It is thus possible that conduct which breaches s 9 may not constitute a breach of art 7 of the ICCPR.

Henry J agreed,[220] put the point even more strongly:[221]

> [W]hile this Court should be fully aware of and alive to overseas decisions and the standards of conduct they implicitly involve, in the end it is New Zealand values and standards which we should adopt. This point is highlighted when one puts into the equation the fact that the phrase "disproportionately severe" in s 9 is our own indigenous one and has no direct counterpart in any of the other human rights instruments which Blanchard J has surveyed.

Elias CJ made a similar point when she said that minimum standards of treatment provided for under the Penal Institutions Act 1954:[222]

> … are perhaps the best guide to what is unacceptable in contemporary New Zealand. As such, they are highly significant in assessing whether the treatment of the prisoners conforms with ss 9 and 23(5) of the New Zealand Bill of Rights Act.

[167] In summary, then, the Crown accepts that the sentence of seven years' imprisonment imposed on the appellant crosses the high threshold set in s 9 – the sentence is grossly disproportionate, such as to shock the national conscience. Not only does the sentence breach s 9, but it is likely also to put New Zealand in breach of its international obligations.[223] In their joint reasons in the Court of Appeal, Clifford and Goddard JJ explained why they considered the appellant's sentence breached s 9 in the following terms:[224]

> A sentence of seven years' imprisonment is grossly disproportionate in this case, having regard to the factors identified at [34] above: offending at the lower end of the range for the offence; reduced culpability by reason of Mr Fitzgerald's impaired mental health; his impaired ability to act on the warnings given under the three strikes regime; and the disproportionately severe effect on him of a lengthy sentence of imprisonment. Mr Fitzgerald should be receiving care and support in an appropriate facility, not serving a lengthy term of imprisonment. He has ended up in prison for a very long term, in circumstances where he should not be there at all. The rationale that underpins this disproportionate response is that Mr Fitzgerald was given warnings that severe consequences would follow if he offended again, and he should have responded to those warnings. But his ability to respond to such warnings is materially impaired by his significant mental health issues. In these circumstances, a sentence of seven years' imprisonment goes well

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220 At [382]–[383].

221 At [279].

222 At [11]. See also at [101].

223 We have used the expression "is likely to" because, as noted above at n 219, a breach of s 9 may not always put New Zealand in breach of its international obligations as the breach may reflect the application of New Zealand, rather than international, values.

224 CA judgment, above n 195, at [43].

> beyond excessive punishment, and would in our view shock the conscience of properly informed New Zealanders who were aware of all the relevant circumstances including Mr Fitzgerald's mental disability.

We agree with that assessment.

[168] Despite this, the Crown argued that Simon France J was obliged under the three strikes legislation to impose the seven-year sentence and the Court of Appeal was obliged to uphold it, as is this Court. In response to this Court's request for further written submissions on the question of whether s 86D(2) should be interpreted so that it did not exclude the operation of s 9 of the Bill of Rights, the Crown submitted that to interpret s 86D(2) in that way would:

(a) nullify the legislative text as it applies to this and other cases; and

(b) be so inconsistent with the statutory purpose of s 86D(2) as to do violence to its scheme.

[169] To address the Crown submissions, we consider what approach should be adopted to the interpretation of s 86D(2).

Interpretation under the Bill of Rights

[170] Section 3(a) of the Bill of Rights provides that it applies to acts done by the legislative, executive and judicial branches of government. There has been some dispute about precisely what this means in relation to Parliament's law-making function, particularly as s 4 prohibits courts from holding statutory provisions to have been impliedly repealed or revoked, or to be invalid or ineffective, or from declining to apply them, on the basis that they are inconsistent with the Bill of Rights.[225] This is not an issue that we need to discuss, beyond noting that the decision of this Court in *Attorney-General v Taylor*[226] that the High Court has the power to make declarations

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225 For leading commentary on both sides of the debate, see Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11(3) Otago LR 389; and Butler and Butler, above n 202, at [5.4.2]–[5.4.4].

226 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

of inconsistency (which is likely to be given legislative recognition)[227] indicates that the legislature does have substantive obligations under s 3(a) in relation to legislation.

[171] For our purposes, it is sufficient to say that under s 3(a), the legislature has accepted that there are fundamental human rights standards to which it should adhere in the legislation it enacts. To facilitate this, Parliament has, in s 7, imposed an obligation on the Attorney-General to bring to its attention any provision in a Bill that appears to be inconsistent with any of the rights or freedoms contained in the Bill of Rights.[228] Further, Parliament's direction to the courts in s 6 that a Bill of Rights-consistent meaning of an enactment is to be preferred wherever that enactment "can be given" such a meaning is also, in our view, an acknowledgement by Parliament of its obligations under s 3(a) in relation to legislation.

[172] Finally, as noted earlier, in s 5, Parliament provided that the rights and freedoms in the Bill of Rights may be subject to "reasonable limits prescribed by law" if those limits can be "demonstrably justified in a free and democratic society". This recognises that many of the rights and freedoms in the ICCPR are formulated in a way that makes them subject to reasonable limits.[229] Where a statutory provision does impose a limitation on a right or freedom protected by the Bill of Rights and that limitation can be demonstrably justified as reasonable in a free and democratic society, the statutory provision will, of course, not breach the Bill of Rights but rather will be consistent with it.

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227 See the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1), a Government Bill which is based on the premise that courts do have the power to issue declarations of inconsistency and which sets out a process for addressing any declarations made. The select committee reported back on the Bill on 30 September 2021 and recommended that the Bill be passed: New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2021 (230-2) (select committee report).

228 One of the unfortunate features of the present case is that although the Bill as introduced underwent a Bill of Rights vet, the Bill as enacted did not. This is significant given that the Bill was changed fundamentally in the course of the select committee process, as discussed below at [188] and [193]. For the s 7 report on the Bill as introduced, see Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill* (18 February 2009) [Section 7 report]. For a discussion of the legislative history, see *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [67]–[72].

229 See, for example, *Hansen*, above n 202, where Blanchard J said "no one would dispute that many of the freedoms enumerated in Part 2 [of the Bill of Rights], for example freedom of expression, are in practice routinely limited to a greater or lesser extent by other concerns … which are demonstrably justified": at [65]. Unlike the general limitation clause in s 5, the ICCPR follows a model of outlining the right first and then providing a limitation clause to each right: Butler and Butler, above n 202, at [6.2.2].

[173] To summarise, then, Parliament has accepted that it has obligations under s 3(a) of the Bill of Rights in relation to its legislative functions. However, it has retained the right to enact legislative provisions that: (i) are inconsistent with the rights and freedoms in the Bill of Rights; (ii) cannot be justified as reasonable limits under s 5; and (iii) are not properly amenable to a rights-consistent interpretation under s 6. Where that combination occurs, s 4 requires the courts to apply the legislation as enacted even though it is inconsistent with the Bill of Rights.

[174] In *Hansen*, this Court discussed issues arising out of the interrelationship between ss 4, 5 and 6 and the scope of Parliament's direction in s 6.[230] That case concerned a reverse onus provision in s 6(6) of the Misuse of Drugs Act 1975. At issue was whether the provision was consistent with the presumption of innocence in s 25(c) of the Bill of Rights; if not, whether the inconsistency was a reasonable limit, demonstrably justifiable in a free and democratic society in terms of s 5; and, if not, whether the provision could be given a rights-consistent meaning under s 6.

[175] The five separate sets of reasons in *Hansen* have given rise to considerable academic discussion.[231] As both the judgment and the academic discussion demonstrate, the interrelationship and the scope issues are difficult. Because the prohibition in s 9 is absolute and not subject to reasonable limits, the question of the relationship between s 5 on the one hand and ss 4 and 6 on the other is not one that requires further discussion here. However, the scope of the s 6 direction is relevant and so must be addressed.

[176] The interpretation of s 86D(2) of the Sentencing Act must be approached against the background of ss 3(a), 4 and 6 of the Bill of Rights. In particular, the question is whether there is only one (Bill of Rights-inconsistent) meaning that can properly be given to s 86D(2), so that the Court is bound by s 4 to adopt and apply that meaning, or whether there is a Bill of Rights-consistent meaning that "can be given" to s 86D(2), so that it should be "preferred" under s 6.

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230 *Hansen*, above n 202.

231 For a helpful summary, see the dissenting reasons of Glazebrook J in *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [166]–[170].

[177] The Crown argues that the meaning of s 86D(2) is plain; the opening words of s 86D(2) are "Despite any other enactment"; even though it is constitutionally significant, the Bill of Rights is simply "an enactment";[232] accordingly, the words are effective to exclude the operation of the Bill of Rights and s 9 in particular; consequently, s 86D(2) takes effect even if the result it produces breaches s 9 (and New Zealand's international obligations). The Crown submits that this outcome is consistent with Parliament's purpose in enacting the three strikes legislation, which it identifies as being:

> … to achieve certainty, deterrence and incapacitation of repeat offenders. Proportional sentence outcomes were patently not a purpose of the enactment containing the third strike provision.

[178] How, then, does s 6 operate in this case? In *Hansen*, Tipping, McGrath and Anderson JJ found that the reverse onus provision at issue was not a reasonable limit, demonstrably justifiable in a free and democratic society.[233] However, they concluded that the appellant's alternative, rights-consistent meaning (which was that the reverse onus provision imposed only an evidentiary and not a legal burden) was not available under s 6 because that meaning was not one that the language would reasonably bear – it was not a "reasonably possible", "fairly open and tenable", "tenable" or "reasonably available" meaning.[234] As Tipping J put it: "The Courts may interpret but must not legislate."[235] In this context, Tipping J noted that in England, s 3 of the Human Rights Act 1998 (UK) (which is in similar terms to s 6)[236] "appears at times to have been construed as mandating a judicial override of Parliament, if Parliament's

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232 "Enactment" is defined in s 29 of the Interpretation Act 1999 to mean "the whole or a portion of an Act or regulations".

233 *Hansen*, above n 202, at [149] per Tipping J, [234] per McGrath J and [281] per Anderson J. Blanchard J dissented on this point (at [83]) and Elias CJ did not think consideration of s 5 arose (at [8]).

234 See, for example, at [91]–[92], [149]–[150] and [158] per Tipping J, [252] and [257] per McGrath J, and [288] and [290] per Anderson J. Tipping J noted at [158], n 191 that he viewed "reasonably possible" and "tenable" as equivalents.

235 At [156] (footnote omitted). Anderson J made the same point at [290]: "the duty of the Courts is to construe, not to reconstruct".

236 Suggestions that s 3 of the Human Rights Act 1998 (UK) was stronger in form than s 6 of the Bill of Rights were rejected in *Hansen*: see at [12]–[13] per Elias CJ, [158], n 192 per Tipping J, [243]–[244] per McGrath J and [287] per Anderson J. Both Tipping and McGrath JJ considered that the differences in approach between the English courts and those in New Zealand concerning their roles under s 3 and s 6 respectively arose from the context within which the English courts were operating, rather than from differences in the text of the two provisions: at [158], nn 192–193 per Tipping J and [244] per McGrath J.

meaning is inconsistent with a right or freedom".[237] Whatever the appropriate position was in England, the Judge said, the use of s 6 as a "concealed legislative tool" was not appropriate in New Zealand.[238]

[179] Blanchard J considered that the reverse onus provision was a reasonable limit in terms of s 5,[239] so he did not have to address whether an alternative meaning was available under s 6. However, the Judge did indicate that an alternative meaning would have to be one that the provision was "reasonably capable of bearing".[240] He went on to make the following observation: [241]

> In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

[180] Elias CJ said that a rights-consistent meaning given to a provision under s 6 "must be a meaning that is tenable on the text and in the light of the purpose of the enactment",[242] a formulation similar to those of other members of the Court. However, it appears that the Chief Justice considered that a "tenable" interpretation could include one that might, linguistically, appear strained and noted that, even apart from s 6, "apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock values".[243] On this view, text may be less significant.[244]

[181] The various expressions used in *Hansen* to describe a meaning that can properly be given to a provision under s 6 – "reasonably possible", "reasonably available", "genuinely open", "tenable", "fairly open and tenable" and so on – must be understood in the context of the case. As noted, the case involved two competing interpretations of the provision in issue, one a rights-*inconsistent* meaning that the

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237 At [158].
238 At [158].
239 At [83].
240 At [57].
241 At [61].
242 At [25]. See also at [15], where the Chief Justice indicates the alternative meaning must be "tenable", and [18], where she says it must be "available".
243 At [13] (footnote omitted).
244 Elias CJ said s 6 of the Bill of Rights now "makes it clear that textual ambiguity is not required" before interpreting legislation to conform wherever possible with human rights instruments: at [13].

provision reversed the legal onus of proof and the other a more rights-*consistent* meaning that it simply placed an evidentiary onus on a defendant. All members of the Court considered that the rights-consistent meaning was not a tenable one on the text of the provision.[245] This was despite the fact that the House of Lords had earlier upheld the more rights-consistent meaning in respect of a similarly worded provision in a comparable statute, applying s 3 of the Human Rights Act (UK).[246] For some of the Judges in *Hansen*, the United Kingdom courts had gone too far under the guise of "interpretation", which seems to explain the adverbs in the expressions noted above. However, the essential point is clear – an alternative rights-consistent meaning under s 6 must be tenable in light of text and statutory purpose.

[182] On their face, expressions such as "reasonably possible" do not allow for the "reading down" of a provision's text (by interpreting it as subject to an unexpressed exception, for example) as occurred when the common law presumptions of interpretation were applied.[247] However, a subsequent decision of this Court, *Cropp v Judicial Committee*,[248] makes it plain that "reading down" (or "reading in", which is a more accurate characterisation when a provision is interpreted as being subject to an unexpressed exception) remains a legitimate process of interpretation, whether in the context of the common law presumptions or of s 6 of the Bill of Rights.

[183] In *Cropp*, a jockey was required to provide a urine sample by a racehorse inspector under a random drug testing regime. The sample was found to contain prohibited drugs, with the result that the jockey was charged with a breach of the racing rules. In the course of an argument about whether the relevant rules were authorised under the statutory rule-making provision, counsel for the jockey submitted that both at common law and under s 21 of the Bill of Rights (right to be secure against unreasonable search and seizure), a fundamental human right such as bodily integrity could not be interfered with except under a statutory provision where the right was

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245 At [5] and [39] per Elias CJ, [149] per Tipping J, [257] per McGrath J and [290] per Anderson J. As noted above at [179], Blanchard J, having found the rights inconsistency was demonstrably justifiable, did not have to undertake the s 6 analysis. Nevertheless, he observed that "even in a Bill of Rights environment, it would be overstretching the language of [the] provision" to give it the meaning of simply placing an evidentiary onus on the defendant: at [56].

246 *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545.

247 See the discussion of these presumptions below at [207]–[215].

248 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

excluded or abridged expressly or by necessary implication. Counsel submitted that the statutory provision under which the racing rules were authorised did not expressly or by necessary implication authorise a random drug testing regime.

[184] Blanchard J delivered the Court's judgment. Two relevant points emerge from it. First, the Court said that it was unnecessary to undertake the *Hansen* step-by-step analysis because s 5 of the Bill of Rights had no role in respect of unreasonable search and seizure.[249] Second, the Court said that counsel was "correct in pointing out that the courts will presume that general words in legislation were intended to be subject to the basic rights of the individual",[250] citing Lord Hoffmann's reasons in *R v Secretary of State for the Home Department, ex parte Simms*,[251] to which we return below. While accepting the principle advanced by counsel, the Court held that the statutory provision under which the rules were authorised expressly provided for the making of rules going to the safety of racing and that the random drug testing regime was a legitimate aspect of ensuring safety.[252]

[185] Finally, we note that there is obviously a tension between ss 4 and 6 of the Bill of Rights, in the sense that they may pull in different directions.[253] But a point that emerges clearly from *Hansen* is that meanings ascribed under s 6 should not be inconsistent with the purpose of the enactment at issue.[254] Accordingly, we will consider the purpose of the three strikes legislation, and then move to the text of s 86D(2).

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249 At [33]. As noted above at [160], the right at issue in the present case is absolute and similarly cannot be subject to demonstrably justifiable limits.

250 At [27] (footnote omitted).

251 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

252 *Cropp*, above n 248, at [27].

253 Butler and Butler, above n 202, at [7.9.1].

254 In the United Kingdom jurisprudence, the cases refer to the need for the meaning imported by the application of s 3 of the Human Rights Act (UK) not to be "inconsistent with a fundamental feature of the legislation", to be "compatible with the underlying thrust of the legislation", to be "consistent with the scheme of the legislation" or to "go with the grain of the legislation": see, for example, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [33] per Lord Nicholls, [67]–[68] per Lord Millett and [121] per Lord Rodger. See also Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at 924.

Purpose of the three strikes legislation

[186] The three strikes provisions – ss 86A to 86I of the Sentencing Act – were introduced by the Sentencing and Parole Reform Act 2010, under the sub-heading "Additional consequences for repeated serious violent offending". The explanatory note to the Sentencing and Parole Reform Bill as introduced on 18 February 2009 stated:[255]

> The purpose of the Bill is to create a three stage regime of increasing consequences for the worst repeat violent offenders. The Bill is specifically targeted at offenders who show contempt for the court system and the safety of others by continuing to offend despite long prison sentences and judicial warnings.
>
> This regime is intended to improve public safety by incapacitating these offenders for longer periods. It is also intended to increase the confidence of victims and the public in the justice system through truth in sentencing (no parole for certain offenders) and longer sentences (stage 3 of the regime).

[187] It is noteworthy that the targets of the regime were described as "the worst repeat violent offenders" and offenders who continue to offend "despite long prison sentences and judicial warnings". As is developed further below, the responsible Ministers described the intended targets of the regime in similar terms during the Parliamentary debates as the Bill progressed through the House.

[188] To "qualify" for the regime as initially envisaged, an offender had to receive a determinate sentence of five or more years' imprisonment, life imprisonment or preventive detention (a "qualifying sentence") for a specified serious violent offence.[256] Indecent assault was one of the specified serious violent offences.[257] Offenders convicted of any third strike offence (except murder) had to be sentenced to life imprisonment, with a non-parole period of 25 years, although in exceptional cases a lesser non-parole period could be imposed.[258] Offenders convicted of murder as a second or third strike offence and sentenced to life imprisonment had to be ordered

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255 Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at 1.

256 At 1. See the proposed s 86A set out in cl 5 of the Bill as introduced.

257 See the proposed s 86A definition of "serious violent offence" in cl 5 of the Bill as introduced, para (13).

258 See the proposed s 86D in cl 5 of the Bill as introduced.

to serve the sentence without parole, although this could be varied in exceptional cases.[259]

[189] The Attorney-General, the Hon Christopher Finlayson QC, prepared a report to the House of Representatives under s 7 of the Bill of Rights.[260] He concluded that the Bill appeared to be inconsistent with the Bill of Rights. He wrote:

> [15] I consider that the differential treatment of offenders, and in particular the imposition of a life sentence for offences that would otherwise be subject to a penalty of as little as five years, based on whether they have been previously convicted of listed offences and warned in terms of cl 5[261] may result in disparities between offenders that are not rationally based. The regime may also result in gross disproportionality in sentencing. For these reasons I consider that the proposed regime raises an apparent inconsistency with the Bill of Rights Act.

[190] When the Minister of Justice, the Hon Simon Power, moved that the Bill receive its first reading, he advised the House that the Bill accommodated the parole policies of both the National and the ACT Parties so as to fulfil their confidence and supply agreement.[262] The Minister explained that the Bill dealt with two types of offenders: "the worst repeat violent and sexual offenders and the worst murderers".[263] He said that the measures were:[264]

> … intended to enhance the integrity of the parole system and to protect the public from the worst repeat offenders. These offenders have shown contempt for the safety of others by committing serious acts of violence, being released, and then offending again.

[191] The Bill was read a first time and was then referred to the Law and Order Committee,[265] which received submissions and held hearings on the Bill during 2009.

[192] However, on 19 January 2010, before the Committee had reported, the Government announced a revised three strikes policy to be incorporated into the Bill.[266] The Committee met to discuss this on 10 February 2010. A week later, on

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259 See the proposed s 86E in cl 5 of the Bill as introduced.
260 Section 7 report, above n 228.
261 Clause 5 of the Bill as introduced inserted the proposed sections into the Sentencing Act 2002.
262 (18 February 2009) 652 NZPD 1420–1421.
263 (18 February 2009) 652 NZPD 1421.
264 (18 February 2009) 652 NZPD 1421.
265 (18 February 2009) 652 NZPD 1440.
266 Judith Collins, Minister of Police and Corrections "National and ACT agree to three-strikes regime" (press release, 20 January 2010) <www.beehive.govt.nz>.

17 February 2010, the Committee issued an interim report attaching the Bill with the proposed amendments resulting from Cabinet's policy changes and invited further submissions from certain submitters, to be received by 5 March 2010.

[193] The two most significant changes for present purposes were:

(a) to qualify for the regime, an offender had simply to be convicted of a qualifying offence rather than to have been sentenced to a determinate sentence of five or more years' imprisonment or an indeterminate sentence of imprisonment for a qualifying offence; and

(b) the obligation to sentence a person convicted of *any* third strike offence (except murder) to life imprisonment was removed and replaced by an obligation to sentence the offender to the maximum term of imprisonment for the particular offence. This was to be without the possibility of parole unless the court determined that depriving the offender of the opportunity to obtain parole would be manifestly unjust.

[194] Having heard further submissions, the Committee reported back on 26 March 2010, recommending by a majority the passage of the Bill as amended.[267] The report included a minority view from the Labour Party. The minority protested at the nature and speed of the process that had been followed to address the amended Bill[268] and noted that many of the qualifying offences could cover "relatively minor offending to very serious offending".[269]

[195] The second reading debate took place on 4 May 2010. The Minister of Corrections, the Hon Judith Collins, moved that the Bill be read a second time.[270] The Minister described the purposes of the Bill as follows:[271]

> This bill has two main purposes: to deny parole to repeat serious violent offenders and to offenders who are guilty of committing the worst murders,

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267 Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 1.

268 At 11.

269 At 13.

270 The Minister, who was also the Minister of Police, had taken over responsibility for the Bill from the Minister of Justice, and the New Zealand Police and Department of Corrections had replaced the Ministry of Justice as the supporting departments.

271 (4 May 2010) 662 NZPD 10673.

> and to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious and violent offences.
>
> This bill is specifically focused on offenders who show no regard for victims, their families, or the community, and who are repeatedly convicted of serious violent and sexual offending. Parole is not a right for prisoners; it is a privilege. This privilege is earned, and it should not be granted to those who demonstrate total disregard for the law by continuing to commit serious violent offences, despite being warned of the consequences. This bill ensures that the victims of repeat offenders and their families do not have to experience the additional stress of attending regular parole hearings or worry that an offender may be released on parole.

[196] The Minister was aware that, if enacted, the Bill could result in disproportionate sentences for some offenders. She said:[272]

> The Labour Party did not support this bill. Labour members say that it could result in disproportionate sentences for offenders at stage three. I make no apology for that. By stage three, an offender has been convicted of two previous serious violent offences and has been warned on two occasions, both orally and in writing, of the consequences of further convictions for serious violent offences. This legislation recognises the repeat nature of offending by those few who fail to heed the warnings and continue to offend regardless of the consequences. The community can rightly expect to be protected from these serious recidivist offenders for a lengthy period.

[197] The ACT Party had been the primary promotor of the three strikes regime. In the second reading debate, its leader, the Hon Rodney Hide, said of the regime:[273]

> It is focused solely on the worst violent crimes; it is focused on the few offenders who repeatedly commit violent crime. Unlike the Californian law, people will not receive severe sentences under this law from conviction for relatively trivial offences. The offences on the qualifying list all represent serious crimes.

[198] During the Committee stage of the Bill, the Labour Party put forward an amendment to introduce a "manifestly unjust" exception to the proposed s 86D(2),

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[272] (4 May 2010) 662 NZPD 10674. Butler and Butler, above n 202, at [10.14.6] argue that this and similar references constitute an explicit acknowledgement of the inconsistency of the three strikes regime with the Bill of Rights. We do not agree with that assessment, for reasons which will become apparent.

[273] (4 May 2010) 662 NZPD 10684.

which was rejected.[274] Ms Collins said that the Government did not support the amendment as it would reduce the certainty of the penalty. She went on to say:[275]

> That moves away from the fact that a stage three sentence is meant to be a very serious penalty in all cases because the offender is continuing to commit very serious offences that victimise people. It would reduce any deterrent force of the bill. If it is going to deter people from this sort of offending, it needs to be very certain.

The Crown argued that the rejection of this amendment indicated that the three strikes legislation was intended to be rigid in its application and to allow no exceptions to the qualifying criteria: conviction for any indecent assault was sufficient to trigger the regime.

[199] A further unsuccessful amendment put forward by the Labour Party was that the words "resulting in a custodial sentence" should be added after the words "is a serious violent offence" in paragraph (a) of the definitions of "stage-1 offence", "stage-2 offence" and "stage-3 offence" in the proposed s 86A.[276]

[200] In her speech moving the third reading of the Bill, Ms Collins acknowledged that it was important to the operation of the three strikes regime that appropriate charges were laid by police. She said:[277]

> Another issue that has been raised is the importance of the appropriate charges being laid by police. The Government is confident that the police have sufficient checks and safeguards in place to ensure that the appropriate charges are laid, particularly at the third stage of the regime. At stage three police will be referring all charges that qualify for the mandatory maximum penalty to the Crown solicitor for review, either pre-charge or by second appearance.

Cabinet had decided on this process on 1 March 2010. Presumably the expectation was that this would operate as a "sifting" mechanism, so that only cases falling within the purpose of the regime as articulated would be caught by it.

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274 (18 May 2010) 663 NZPD 10926.
275 (18 May 2010) 663 NZPD 10922.
276 (18 May 2010) 663 NZPD 10925.
277 (25 May 2010) 663 NZPD 11228. The Minister also referred to this safety mechanism in the second reading debate: (18 May 2010) 663 NZPD 10903.

[201] Ms Collins ended her third reading speech as follows:[278]

> In conclusion, this Government is very pleased to fulfil our election promise to deny parole to, and impose maximum terms of imprisonment on, the very worst repeat violent offenders. This bill sends a clear message to those offenders who think it is OK to use violence to get what they want that their behaviour will no longer be tolerated. If they continue to commit serious violent crime despite being warned of the consequences, they can look forward to being locked up for a long time. This Government is proud to put the interests of victims, their families, and the wider community ahead of serious violent criminals. I commend this bill to the House.

[202] What emerges from this parliamentary history is that the proposed three strikes regime underwent significant changes late in the legislative process, without a s 7 vet of the changes. From the Government's perspective, the purpose of the regime was, as the Minister put it in her third reading speech, "to deny parole to, and impose maximum terms of imprisonment on, *the very worst repeat violent offenders*" (emphasis added). There was an awareness that the regime might result in disproportionate sentences at stage three but that was considered appropriate, at least to some extent. To meet concerns about potential "overreach", an administrative process – the review of third strike charges by the local Crown Solicitor – was put in place in an effort to ensure that the regime was applied only to those against whom it was directed. While several members of the Opposition referred in the debates to the Attorney-General's s 7 vet of the Bill as originally introduced,[279] there was no acknowledgement by Government speakers that the amended regime could produce outcomes so extreme that they would breach s 9 of the Bill of Rights or New Zealand's international obligations.

[203] We accept the Crown's submission that proportional sentence outcomes were not a purpose of the third strike provisions. However, as *Taunoa* makes clear, there is a difference between sentences that are severe, excessive or disproportionate (and might result in successful sentence appeals) and ones that are so disproportionately severe as to breach s 9.[280] We do not accept that it was a purpose of the three strikes legislation to require the courts to impose sentences that are so grossly disproportionate that they shock the national conscience and breach s 9 of the Bill of

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278 (25 May 2010) 663 NZPD 11228.

279 See (4 May 2010) 662 NZPD 10680 per the Hon Parekura Horomia and 10686 per Hone Harawira; and (25 May 2010) 663 NZPD 11230 per Grant Robertson.

280 See the discussion above at [161].

Rights, as well as placing New Zealand in breach of its international obligations. If it had been part of Parliament's purpose to direct the courts to act in a way that breached New Zealand's national and international obligations, it is reasonable to expect that it would have been stated explicitly.[281]

[204] Given that the purpose of the three strikes legislation was to put in place a regime to deal with offenders described by the responsible Ministers as "the very worst repeat violent offenders" and that, according to Mr Hide, people would not fall within the regime on the basis of "relatively trivial offences", the application of the regime to the appellant seems misplaced. Although he has an extensive criminal record, most of the appellant's offending was minor. Even the most serious instances of his offending, the indecent assaults, were at the lower end of the scale (despite the fact that they would have been harrowing for the victims). In addition, as the Court of Appeal emphasised, the appellant has long-standing and serious mental health problems, which require on-going treatment. The appellant is simply not the type of offender identified by the responsible Ministers in their speeches to the House as the target of the three strikes regime. Indeed, there was every reason to expect that the administrative process involving the Crown Solicitor would mean that people like him would not fall within the regime.[282]

[205] We turn now to the text of s 86D(2).

The text of s 86D(2)

[206] The question is whether the general words "Despite any other enactment" in s 86D(2) are sufficient to exclude the operation of the Bill of Rights, given its constitutional status as being protective of fundamental rights and the fact that it gives effect to New Zealand's international obligations. This is against the background that Parliament made it explicit that the three strikes regime overrides provisions in the

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281 See the reasons given by Winkelmann CJ at [118]–[119].

282 During the hearing, we were advised that the Wellington Crown Solicitor reviewed the police charging decision in this case. We do not know the contents of the review that occurred, but were advised by Ms Laracy that the Crown Solicitor's responsibility was to assess the charge in light of the Solicitor-General's prosecution guidelines (*Solicitor-General's Prosecution Guidelines* (Crown Law Office, 1 July 2013)). This would take into account not just the sufficiency of the evidence, but also the public interest in prosecution, which would include Bill of Rights considerations.

Sentencing Act and in the Parole Act 2002 that are inconsistent with it. Section 86I provides:

> **86I Sections 86B to 86E prevail over inconsistent provisions**
>
> A provision contained in sections 86B to 86E that is inconsistent with another provision of [the Sentencing Act 2002] or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

It would have been straightforward to include the Bill of Rights in this provision.[283] By doing so, Parliament would have made its purpose clear, both nationally and internationally.

[207] While there remains some dispute about the precise scope and meaning of s 6 of the Bill of Rights, there seems little doubt that it at least requires the courts to take a similar approach to that adopted under the common law "principle of legality".[284] Lord Hoffmann described that principle in *Simms*, in the passage cited by this Court in *Cropp*:[285]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[208] Subsequently, in *R (Wilkinson) v Inland Revenue Commissioners*, Lord Hoffmann drew an analogy between the principle of legality and s 3 of the

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283 The legislative history is silent as to the reasons for the limited scope of s 86I.

284 See, for example, *R v Pora* [2001] 2 NZLR 37 (CA) at [53] per Elias CJ and Tipping J; Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59 at 93, noting that the "vision of section 6 that predominates in the New Zealand jurisprudence is that it is a statutory legitimisation of the common law principle of legality"; and R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 442, noting that any common law principle of legality or requirement for a "clear statement" before fundamental rights are overridden is "subsumed into" the Bill of Rights. How much further s 6 goes is not an issue that we need to address here. For detailed discussion of the principle of legality, see Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017).

285 *Simms*, above n 251, at 131, cited in *Cropp*, above n 248, at [27], n 28.

Human Rights Act (UK) and confirmed that despite s 3, the courts' role remained that of interpreting the legislation at issue.[286] His Lordship said:[287]

> [17] I do not believe that section 3 of the 1998 Act was intended to have the effect of requiring the courts to give the language of statutes acontextual meanings. That would be playing games with words. The important change in the process of interpretation which was made by section 3 was to deem the Convention [for the Protection of Human Rights and Fundamental Freedoms[288]] to form a significant part of the background against which all statutes … had to be interpreted. Just as the "principle of legality" meant that statutes were construed against the background of human rights subsisting at common law …, so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights. … The Convention, like the rest of the admissible background, forms part of the primary materials for the process of interpretation. But, with the addition of the Convention as background, the question is still one of *interpretation*, ie, the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.
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> [18] … It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in [*Ghaidan v Godin-Mendoza*] that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the "intention of Parliament". But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.[289]

[209] Examples of fundamental values protected by the common law presumptions are individual freedom, property rights, the right of access to the courts and the solicitor/client privilege.[290] The courts use a variety of interpretative techniques to give effect to these presumptions, such as reading apparently wide statutory words more narrowly than their literal meaning indicates or as being subject to some form of

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286 *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718.

287 Citations omitted.

288 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953). Section 3(1) of the Human Rights Act 1998 (UK) provides that, so far as it is possible to do so, primary and subordinate legislation "must be read and given effect in a way which is compatible with the Convention rights". "Convention rights" is defined in s 1 of the Act.

289 See similarly *Re application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [50], discussed in Butler and Butler, above n 202, at [7.12.1], n 190.

290 See the discussion in Carter, above n 284, at 431–442.

unexpressed qualification.[291] In some instances – the reading down of privative provisions being the most obvious example – the courts' interpretations have arguably cut across the apparent legislative purpose, at least on occasion.[292] But the fundamental nature of the freedoms protected by the presumptions has been seen as requiring the courts to adopt a protective approach.

[210] By way of illustration, we describe the application of two of the presumptions by courts. First, in *Commissioner of Inland Revenue v West-Walker*, the Court of Appeal held that the widely-worded statutory power of the Commissioner of Inland Revenue to require "every person" to provide "any information" or to produce "any books or documents" considered necessary or relevant to the administration or enforcement of the tax legislation did not apply to material held by a taxpayer's solicitor that was covered by the solicitor/client privilege.[293] While it was recognised that, read literally, the statutory language would cover such material,[294] the majority considered it unlikely that an important common law principle was intended to be overridden by general statutory language.[295] Rather, very clear language would be required.[296]

[211] A similar result was reached by the Privy Council in *B v Auckland District Law Society*.[297] There, the main issue was whether the Auckland District Law Society was entitled under generally-worded provisions in the Law Practitioners Act 1982[298] to require a law firm to hand over documents protected by the solicitor/client privilege in the context of an investigation into allegations of professional misconduct.

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291 At 474. The author notes that "even before the Bill of Rights Act there were a number of quite extreme examples of general words being read as subject to exceptions to avoid the infringement of long-established values. … One would expect that style of 'reading down' to be particularly appropriate in Bill of Rights cases": at 474.

292 Carter, above n 284, at 441.

293 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA). See also *Rosenberg v Jaine* [1983] NZLR 1 (HC), where a widely worded power to issue search warrants was held to be insufficient to displace the solicitor/client privilege.

294 *West-Walker*, above n 293, at 211 per Gresson J and 220 per North J. See also at 215 per Stanton J (dissenting).

295 At 209 per Fair J, 212 per Gresson J, 217–218 per Hay J and 221 per North J.

296 At 207–209 per Fair J, 212–213 per Gresson J and 219 per North J.

297 *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326.

298 In particular, s 101(3)(d) and (e) of the Law Practitioners Act 1982 gave a complaints committee an apparently unrestricted right to obtain "any books, documents, papers, accounts, or records" in the possession or control of the lawyer complained about or their employer, as well as all information in relation to any such books, documents, papers, accounts or records.

Delivering the Privy Council's judgment, Lord Millett set out the rationale for the privilege and the principles relevant to it[299] and noted that in *West-Walker*, it had been accepted that if a section was capable of being interpreted on the basis that the privilege was not abrogated by it, it should be so interpreted.[300] Lord Millett said that a useful test was to write into the generally-worded provisions the words "not being privileged documents" and to ask "does that produce an inconsistency?" or "does it stultify the statutory purpose?".[301] The effect of the Privy Council's decision was that the words were read into the generally-worded text of the relevant provisions so as to exclude privileged documents.

[212] Second, in *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*,[302] the Full Court of four Judges of the (then) Supreme Court held that the language of s 96(2) of the Industrial Conciliation and Arbitration Act 1908 was not effective to prevent the Supreme Court from considering a motion for prohibition or certiorari in relation to a clause in an award of the Arbitration Court that was alleged to be outside its jurisdiction. Section 96(2) provided:

> Proceedings in the [Arbitration] Court shall not be impeached or held bad for want of form, nor shall the same be removable to any Court by *certiorari* or otherwise; and no award, order, or proceeding of the Court shall be liable to be challenged, appealed against, reviewed, quashed, or called into question by any Court of judicature on any account whatsoever.

[213] Salmond J's reasons on this point (with which Reed J agreed)[303] is instructive. The Judge accepted that, read literally, s 96(2) did prevent the Supreme Court from reviewing an award of the Arbitration Court even if it appeared the Arbitration Court had exceeded its jurisdiction.[304] Further, he acknowledged that Parliament had the power to make the Arbitration Court the final arbiter of its own jurisdiction. He said, however, that to achieve that, Parliament would have to use language "so clear and coercive as to be incapable of any other interpretation".[305] In this case, the section

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299 At [37]–[56].
300 At [59].
301 At [59].
302 *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC).
303 At 713. See also at 697 per Herdman J. Hosking J concurred: at 716.
304 At 701.
305 At 702.

could be interpreted "in the same restrictive sense in which statutory provisions taking away the writ of certiorari have always been read".[306] Salmond J went on to say:[307]

> The existence and exercise of this controlling authority on the part of the Supreme Court is so essential a point of civil freedom and public policy that an intention to take it away in the case of any Court of special and limited jurisdiction cannot be properly imputed to the Legislature merely because of the use of general language which is reasonably capable of a [more] restricted and reasonable interpretation.

The Judge noted that the High Court of Australia had, in *Clancy v Butchers' Shop Employees Union*,[308] reached the same result in respect of an identically worded provision in the Industrial Arbitration Act 1901 (NSW). He cited from the reasons of Griffith CJ and O'Connor J and went on to say that the High Court's decision was correct and should be followed.[309]

[214] It is noteworthy that in a decision four years after *Clancy*, the High Court of Australia again addressed the common law presumptions in *Potter v Minahan*.[310] In the course of his reasons in that case, O'Connor J cited a passage from the fourth edition of Peter Maxwell's *On the Interpretation of Statutes*, which contained a sentence that has been referred to often in subsequent Australian authorities:[311]

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness …

[215] To summarise, in the cases discussed, apparently unrestricted general words were not sufficient to displace presumptions reflecting core legal values. In each instance, the effect of the Court's decision was to limit the general statutory language by making it subject to an unexpressed qualification that protected the relevant core

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306 At 702.

307 At 703.

308 *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181.

309 *Frazer*, above n 302, at 705.

310 *Potter v Minahan* (1908) 7 CLR 277.

311 At 304, citing Peter Benson Maxwell *On the Interpretation of Statutes* (4th ed, Sweet & Maxwell, London, 1905) at 122. See the discussion in Stephen McLeish and Olaf Ciolek "The Principle of Legality and 'The General System of Law'" in Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017) 15 at 15. The passage from Maxwell has been adopted in New Zealand decisions: see *R v Leonard* [1922] NZLR 721 (CA) at 740–741; *Mitchell v Licensing Control Commission* [1963] NZLR 553 (SC) at 558; *R v Beynon* [1963] NZLR 635 (CA) at 638 per North J; and *Williams v Murdock* [1968] NZLR 1191 (SC) at 1193.

value. To render the core value inapplicable, the statutory language had to address that value explicitly.

[216] As we have said, the question is whether the opening words of s 86D(2), "Despite any other enactment", oust the operation of the Bill of Rights, and s 9 in particular. Those words appear in only three provisions in the Sentencing Act – s 6(2) (penal enactments not to have retrospective effect to offender's disadvantage), s 86D(1) and s 86D(2). Section 86D(1) deals with matters of procedure and jurisdiction in relation to third strike offences. Accordingly, the words will exclude the operation of inconsistent provisions of other enactments dealing with procedure and jurisdiction, such as the Criminal Procedure Act 2011. On the view William Young J takes,[312] because provisions in the Sentencing and Parole Acts that are inconsistent with the three strikes regime are excluded by s 86I, so that the words "Despite any other enactment" in s 86D(2) are unnecessary as far as those enactments are concerned, the words must be directed at excluding the operation of the Bill of Rights. We do not agree.

[217] To explain, as noted at [207] above, at a minimum, s 6 effectively gives legislative force to certain aspects of the principle of legality. Some of the fundamental values protected by the common law presumptions are specifically addressed in the Bill of Rights, while others are not (an example is the solicitor/client privilege). In that sense, the principle of legality at common law has wider scope than s 6.

[218] But just as the principle of legality means that Parliament must use explicit language[313] to override fundamental values protected by the common law, so too must it use explicit language where it seeks to override an absolute right protected by the Bill of Rights, such as the right protected by s 9.[314] If Parliament wished to require the courts to sentence offenders in a way that breached s 9 of the Bill of Rights, it

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312 See below at [324](b).

313 The extract from Lord Hoffmann's reasons in *Simms*, above n 251, quoted above at [207] refers to "express language or necessary implication". For what constitutes "necessary implication", see *R (Morgan Grenfell & Co Ltd v) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45] per Lord Hobhouse, which was approved by the Privy Council in *B v Auckland District Law Society*, above n 297, at [58] and adopted by this Court in *Cropp*, above n 248, at [26].

314 See, for example, *Diamond Laser Medispa Taupo Ltd v Human Rights Review Tribunal* [2020] NZCA 437, (2020) 17 NZELR 569 at [38].

needed to say so explicitly rather than relying on the general words "Despite any other enactment". The fact that Parliament would be directing the judicial branch of government, which is bound by the Bill of Rights (s 3(a)), to impose sentences that would, in some instances at least, breach s 9 of the Bill of Rights and also art 7 of the ICCPR, highlights the need for specificity. Further, as noted, Parliament was explicit in overriding the application of inconsistent provisions in the Sentencing and Parole Acts to the three strikes regime; in our view, the fact that Parliament was not explicit in overriding the application of s 9 of the Bill of Rights as well is highly significant. If the only purpose of including the words "Despite any other enactment" in s 86D(2) was to oust the operation of the Bill of Rights, we think it implausible there would be no mention of that anywhere in the legislative materials.

[219] We consider that s 86D(2) can be given a rights-consistent meaning under s 6. This can be done by excluding from its ambit cases where compliance with the section produces a sentence that is not simply severe, excessive or disproportionate, but is so grossly disproportionate as to breach s 9 of the Bill of Rights. This interpretation does not deprive s 86D(2) of any meaning, as we agree with the assessment in *The New Zealand Bill of Rights Act: A Commentary* that it will be rare that sentences imposed under the three strikes regime would meet the high threshold set by s 9.[315] As a consequence, the regime will continue to operate in respect of those against whom it was directed – repeat serious violent or sexual offenders, who will have previously served substantial terms of imprisonment.[316] While some of those offenders may receive longer terms of imprisonment under s 86D(2) than they would have received in the absence of the three strikes regime, so that their sentences could be described in some instances as severe, excessive or even disproportionate, that would not be sufficient to breach s 9.[317]

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315 Butler and Butler, above n 202, at [10.14.5].

316 This outcome is consistent with the outcome that the sifting mechanism established by the Minister was expected to achieve: see above at [200].

317 We note that one of the principles in the Sentencing Act is that the court must impose the maximum penalty for the most serious offences, unless the offender's circumstances make that inappropriate: s 8(c). Similarly, where the offending is near the most serious of cases, the penalty must be near the maximum penalty prescribed, subject to the offender's circumstances: s 8(d). So, apart from the three strikes regime, the Sentencing Act provides for substantial sentences of imprisonment for the most serious offenders.

[220] As William Young J points out,[318] this interpretation requires adding an unexpressed qualification to the text of s 86D(2), namely that the subsection is subject to the Bill of Rights, and s 9 in particular. As we have said, the courts have long viewed that process as legitimate – indeed, necessary – where fundamental rights are involved; s 6 of the Bill of Rights certainly does not diminish or constrain that, but rather, confirms or enhances it. As noted at [211] above, in *B v Auckland District Law Society*, the Privy Council said that it was helpful to ask whether the words that needed to be added in that case produced an inconsistency or stultified the statutory purpose. As will be clear from what is said above, we see the insertion of the unexpressed qualification in the present case as giving effect to, rather than stultifying, the statutory purpose.

[221] The Bill of Rights is properly characterised as a constitutional statute – it sets out a number of fundamental rights and freedoms of New Zealanders and imposes obligations on the three branches of government in relation to them. The English courts have drawn a distinction between "constitutional" and "ordinary" statutes in a context analogous to the present, namely, the implied repeal of an earlier statute by a later one. In *Thoburn v Sunderland City Council*, there was an issue about the validity of subordinate legislation which facilitated a move from imperial to metric weights and measures, as required by European Union law.[319] Counsel for those challenging the move raised an implied repeal argument.[320]

[222] In the course of his judgment (with which Crane J agreed),[321] Laws LJ noted that the common law had come to recognise rights which should properly be classified as constitutional or fundamental, referring to authorities such as *Simms*.[322] He went on to say that a "hierarchy of Acts" should be recognised, comprising two categories of statute – "ordinary" and "constitutional". As examples of constitutional statutes, Laws LJ referred to the Magna Carta 1297, the Bill of Rights 1688, the Union with

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318 See below at [323]–[324].

319 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

320 At common law, the ordinary rule in relation to implied repeal was that where Parliament had passed successive statutes which, properly construed, contained irreconcilably inconsistent provisions, the later in time prevailed and impliedly repealed the earlier: at [37]. See also Bailey and Norbury, above n 254, at 292–294.

321 At [83].

322 At [62].

Scotland Act 1706, the Reform Acts of the 19th century, the European Communities Act 1972, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998.

[223] Laws LJ then said:

> [63] Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual*—not imputed, constructive or presumed—intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. … A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute.

This distinction, and the approach flowing from it, has been approved by the United Kingdom Supreme Court, most recently in *R (Privacy International) v Investigatory Powers Tribunal*.[323]

[224] Section 4 of the Bill of Rights prohibits the courts from holding that any enactment is invalid or ineffective or has been impliedly repealed or revoked, or from declining to apply it, only because it is inconsistent with a provision in the Bill of Rights. No issue of implied repeal of an enactment, or refusal to apply it, arises in the present case. Here, the issue concerns the proper interpretation of an enactment in light of the principle of legality and Parliament's direction in s 6 of the Bill of Rights. The emphasis that Laws LJ placed on the need for unambiguous clarity of statutory purpose in the context of the repeal of a constitutional enactment applies equally where, as here, it is argued that a provision deprives a person of the benefit of an absolute right protected by the Bill of Rights.

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[323] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 at [120] per Lord Carnwath. See also *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 at [207]–[208]; and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [67].

[225] For completeness, we note that there is another presumption of interpretation which provides some support for this conclusion, namely the presumption that legislation should be read, so far as possible, as being consistent with New Zealand's relevant international obligations[324] – here, New Zealand's obligations concerning torture and cruel, inhuman or degrading treatment or punishment contained in art 7 of the ICCPR and elsewhere.[325] This "presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant [international] text".[326] Thus, the lack of reference to New Zealand's international obligations in the legislative history of the three strikes provisions does not affect the applicability of the presumption.

[226] Nor do we see the application of the presumption as being affected by the possibility (given what is said in *Taunoa* about the application of New Zealand values) that not all breaches of s 9 of the Bill of Rights will necessarily also be breaches of art 7 of the ICCPR.[327] The nature of the three strikes regime means that there will be instances where the sentence required to be imposed breaches not only s 9 of the Bill of Rights but also New Zealand's international obligations.

[227] Parliament is, of course, free to legislate inconsistently with New Zealand's international obligations. Again, however, it must do so explicitly. The language of the three strikes provisions is not, in our view, effective to rebut the presumption that

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324 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96], citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J.

325 That presumption is of particular relevance here vis-à-vis the ICCPR because a stated purpose of the Bill of Rights is "to affirm New Zealand's commitment to the [ICCPR]": long title, recital (b). For a discussion of the New Zealand courts' endorsement of the necessity and utility of interpreting legislation consistently with international human rights instruments, see Andrew S Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173; Kenneth Keith "Roles of the Courts in New Zealand in giving effect to International Human Rights – with some History" (1999) 29 VUWLR 27; and Claudia Geiringer "*Tavita* and all that: Confronting the confusion surrounding unincorporated treaties and administrative law" (2004) 21 NZULR 66. See also, for example, the emphasis on interpreting the Bill of Rights consistently with the ICCPR in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) and the discussion of that case in Butler and Butler, above n 202, at [4.5.4]–[4.5.7].

326 *New Zealand Air Line Pilots'*, above n 324, at 289.

327 See the discussion above at [166] and n 219.

Parliament did not intend to enact a provision (s 86D(2)) that would produce outcomes that are inconsistent with New Zealand's international obligations.

[228] Finally, we should mention s 8(h) of the Sentencing Act. It provides that when sentencing an offender the court:

> must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe

[229] It might be argued that this provision brings the s 9 "disproportionately severe" standard into the Sentencing Act;[328] because the three strikes regime prevails over inconsistent provisions in the Sentencing Act, s 8(h) must be treated as overridden for the purposes of the regime; and as a consequence, the "disproportionately severe" element of s 9 must also be treated as overridden in this context.

[230] We do not accept that interpretation of s 8(h). As *Taunoa* emphasises, the phrase "disproportionately severe" in s 9 is coloured by its association with "torture", "inhuman" and "degrading" and sets a high threshold. As *Taunoa* also indicates, sentences that are considered to be excessive in a sentence appeal context will generally not meet the high threshold of being "disproportionately severe" for s 9 purposes.[329] There are numerous examples of sentence appeals being allowed wholly or partly on the basis of the s 8(h) "disproportionately severe" standard where the original sentence could not be said to meet the high threshold in s 9.[330] In short, despite the identity of language, the concepts in s 8(h) of the Sentencing Act and s 9 of the Bill of Rights are not identical in scope.

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328 See the dicta in *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [62]. See also Butler and Butler, above n 202, at [10.14.10].

329 See above at [161].

330 For example, foreign nationals who are sentenced to imprisonment may receive a discount in terms of s 8(h) to reflect the particular difficulties that they face in being imprisoned in New Zealand: see, for example, *Wan v R* [2020] NZCA 328 at [32]–[35]. Similarly, a discount may be given under s 8(h) for offenders who suffer mental or physical disabilities which mean imprisonment will be a particular burden for them: see, for example, *R v Verschaffelt* [2002] 3 NZLR 772 (CA) at [22]–[31]; *L (CA719/2017) v R* [2019] NZCA 676 at [57]–[58]; and *Whiteford v R* [2020] NZCA 130 at [36]–[40].

[231] Accordingly, we conclude that, interpreted in accordance with Parliament's direction in s 6 of the Bill of Rights, s 86D(2) does not require the courts to impose the maximum sentence on conviction of a third strike offence in the rare cases where the resulting sentence would breach s 9 of the Bill of Rights. As it is accepted that the appellant's sentence of seven years' imprisonment on one count of indecent assault does breach the high threshold set by s 9, we would allow the appeal and quash the sentence. The matter should be remitted to the High Court so that the appellant can be re-sentenced in accordance with ordinary sentencing principles, taking particular account of his significant mental health issues. We do not agree with the Chief Justice that in these rare cases there is an additional stern sentencing principle arising from s 86D(2).[331]

The s 106 issue

[232] Section 106(1) of the Sentencing Act provides:

> If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, *unless by any enactment applicable to the offence the court is required to impose a minimum sentence*.
>
> (emphasis added)

The question is whether s 86D(2) requires the court to impose a minimum sentence so that a discharge without conviction is not available.

[233] The effect of the three strikes regime is to require a third strike offender to be given the maximum penalty for the qualifying offence. In terms of the legislation, the maximum sentence is also the minimum sentence. On its face, then, the proviso in s 106 would apply in such a case.

[234] However, the appellant submitted that the three strikes regime is directed at the status of the offender rather than at the qualifying offence per se; the proviso in s 106 only applies where the relevant substantive offence requires a minimum sentence (which only applies to treason and certain piracy offences); and, as indecent assault is

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331 See above at [138].

not an offence that requires such a minimum sentence, the proviso does not apply to the appellant.

[235] The appellant's submission was made on the premise that this interpretation of s 106 was required to avoid the imposition of a sentence under s 86D(2) that breached s 9 of the Bill of Rights. The Judges in the Court of Appeal addressed the s 106 issue on that premise as well.

[236] However, the effect of this Court's decision is that the premise does not apply – properly interpreted, s 86D(2) is subject to a limitation that it does not apply where the sentence it produces meets the high threshold set by s 9 of the Bill of Rights. Accordingly, in the rare cases where a third strike sentence would breach s 9 if imposed (so that s 86D(2) does not apply), the s 106 power would be available as part of the usual suite of options available to a sentencing judge.

[237] If the direction to sentencing judges in s 86D(2) does not apply where the resulting sentence would breach s 9 of the Bill of Rights, there is, in our view, no reason to determine the precise scope of s 106 in the present case. This is particularly so when the result of accepting the appellant's submission as to the meaning of the proviso in s 106 is considered. It would mean that s 106 would be available to a sentencing judge in relation to any third strike sentence where the sentencing judge was satisfied "that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence",[332] even if the required sentence would not breach s 9 of the Bill of Rights. We consider that it is strongly arguable that this would be inconsistent with the purpose of the three strikes regime, given that disproportionate sentences were acknowledged to be a feature of the regime.[333] Even though, as a practical matter, it is unlikely that this issue would arise in cases where there was no breach of s 9, we consider the Court should address the issue if and when it arises.

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[332] Sentencing Act, s 107.

[333] Compare the reasons given by Winkelmann CJ at [106].

GLAZEBROOK J

Summary

[238] I write separately because, although agreeing with Winkelmann CJ and O'Regan and Arnold JJ that the appeal against sentence should be allowed and the conviction appeal dismissed, my reasons differ in some respects to theirs.[334]

[239] I adopt Winkelmann CJ's outline of Mr Fitzgerald's background and her description of his offending and sentencing.[335] I also adopt her description of the "three strikes" regime.[336] Both Winkelmann CJ and Arnold J consider (and I agree) that Mr Fitzgerald's sentence is in breach of s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).[337] Both outline in their reasons what this entails and I agree with their analysis.[338] Effectively, a sentence that breaches s 9 would be one that is so out of proportion in the circumstances of the case that it would shock the conscience of New Zealanders.

[240] I agree with Arnold J that, despite the identity of language ("disproportionately severe") in s 8(h) of the Sentencing Act 2002 and s 9 of the Bill of Rights, s 9 is much more limited.[339] As Arnold J notes, *Taunoa v Attorney-General*[340] emphasises that the phrase "disproportionately severe" in s 9 takes its colour from its association with "torture", "inhuman" and "degrading" and sets a high threshold.[341]

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334 In the main text, I subsequently refer to the joint reasons of O'Regan and Arnold JJ as the reasons of Arnold J (as they were given by him).

335 See above at [15]–[20] and [28]–[31].

336 See above at [21]–[25].

337 See above at [11] per Winkelmann CJ and [154] per O'Regan and Arnold JJ. This was, in any event, common ground between the parties. William Young J (in his reasons below at [284]) suggests that an alternative sentence of seven years' imprisonment accompanied by an order under s 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 may not have necessarily been in breach of s 9 of the New Zealand Bill of Rights Act 1990 [Bill of Rights]. I do not comment on this suggestion as we heard no argument on it. It was, in any event, not an option considered at sentencing: see *R v Fitzgerald* [2018] NZHC 1015 (Simon France J) [HC judgment].

338 See above at [75]–[79] per Winkelmann CJ and [159]–[167] per O'Regan and Arnold JJ.

339 See above at [228]–[230].

340 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [176] per Blanchard J.

341 There is overwhelming support for the proposition that the prohibition on torture has the status of jus cogens in international law: see *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [51], n 43. In that case, this Court held that s 6 of the Bill of Rights directs that the power in s 72 of the Immigration Act 1987, for the Governor-General, by Order in Council, to order the deportation of a person whose continued presence in New Zealand was certified to be a threat to national security, be exercised consistently with ss 8 and 9 of the Bill of Rights: see at [90]–[93]. This involved both substantive and procedural requirements.

[241] Both Winkelmann CJ and Arnold J accept (and I agree) that s 9 is not subject to a "reasonable limits" analysis under s 5 of the Bill of Rights.[342]

[242] Winkelmann CJ is of the view that a breach of the s 9 right necessarily also entails a breach of art 7 of the International Covenant on Civil and Political Rights (ICCPR),[343] and that, if an ICCPR right is violated in New Zealand and not remedied, then New Zealand will be in breach of its international obligations.[344]

[243] Arnold J raises a possibility that not all breaches of s 9 of the Bill of Rights will be breaches of art 7 of the ICCPR, given that whether s 9 is breached depends on the application of New Zealand values.[345] Even if the latter is the case (and I make no comment on this), I would see it as exceedingly unlikely that breaches of s 9 of the Bill of Rights would not also be breaches of art 7 of the ICCPR, given the high threshold in s 9.

[244] I do not consider it necessary for the purposes of this case to discuss *R v Hansen*[346] or the proper approach to ss 4, 5 and 6 of the Bill of Rights.[347] This is because the matter can, in my view, be disposed of by using standard statutory

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342 See above at [47] and [78] per Winkelmann CJ and [160] per O'Regan and Arnold JJ.

343 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

344 See above at [42].

345 See above at [166], n 219 and [226].

346 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

347 I made some comments on the *Hansen* approach to the Bill of Rights in *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [166]–[170] and [252]–[255]. As it is not necessary in the present case to come to any concluded view on the issues I raised in that case, I do not comment on [44]–[73] of Winkelmann CJ's reasons or [174]–[185] of the reasons given by Arnold J. I do agree with their descriptions of the Bill of Rights: see above at [36]–[42] per Winkelmann CJ and [170]–[173] per O'Regan and Arnold JJ. I do not agree with William Young J's discussion on the Bill of Rights at [287]–[302] below. In particular, I disagree with William Young J that the starting point of the Bill of Rights analysis is s 4 (see below at [292]) and that his approach is consistent with *Hansen* (see below at [294]).

interpretation techniques as explained below.[348] Further, there is no question of justification under s 5 of the Bill of Rights as s 9 is not subject to any limits.[349]

[245] I agree with Arnold J that in the rare cases where a third strike sentence would breach s 9 of the Bill of Rights, the power under s 106 of the Sentencing Act to discharge without conviction would be available as a sentencing option.[350] I also agree that it is not necessary for the purposes of this appeal to determine the exact scope of s 106 of the Sentencing Act and its relationship to the three strikes regime in cases where a sentence would not breach s 9 of the Bill of Rights.[351]

Parliamentary purpose

[246] The Crown submits that the text and purpose of s 86D(2) of the Sentencing Act requires Mr Fitzgerald to be sentenced to seven years' imprisonment, despite the fact the sentence breaches s 9 of the Bill of Rights.[352]

[247] To accept the Crown's submissions in this case would mean finding that Parliament's purpose in enacting the three strikes regime was to require judges to impose sentences on mentally ill persons, like Mr Fitzgerald, that breach s 9 of the Bill of Rights (a right not subject to any reasonable limits). This is despite both Parliament and judges being bound by the Bill of Rights as a result of s 3(a) of the Bill of Rights, and despite the fact that the imposition of such sentences would mean

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348 In particular, as parliamentary purpose coincides with the proper interpretation of s 86D(2) of the Sentencing Act 2002, it is not necessary to decide on the limits to the use of s 6 of the Bill of Rights. Nor is it necessary to decide if there are any circumstances where an interpretation available on the statutory wording but inconsistent with parliamentary purpose may be arrived at by the courts – see my discussion in *D v New Zealand Police*, above n 347, at [170]. Winkelmann CJ says that the words of the statute must clearly exclude a rights-consistent meaning: see above at [55] and [124]. Compare O'Regan and Arnold JJ's view that s 6 of the Bill of Rights cannot ascribe a meaning to a statute that is inconsistent with that statute's purpose: see above at [185].

349 This was not the case in *D v New Zealand Police*, which concerned the right protected in s 25(g) of the Bill of Rights.

350 See above at [236].

351 See above at [237]. I therefore do not comment on the discussion of s 106 of the Sentencing Act above at [85]–[108] per Winkelmann CJ or below at [305]–[318] per William Young J.

352 William Young J accepts this argument: see below at [328]. I do not agree. Note that I do not comment on whether or not *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49 was correctly decided as there was no argument on this before us: see below at [316] per William Young J.

a breach of New Zealand's obligations under international law. To attribute such a purpose to Parliament would be surprising.[353]

[248] Of course, the legislative history makes it plain that this was not in fact Parliament's purpose.[354] The purpose of the regime was that it would apply to the very worst repeat violent offenders and the language was broadly drawn to ensure all such offenders would be included. To meet the concerns about possible overreach, an administrative process was put into place to make sure that the regime was properly directed.[355]

Purposive interpretation

[249] Section 5(1) of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in light of its purpose.[356] It is a standard interpretation technique for general provisions to be "read down" to accord with parliamentary purpose or for limitations or exceptions to be "read in" for similar reasons.[357]

[250] I consider that reading down s 86D(2) so that it does not require the imposition of sentences that breach s 9 of the Bill of Rights is not only possible, but also necessary to accord with parliamentary purpose.[358] This is particularly so given the interpretive presumptions of consistency with international law[359] and with fundamental human

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353 Although expressed in stronger terms, Collins J in the Court of Appeal was of a similar view: see *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 at [116].

354 See above at [122]–[123] and [125]–[128] per Winkelmann CJ and [186]–[204] per O'Regan and Arnold JJ. I agree with their analysis. I do not comment on [124] per Winkelmann CJ.

355 See above at [125]–[130] per Winkelmann CJ. See also [200] and [202]–[204] per O'Regan and Arnold JJ. That administrative process seems to have failed in this case: see above at n 282 per O'Regan and Arnold JJ. I agree with Winkelmann CJ (above at n 174) and William Young J (below at [326], in particular, at n 411) that, in any event, the administrative process was neither a sensible nor principled means of addressing concerns around inappropriately harsh outcomes.

356 Section 5 of the Interpretation Act 1999 is to be replaced by s 10 of the Legislation Act 2019: see also above at n 60 per Winkelmann CJ.

357 See above at [62] per Winkelmann CJ and [209]–[215] per O'Regan and Arnold JJ. See also generally Jim Evans "Reading Down Statutes" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 123. I should not be taken as agreeing with all of Professor Evans' discussion.

358 I therefore agree with O'Regan and Arnold JJ above at [204].

359 Discussed by Winkelmann CJ above at [116] and by O'Regan and Arnold JJ above at [225]–[227].

rights.[360] It is also highly significant that the s 9 right is contained in the Bill of Rights, a statute that has constitutional status.[361]

[251] This interpretation is also supported by the principle of legality.[362] The principle of legality means that plain words are needed to override fundamental rights embedded in the common law.[363] This is on the basis that, if Parliament wishes to override such rights, it must show that it knows it is doing so and that it is prepared to face the consequences. This requires such rights to be overridden explicitly or by necessary implication.[364] The words "[d]espite any other enactment" in s 86D(2) do not reach the threshold of being clear or explicit enough to override such a fundamental right as the one at issue in this case.[365]

Disposition

[252] As there is an exception from the three strikes regime for sentences that would breach s 9, it follows that the regime does not apply to Mr Fitzgerald and therefore that he should have been sentenced in accordance with ordinary sentencing principles, taking into account his mental health issues.[366] I agree that his case should be remitted to the High Court for this to be done, as his counsel has asked.

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360 Discussed by Winkelmann CJ above at [63]–[64] and by O'Regan and Arnold JJ above at [220]. See also this Court's decision in *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 as discussed in the reasons given by Arnold J above at [182]–[184].

361 See above at [41] per Winkelmann CJ and [221]–[223] per O'Regan and Arnold JJ. I agree with the latter's discussion of *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [221]–[223] above.

362 The majority of this Court recently applied the principle of legality in *D v New Zealand Police*, above n 347: at [75]–[82] per Winkelmann CJ and O'Regan J (with whom Ellen France J agreed: at [159]). See also Winkelmann CJ's discussion of *D v New Zealand Police* in the present case above at [53].

363 Winkelmann CJ discusses the relationship between s 6 of the Bill of Rights and the principle of legality in her reasons above at [54]–[57]. See also O'Regan and Arnold JJ's discussion above at [207]. I do not wish to comment on the relationship between s 6 of the Bill of Rights and the principle of legality, except to say that I agree with Winkelmann CJ that s 6 of the Bill of Rights may go further than the principle of legality.

364 The principle of legality is discussed in more detail in the reasons given by Arnold J above at [207]–[215]. I broadly agree with that discussion. See also n 313 above per O'Regan and Arnold JJ for what constitutes necessary implication.

365 On this issue, I am in broad agreement with Winkelmann CJ at [112]–[118] above and O'Regan and Arnold JJ at [206] and [216]–[219] above.

366 On this point, I agree with O'Regan and Arnold JJ above at [231]. I do not agree with Winkelmann CJ's comments at [138] with regards to a stern sentencing principle being added because of s 86D(2).

[253] I comment that sentencing options would include a sentence limited to time served. In my view, this may well be the most principled option, given Mr Fitzgerald has already served a large part of a sentence that breached s 9 of the Bill of Rights. If that is the course taken, I would expect Mr Fitzgerald to receive a referral to services to assist with his complex needs outside of the criminal justice system.[367]

WILLIAM YOUNG J

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Introduction

[254] Being of the same mind as Simon France J in the High Court[368] and the majority in the Court of Appeal[369] as to the application of s 106 of the Sentencing Act 2002, I would dismiss the conviction appeal. As well, I am of the view that s 86D of the Sentencing Act required Simon France J to impose a sentence of seven years' imprisonment and, for this reason, I would also dismiss the appellant's challenge to the sentence imposed, save possibly to amend the sentence by ordering under

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367 The situation described in the psychiatric report (see below at [267] per William Young J) is not one that should be allowed to occur in New Zealand.

368 *R v Fitzgerald* [2018] NZHC 1015 [HC judgment].

369 *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 (Clifford, Collins and Goddard JJ) [CA judgment]. Clifford and Goddard JJ were the majority.

s 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 that the appellant serve it as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[255] The reasons which follow are organised around the following headings:

(a) the reasons why the punishment of the appellant is disproportionately severe;

(b) how s 6 of the New Zealand Bill of Rights Act 1990 operates;

(c) interpretation and application of s 106 of the Sentencing Act; and

(d) interpretation of s 86D of the Sentencing Act.

The reasons why the punishment of the appellant is disproportionately severe

A preliminary comment

[256] A feature of this appeal process is that there has been no defence offered of the application of the three strikes regime to the appellant. Counsel for the Crown were as critical of this application as counsel for the appellant and the Human Rights Commission | Te Kāhui Tika Tangata (the Human Rights Commission). All agreed that the sentence imposed on the appellant was disproportionately severe under s 9 of the New Zealand Bill of Rights Act (Bill of Rights), which provides: "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment". Because of this unanimity between counsel, the reasons why the sentence is disproportionately severe were never teased out.

[257] I agree that the appellant has been subjected to punishment which is disproportionately severe but think it a pity that the reasons why this is so have not been examined.

[258] In this section of my reasons, I will explain why I both accept that the punishment of the appellant has been disproportionately severe but also think it at least possible that the appellant could have been sentenced in accordance with s 86D on a

basis which would not necessarily have involved disproportionately severe punishment.

[259] I see no point in adding significantly to the explanations given in the reasons of those in the majority of what constitutes disproportionately severe punishment. Where the issue concerns sentence length, s 9 of the Bill of Rights seems to me to invite:

(a) comparison between the punishment in issue and what would be proportionate punishment; and

(b) assessment of whether the difference is sufficiently great to merit the description "disproportionately severe".

[260] The comparison and assessment exercises just postulated are material to determining whether s 9 of the Bill of Rights has been infringed, but I do not regard them as controlling. A sentence that on ordinary sentencing practice is disproportionate (on the severe side) will not necessarily breach s 9. As well, it may be that some of the principles which inform the proportionality assessment for sentencing purposes are not necessarily to be carried over to a s 9 assessment. I will refer to this a little later in these reasons in relation to the limited weight placed on recidivism under ordinary sentencing practice.

[261] That caveat notwithstanding, I think it is helpful to look first at how the appellant would have been sentenced but for the three strikes regime. As will be apparent, I see this as providing a baseline which is at least material to the application of the "disproportionately severe" standard.

How would the appellant have been sentenced but for the three strikes regime?

[262] The appellant is 48 years of age. He suffers from schizophrenia. His illness has been characterised by disturbed behaviour, disorganisation in his thought processes, delusional beliefs and abnormal perceptual experiences. As a teenager, he displayed signs of poor mental health. He engaged with mental health services when he was in his early 20s. Since then, he has been admitted to hospital on a number of

occasions and also treated extensively by community mental health services and while in prison. He has a history of alcohol abuse and he has regularly used cannabis.

[263] The appellant has a long list of previous convictions. The first was for an assault committed on 30 November 1990 (when he was 17) for which he was sentenced to corrective training. Including the convictions for the events of December 2016, he has seven convictions for indecent assault and 10 convictions for assault. He also has five convictions for obscene exposure. He has been sentenced to imprisonment on numerous occasions and, save for the present sentence, always for short periods. The longest sentence was 11 months, imposed in November 2012 in respect of the first strike offending.

[264] The appellant's living circumstances have been heavily affected by his illness and he has at times slept on the streets.

[265] Section 34 of the Criminal Procedure (Mentally Impaired Persons) Act relevantly provides:

> **34 Power of court to commit offender to hospital or facility on conviction**
>
> (1) If the court is satisfied of the matters specified in subsection (2), the court may deal with an offender who is convicted of an imprisonable offence—
>
> (a) by sentencing the offender to a term of imprisonment and also ordering that the offender—
>
> (i) be detained in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
>
> …
>
> (b) instead of passing sentence, by ordering that the offender—
>
> (i) be treated as a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992; …
>
> …
>
> (2) For the purposes of subsection (1), the court must be satisfied, on the evidence of 1 or more health assessors, that the offender's mental impairment requires the compulsory treatment … of the offender

> either in the offender's interest, or for the safety of the public or for the safety of a person or class of person.
>
> (3) Before the court makes an order under subsection (1)(a)(i) or (b)(i), the court must be satisfied on the evidence of 1 or more health assessors (at least 1 of whom must be a psychiatrist) that the defendant is mentally disordered.
>
> …

[266] On the basis of the pre-sentence psychiatric reports, I am inclined to think that the s 34(2) and (3) prerequisites to orders under s 34(1) were satisfied at the time the appellant was sentenced, albeit that the reports did not directly address s 34(2).

[267] The most recent psychiatric report (provided after the hearing before us) addresses the situation as it now is, but I see it as also being material to the possibility of resort being made to s 34(1) when the appellant was sentenced:

> Mr Fitzgerald is of no fixed abode and has chosen to live in the Wellington area if released.
>
> …
>
> If released into the community from a term of imprisonment he would be provided with a script and a referral to a Community Mental Health Service (CMHS). He would seek accommodation at the Night Shelter, although if a bed was not available, he would likely sleep on the street as he has no other support.
>
> If the court decides to re-sentence, then consideration could be given to disposition pursuant to section 34(1)(b)(i) of the Criminal Procedure (Mentally Impaired Persons) Act 2003, to be treated as a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992. The court would have to order pursuant to section 36 whether the order takes effect as a community treatment order or as an inpatient order.
>
> As he is currently mentally well it is likely that if he went to an acute unit as an inpatient he would quickly be discharged into the community and … he is likely to not engage with the mental health service.
>
> Mr Fitzgerald (and the public) would be best served if he received a minimum of 1–2 years of mental health rehabilitation in RRS [Regional Rehabilitation Service]. There are different ways this could happen.
>
> For the usual process to occur for a patient in the Wellington area he would need to be assessed by the Needs Assessment Service Coordination (NASC) team as requiring rehabilitation. He would then be placed on a waitlist and the decision for admission to the next available bed (depend[e]nt on a discharge) would be made by the Wellington Service Coordination depend[e]nt on need. Currently there are 6 on this wait list. There is no

> guarantee he would be prioritised or receive a bed in RRS prior to becoming unwell.
>
> At RRS there are renovations underway planned to be completed mid-April 2021. Then a physical bed would be available on the locked rehabilitation unit, Tāwhirimātea, (the usual entry point) at RRS.
>
> For this bed to be available to Mr Fitzgerald funding would need to be obtained = fee for bed. The bed (and all that goes with it, including but not restricted to, … psychiatrist, psychology, nursing, AOD, social skills, education about illness and medication) costs $535.21 per day.
>
> Capital and Coast District Health Board [Mental] Health is most unlikely to purchase an additional bed for Mr Fitzgerald above those on their waitlist.
>
> Corrections have been approached about supporting Mr Fitzgerald with accommodation, but my understanding is that they do not have accommodation available at this time. The possibility of funding a bed at RRS could be a conversation to have with Corrections. I do not know of other possible funding streams.

Although an order under s 34(1)(a)(i) would presumably resolve the problem of finding a bed, it is not referred to as an option in either this report or at least explicitly in any of the reports available at the time of sentencing.

[268] Turning now more directly to how the appellant might have been sentenced, I think it inconceivable that he would have been discharged without conviction; this given the moderately serious nature of the offending and his prior convictions.

[269] I also think it unlikely that, in lieu of imposing sentence, a judge would have made an order under s 34(1)(b)(i). There are two reasons for this: first, that no such order had been made in relation to the appellant's prior convictions; and second, the likely lack of utility of such an order in light of the considerations referred to in the most recent psychiatric report from which I have quoted.

[270] Moving to the other end of the spectrum of sentencing options, indecent assault is a "qualifying sexual or violent offence" for the purposes of s 87 of the Sentencing Act,[370] and, in light of the appellant's prior qualifying convictions for indecent assault and the likelihood that he will commit further such offences, he was eligible to be sentenced to preventive detention.[371] But, as with the option of a

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370 Sentencing Act 2002, s 87(5)(a).
371 Section 87(2).

discharge without conviction, it is inconceivable that he would have been sentenced to preventive detention; this because, in accordance with ordinary sentencing practice, his likely future offending is of insufficient seriousness to warrant indefinite detention under a sentence of preventive detention.

[271] Against this background, I think it likely that the appellant would have been sentenced to a finite term of imprisonment. This would have been warranted by the combination of the inherent culpability of the offending and his prior convictions.[372] It is also consistent with the way he had been dealt with in the past for similar offending. As to the likely sentence length, proportionality considerations would dictate that it be comparatively short, perhaps a year.

[272] As explained, I think it would have been open to a sentencing judge to have made an order that the appellant serve such sentence as a special patient, albeit that this would probably have required psychiatric reports which engaged directly with s 34(2) of the Criminal Procedure (Mentally Impaired Persons) Act. I am unsure as to how probable such an outcome would have been.[373] I suspect that the shortish length of sentence, together with the entitlement to be released at the halfway point,[374] would have meant that there would have been limited utility in making an order under s 34(1)(a)(i). The making of an order under s 34(1)(a)(i) would not have justified imposing a sentence of imprisonment which would have been longer than otherwise appropriate.

A comment on ordinary sentencing practice

[273] As I have noted, a short sentence of imprisonment would have accorded with ordinary sentencing practice. This warrants brief explanation.

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372 The High Court Judge said that, "Standing alone, and leaving aside aggravating features of the offender, [the offending] would not attract a jail term": HC judgment, above n 368, at [21] (footnote omitted).

373 I am not aware of how often orders are made under s 34(1)(a)(i). They appear to be rare; this may be a function of limited resources in the mental health sector and judicial reluctance to commit resources to particular individuals without a good understanding of how those resources might otherwise be deployed. For a discussion of the principles relating to s 34 (1)(a) and (b) orders, see *R v Goodlet* [2011] NZCA 357, [2011] 3 NZLR 783.

374 Parole Act 2002, s 86(1).

[274] Fundamental to ordinary sentencing practice in relation to serious offending (by which I mean offending for which imprisonment is likely to be imposed) is proportionality. The underlying idea is that sentences of imprisonment should be proportionate to the gravity of the offending. This requires a judge to focus on the inherent culpability of the conduct of the offender. This is sometimes referred to as a just deserts approach to sentencing and generally operates as a limiting principle, serving to moderate sentence length from what it would otherwise be if deterrence and incapacitation were primary drivers.

[275] In this case, under ordinary sentencing practice, the limited seriousness of the offending would be the primary constraint on sentence length. The appellant's prior convictions would have been mainly relevant to whether a sentence of imprisonment (as opposed to a community-based sentence) should have been imposed. But they would not have resulted in significant uplifts to what would otherwise have been an appropriate sentence for the appellant. This is because incapacitation is seen as primarily relevant to sentences of preventive detention and the imposition of minimum terms of imprisonment but is otherwise not a significant driver of sentence length.[375]

The non-making of an order under s 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act

[276] For the reasons already given, I am inclined to think it would have been possible for the High Court Judge to have made an order under s 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act that the appellant serve his sentence as a special patient.

[277] I assume that s 34(1)(a)(i) was not addressed in the Judge's sentencing remarks because it was not referred to explicitly in the psychiatric reports and not proposed as an option. As well, the primary focus at the hearing was on whether there should be a discharge without conviction.

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[375] The leading case on this is still *R v Ward* [1976] 1 NZLR 588 (CA). Incapacitation is highly material to the parole process, which is heavily informed by actuarial risk assessment. An offender who poses an unacceptable risk will not be granted parole: see s 28(2) of the Parole Act.

Parole

[278] By my calculation, the appellant became eligible for parole in early April 2019.

[279] I infer that the appellant has not been released on parole because he has not been able to satisfy s 28(2) of the Parole Act 2002. Under this subsection, the Parole Board may direct a release on parole only if:

> … it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—
>
> (a) the support and supervision available to the offender following release; and
>
> (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

[280] There are a number of measures available to the Parole Board to mitigate the risk an offender would pose if released on parole. These include special conditions under s 15 of the Parole Act, which extend to residential restrictions and requirements to participate in programmes and, subject to certain conditions, to take prescription medicines.[376]

Drawing the threads together

[281] Looking at the situation as it now is, the appellant has served more than four and a half years in prison. I see this punishment as disproportionately severe for two reasons:

(a) It is just too long in light of the only moderate seriousness of the offending. Under ordinary sentencing practice, the appellant would have been sentenced to imprisonment for probably not more than a year. Assuming a sentence of 12 months, he would have been released after six months. This would have been a proportionate response to his offending. As it is, the time he has spent in prison is already nine times

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[376] Parole Act, s 15(3)(ab), (b), (d) and (4).

what would have been appropriate in terms of ordinary sentencing practice.

(b) No allowance has been made for his mental illness.

[282] Had the appellant been released on parole when first eligible (in April 2019), the time he would have spent in prison (28 months from the time of his arrest) would have been approximately five times the six months or so he would have been required to serve if sentenced in accordance with ordinary sentencing practice. I am inclined to think that this too would have been disproportionately severe.

[283] If a requirement to serve 28 months in prison constitutes disproportionately severe punishment, it follows that the sentence of seven years' imprisonment imposed was in breach of s 9 of the Bill of Rights. On this approach, there is no need to consider what, if any, allowance should be made for the likelihood of parole being granted when assessing whether a sentence of imprisonment breaches s 9.

[284] I have some reservations as to whether a sentence of seven years' imprisonment accompanied by an order that the appellant serve it as a special patient would breach s 9. Had such an order been made, the appellant would have served it in a therapeutic environment and in conditions that might not have differed materially from those seen as appropriate in the most recent psychiatric report.[377] As well, it is at least likely that he would have then been reasonably well placed to obtain parole when first eligible.

[285] As is apparent from my earlier discussion, a sentence of seven years' imprisonment accompanied by an order under s 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act would also have been significantly different from the likely outcome had the appellant been sentenced in accordance with ordinary sentencing practice. But I do not see this as meaning that such an outcome would necessarily breach s 9 of the Bill of Rights. As I have explained, I think that the proportionality principles which inform ordinary sentencing practice are not controlling when s 9 is in issue. In the present context, the limited weight placed on

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[377] This would be subject to the possibility of a direction removing the appellant to prison under s 47(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992. I am uncertain as to the likelihood of such a direction.

past and likely future recidivism in the context of sentences of imprisonment required to be served in prison may not be determinative when a s 9 assessment is required in relation to a sentence if it is to be served in a therapeutic setting.[378]

[286] Despite my reservations in this regard, in the balance of these reasons I will assume that even with an order under s 34(1)(a)(i), a sentence of seven years' imprisonment, as required by the three strikes regime, was disproportionately severe.

How s 6 of the New Zealand Bill of Rights Act 1990 operates

[287] Section 6 of the Bill of Rights provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[288] Also in play are two other provisions. The first is s 4 of the Bill of Rights:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[289] The second is s 5(1) of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

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[378] As I have explained, under ordinary sentencing practice, the ability to require a sentence to be served as a special patient would not justify a longer sentence than would otherwise be appropriate. The point I am making is that this is not necessarily controlling for the purposes of s 9 of the New Zealand Bill of Rights Act 1990 [Bill of Rights].

[290] Primarily in issue is the application of "can be given a meaning" in s 6 of the Bill of Rights. On the Humpty Dumpty approach to interpretation,[379] there is no limit to the meaning which can be attributed to language. Applying that approach to s 6 would enable a judge to give any enactment a Bill of Rights-consistent meaning despite that meaning not being in accordance with its text and purpose. As will become apparent, I do not regard this as appropriate.

[291] Where the effect of s 6 on the interpretation of another enactment is in issue, I see it as the task of the court to apply ss 4 and 6 of the Bill of Rights and s 5(1) of the Interpretation Act collectively.

[292] The starting point for me is the direction in s 4 that the courts are not to decline to apply an enactment by reason only of it being inconsistent with the Bill of Rights. This excludes any interpretive approach which amounts to disapplication of a legislative provision.

[293] In the context provided by s 4, s 6 of the Bill of Rights and s 5(1) of the Interpretation Act should be read together so that the words "can be given a meaning" are construed as:

> … can, in light of its text and purpose, be reasonably given a meaning.

[294] This approach is entirely consistent with the leading case, *R v Hansen*.[380] In issue there was the interpretation of s 6(6) of the Misuse of Drugs Act 1975. This had been construed by the Court of Appeal in *R v Phillips* in 1991 as imposing, in certain circumstances, a reverse burden of proof on defendants.[381] The interpretation adopted in *Phillips* was in accordance with the ordinary and natural meaning of the language of s 6(6) and consistent with its purpose. The argument in *Hansen* was that a more rights-consistent interpretation – that the burden imposed on defendants was evidential rather than persuasive – was mandated by s 6 of the Bill of Rights.

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379 As discussed by Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL) at 245, albeit in that example it is the user of language who decides what it means rather than the listener or reader.

380 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

381 *R v Phillips* [1991] 3 NZLR 175 (CA).

[295] I read the reasons of at least four of the Judges (Blanchard, Tipping, McGrath and Anderson JJ) in *Hansen*, and probably Elias CJ as well, as supporting my approach.

[296] Blanchard J noted:[382]

> When new situations [requiring interpretation] arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be the overall parliamentary intention. This intention must be taken to be a compound one, involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions in ss 4–6 [of the Bill of Rights]. In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

[297] In his reasons, Tipping J dealt with the issue rather more discursively. The tenor, however, is the same. That is, he saw his task as being to:[383]

> … examine the words of s 6(6) [of the Misuse of Drugs Act] again to see if a meaning different from Parliament's intended meaning and consistent or less inconsistent with the presumption of innocence *can tenably be found in them*.

He explained:[384]

> … the finding of alternative meanings under s 6 must follow a legitimate process of construction; s 6 must not be used as a concealed legislative tool. The Courts may interpret but must not legislate. A corollary of the latter proposition is that s 6 cannot be used to give a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey. In such a situation no other meaning "can" be given to the enactment.

His preference was to resolve the tension in that case between s 6 of the Bill of Rights and s 6(6) of the Misuse of Drugs Act by considering whether the alternative (to the natural) meaning contended for was "reasonably possible".[385]

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382 *Hansen*, above n 380, at [61] (footnote omitted).
383 At [149] (emphasis added).
384 At [156] (footnote omitted).
385 See Tipping J's summary at [92].

[298] McGrath J expressed himself in different language but to the same effect:[386]

> [252] Section 6 [of the Bill of Rights] … adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the Courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the Court taking up a meaning that is in conflict with s 5. That would be contrary to s 4. Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must *always be viable, in the sense of being a reasonably available meaning on that orthodox approach to interpretation*.

[299] Elias CJ and Anderson J saw the s 6 presumption as applying to any derogation from rights protected in the Bill of Rights. This differed from the approach of Blanchard, Tipping and McGrath JJ who saw it as engaged only if the derogation was not justified under s 5 of the Bill of Rights. But, differing from the majority as they did as to the point at which s 6 is triggered, their approach to how s 6 should be applied seems to me to have been either the same, or at least largely so.

[300] Thus Elias CJ observed:[387]

> [5] I am of the view that the presumption of fact in s 6(6) ("until the contrary is proved") imposes on the accused a legal burden of proof. There is *no other tenable meaning*. The provision is not capable of being interpreted to mean that an evidential burden only is transferred, even applying the interpretative direction prescribed by s 6 of the Bill of Rights Act. *My reasons on the meaning of s 6(6) of the Misuse of Drugs Act do not differ in substance from those of the other members of the Court*. I agree with them that the appeal must be dismissed in application of s 6(6) of the Misuse of Drugs Act, as s 4 of the Bill of Rights Act requires despite any inconsistency with s 25(c).

Her brief elaboration of this at [39] is consistent with the approach of the other Judges. I note, however, that her discussion at [10]–[14] proceeds on the basis that although s 5(1) of the Interpretation Act is part of the exercise, s 6 may result in the interpretation of a provision which "linguistically may appear strained" and which was not necessarily in the minds of the legislature at the time of enactment.

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386 Footnote omitted and emphasis added.
387 Emphasis added.

[301] Anderson J observed:[388]

> … the duty of the Courts is to construe, not to reconstruct. In my view *no other meaning than that decided in* Phillips *is reasonably possible*. The meaning suggested on behalf of the appellant is as strained and unnatural now as it was found to be then.

[302] In *Hansen*, there is much discussion of a series of English cases concerned with the application of s 3 of the Human Rights Act 1998 (UK), which is similar in language and purpose to s 6 of the Bill of Rights. In these cases what was described in *Hansen* as a more "adventurous" approach to interpretation had been adopted.[389] One of these – *R v Lambert* – had resulted in a provision substantially similar to s 6(6) being held to impose an evidential burden only.[390] Tipping J appears to have had this in mind when he referred to "unreasonably possible" interpretations, which on his approach are not mandated by s 6.[391] McGrath J too made it clear that he did not regard the approach adopted in the English cases as appropriate in New Zealand.[392] That none of the five Judges was prepared to follow *Lambert* is highly significant.

Interpretation and application of s 106 of the Sentencing Act

The statutory language

[303] Section 106 of the Sentencing Act is, relevantly, in these terms:

> **106 Discharge without conviction**
>
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
>
> (2) A discharge under this section is deemed to be an acquittal.
>
> (3) A court discharging an offender under this section may—
>
> (a) make an order for payment of costs or the restitution of any property; or

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388 At [290] (emphasis added).
389 At [156] per Tipping J.
390 *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545.
391 *Hansen*, above n 380, at [158].
392 At [246].

(b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—

(i) loss of, or damage to, property; or

(ii) emotional harm; or

(iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:

(c) make any order that the court is required to make on conviction.

…

The issue

[304] The interpretative issue before the High Court and the Court of Appeal was whether a mandatory sentence under s 86D of the Sentencing Act is a "minimum sentence" for the purposes of s 106(1) of the same Act. The Crown position, which was adopted by the High Court Judge and the majority in the Court of Appeal, was that s 86D excludes the possibility of a lesser sentence, and for this reason the maximum sentence stipulated is also a minimum sentence, thus engaging the carve-out to s 106(1).[393] The position advanced by the appellant, adopted by Collins J in the Court of Appeal and now supported by the Human Rights Commission, is that a mandatory sentence imposed under s 86D is not "applicable to the offence" for the purposes of s 106(1);[394] this on the basis that "applicable to the offence":

(a) should be construed as confined to the sentence provided for in the offence-creating provision; and

(b) therefore does not encompass a sentence required to be imposed under another provision by reason of past offending history on the part of the offender.

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393 HC judgment, above n 368, at [13]; and CA judgment, above n 369, at [75].
394 CA judgment, above n 369, at [125] and [132].

How should this issue be approached?

[305] Section 106 does not have any apparent direct impact on the rights of offenders under the Bill of Rights. It is, for instance, difficult to conceive of someone who has pleaded guilty to, or been found guilty of, an offence being able to claim successfully that the entry of a conviction is, in itself, "torture or … cruel, degrading, or disproportionately severe treatment or punishment" for the purposes of s 9 of the Bill of Rights. Such complaint as there may be as to sentences imposed as a result of conviction might be thought to be better addressed to the statutory provisions which mandate such sentences.

[306] Related to the point just made, there is an adventitious character to the arguments advanced by the appellant and the Human Rights Commission. This is because the legislative mechanism by which a minimum sentence is imposed (for instance, by incorporation in the offence/sentence-creating provision or alternatively as part of a regime addressing recidivism) is logically irrelevant to whether such minimum sentence is "disproportionately severe" for the purposes of s 9 of the Bill of Rights.

[307] Because s 106 is not, in any sense, inconsistent with the Bill of Rights, s 6 of that Act does not apply to its interpretation. Rather, I consider that the meaning of the section simply "must be ascertained from its text and in the light of its purpose" as required by s 5(1) of the Interpretation Act.

My conclusion on the meaning of s 106

[308] On this aspect of the case, I am in complete agreement with the views of the High Court Judge and the majority in the Court of Appeal. Section 86D (as I construe it below) requires a sentence of seven years' imprisonment. This means that a lesser sentence may not be imposed. The obvious purpose of the minimum sentence carve-out in s 106 is to prevent a court sidestepping the obligation to impose a particular sentence by the simple expedient of discharging an offender without conviction. This purpose is as engaged by minimum sentences imposed as part of a regime addressing recidivism as it is by minimum sentences mandated in

offence-creating provisions. So, construed in the manner required by s 5 of the Interpretation Act, the section precludes a discharge without conviction in this case.

[309] In the course of argument, I explored with Mr Ewen for the appellant whether the minimum sentence carve-out in s 106 was directed in part to s 65 of the Land Transport Act 1998.[395] Under this section, the courts must require certain recidivist offenders to attend assessment centres and indefinitely disqualify them from holding or obtaining driver licences. If the purposes of the minimum sentence carve-out included precluding discharge without conviction in cases that are subject to s 65, this would be inconsistent with the interpretation of s 106 proffered on behalf of the appellant and the Human Rights Commission. This is because s 65, like the three strikes regime, is addressed to recidivism, and the minimum sanctions (to use a neutral term) both Acts prescribe are not located in the relevant offence-creating provisions.

[310] Mr Ewen's response to this suggestion (which he amplified in very helpful written submissions lodged after the hearing) was that "minimum sentence" for the purposes of s 106(1) of the Sentencing Act does not include disqualification orders (and thus orders under s 65 of the Land Transport Act). Rather, such orders are encompassed by the reference in s 106(3)(c) to "any order that the court is required to make on conviction".

[311] Although initially sceptical of this argument, I am now inclined to accept it. Unless s 106(3)(c) captures disqualification and like orders, it is not clear what it does encompass. The operation of s 106 in relation to mandatory disqualification was under consideration during the legislative process in ways which provide some support for the view that the purpose of s 106(3)(c) was to apply to mandatory disqualification.[396] And on the logic of the structure of s 106, a sanction which is encompassed by s 106(3)(c) cannot be a "minimum sentence" for the purposes of s 106(1).

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395 Section 65 is one of a number of provisions in the Land Transport Act 1998 which provide for minimum disqualification orders for recidivist offenders.

396 See especially (18 April 2002) 599 NZPD 15657; and (1 May 2002) 600 NZPD 15919.

[312] I have dealt with this issue at a reasonably high level as it is, on my approach, not determinative of the outcome of the appeal. More elaborate discussion would have addressed the precursors to s 106,[397] the cases as to their application,[398] the twists and turns of the parliamentary process associated with s 106, the remarks made during its progress through the House of Representatives and the subsequent conflicting decisions of the High Court on the operation of s 106 in relation to mandatory disqualification.[399] It is sufficient to say that the views expressed in [311] have been informed by my consideration of that material.

If possible, would a discharge under s 106 be appropriate?

[313] The whole argument for discharge without conviction is based on the premise (accepted in the High Court and unanimously in the Court of Appeal) that s 86D means what it says and required the appellant, on conviction, to be sentenced to seven years' imprisonment. The primary argument from the appellant and the Human Rights Commission before us was that the Court should discharge the appellant without conviction to avoid the necessity to impose that term of imprisonment. Some support for that argument can be derived from *Barnes v R*.[400]

[314] In *Barnes*, the offender had been sentenced to two years and six months' imprisonment for aggravated robbery. He had previously been convicted of sexual connection with a person under the age of 16. That offending had not been violent and was of limited seriousness.[401] In accordance with ordinary sentencing practice, it was of limited, if any, relevance to sentencing for subsequent offending of a different type.[402] It was, however, a strike offence. This meant that for the aggravated robbery, a second strike offence, the sentencing Judge was required to order that Mr Barnes serve the full term of his sentence.[403] In allowing the appeal, the Court of Appeal

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397 The immediate precursor was s 19 of the Criminal Justice Act 1985, with its precursor being s 42 of the Criminal Justice Act 1954.

398 See, for example, *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA); *Police v Wise* [1987] 1 NZLR 290 (CA); and *R v Eteveneaux* (1999) 16 CRNZ 601 (CA).

399 Compare, for example, *New Zealand Police v Joblin-Hall* HC Whanganui AP5/03, 29 May 2003; and *Police v Stewart* (2004) 22 CRNZ 35 (HC).

400 *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49.

401 The offending resulted in a sentence of eight months' imprisonment imposed after an earlier sentence of home detention was cancelled.

402 The Court of Appeal saw it as being of no relevance (at [20]). I am not sure about this, but I agree that it was at most of limited moment on ordinary principles.

403 Sentencing Act, s 86C(4).

concluded that it had been open to the sentencing Judge to reduce the length of the prison sentence to counteract the absence of a right to seek parole.[404]

[315] At a reasonably high level of generality, the argument which succeeded in *Barnes* is similar to the argument presented to us. Both proceed on the footing that, to counteract or avoid the consequences of the mandatory requirements of the three strikes regime, it is appropriate for a sentencing judge to deal with an offender with prior strike convictions more leniently than would otherwise have been the case, either in terms of sentence length (in the case of *Barnes*) or by way of discharge without conviction (in the present case).

[316] I regard *Barnes* as wrongly decided. The purpose of the three strikes regime (and particularly s 86C) is that second strike offenders should be liable to serve longer in prison than an equivalent offender without a prior strike conviction. This is achieved by eliminating what would otherwise be either a right to release in relation to sentences of two years or less, or for longer sentences, the right to seek parole. This purpose can only be achieved if sentences imposed for second strike offending are appropriate to the culpability of the offending. Giving a discount for prior strike offences to counteract the non-parole requirement defeats that purpose.

[317] An analogy may assist to illustrate the point I am making. In light of the approach (and reasons) adopted in *Hansen*, a trial where s 6(6) of the Misuse of Drugs Act is applied is necessarily in breach of s 25(c) of the Bill of Rights.[405] If the argument advanced for the appellant is right, the logical corollary is that judges should sidestep the requirement to conduct trials which breach the Bill of Rights by utilising s 147(1) of the Criminal Procedure Act 2011 to dismiss charges alleging possession of controlled drugs for supply where s 6(6) is engaged. As is apparent, I would not regard this as appropriate. Despite the generality of the language of s 147(1),[406] such dismissals would seem to me to involve the use of the power for a collateral purpose.

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404 *Barnes*, above n 400, at [57].

405 *Hansen*, above n 380, at [138] per Tipping J, [234] per McGrath J and [281] per Anderson J.

406 It is in these terms: "The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty." Section 147(4) provides a non-exhaustive list of situations in which such dismissal may be appropriate.

[318] In the absence of the three strikes regime, the appellant would not have been discharged without conviction. On the assumption that s 86D requires a sentence of seven years' imprisonment to be imposed on the appellant upon conviction, invoking the application of the three strikes regime to the appellant to justify a discharge without conviction would be strikingly inconsistent with the scheme of the regime under which previous strike convictions result in heavier rather than more lenient sanctions. Such a result would be so paradoxical as to leave the Court open to the criticism of having gamed the statute.

Interpretation of s 86D of the Sentencing Act

[319] Section 86D is relevantly in these terms:

> **86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment**
>
> …
>
> (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
>
> (3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.
>
> …

[320] Section 86I provides:

> **86I Sections 86B to 86E prevail over inconsistent provisions**
>
> A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

[321] The purposes of the three strikes regime are specified in s 3 of the Sentencing and Parole Reform Act 2010:

> **3 Purpose**
>
> The purpose of this Act is to—

(a) deny parole to certain repeat offenders and to offenders guilty of the worst murders:

(b) impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

[322] The expression "serious violent offence" is defined in s 86A of the Sentencing Act in such a way as to include the appellant's indecent assault convictions committed after the three strikes regime came into effect. The opening words of s 86A mean that the definition is subject to the usual "unless the context otherwise requires" exception. Consistently with the scheme and purpose of this Act, I see no principled way of construing "serious violent offence" as permitting judicial assessment of the actual seriousness or violence of the offending in issue. To so construe the expression would be completely inimical to the scheme of the regime. Unsurprisingly, it has not been suggested that such a construction is possible.

[323] The view of the majority is that s 86D(2) should be construed as if it read:

> Despite any other enactment *(but not including the New Zealand Bill of Rights Act 1990)*, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence *but must not do so if this would result in disproportionately severe punishment under s 9 of the New Zealand Bill of Rights Act.*

The italicised portions are what must be read in. Although there are two insertions, they can be treated as amounting to one exception.

[324] I see a number of textual objections to the majority's interpretation:

(a) It involves reading in an exception which is not provided for.

(b) The exception is a flat contradiction to the generality of the words "Despite any other enactment". Within the three strikes regime, the words "Despite any other enactment" are used only in s 86D. If those words are construed as only applying to the Parole Act and other provisions of the Sentencing Act, they duplicate what is separately

provided for in s 86I.[407] So, since the Parole Act and Sentencing Act are already taken out of play and in the absence of any other statutes to which the words "any other enactment" could refer, it might be thought plain that it includes the Bill of Rights. As well, the approach favoured by the majority is a far from natural interpretation of the phrase.[408]

(c) The exception is also a flat contradiction of other expressions in the section. "[I]f, on any occasion" and "the High Court must" are expressions indicative of an inexorable requirement to impose the maximum term of imprisonment, which the proposed exception contradicts. That this is so is apparent from the result arrived at by the majority, under which, on the "occasion" the appellant appeared for sentence, the Judge was required *not* to impose the maximum term of imprisonment.

(d) One of the provisions of the Sentencing Act which is excluded by the phrase "Despite any other enactment" and s 86I is s 8(h), which provides:

> **8 Principles of sentencing or otherwise dealing with offenders**
>
> In sentencing or otherwise dealing with an offender the court—
>
> …
>
> (h) must take into account any particular circumstances of the offender that mean that a sentence … that would otherwise be appropriate would, in the particular instance, be disproportionately severe; …

It seems to me that the use of the same expression, "disproportionately severe", as appears in s 9 of the Bill of Rights is to emphasise that s 9 of the Bill of Rights must be applied by reference to the circumstances

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407 The phrase "despite any other enactment" also appears in s 6(2) of the Sentencing Act. It was in issue in *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552, where it was held to trump a provision to the contrary in a different statute, the Child Protection (Child Sex Offender Government Agency Registration) Act 2016; albeit that this was to the advantage of the offender.

408 As *D v New Zealand Police*, above n 407, shows.

> of the offender.[409] This is particularly relevant in the case of an offender, such as the appellant, whose offending is largely a function of mental illness. Indeed, one of the reasons why the appellant's punishment has been disproportionately severe is that no allowance has been made for his mental illness. The uncontested exclusion of s 8(h) does not sit easily with a construction of s 86D which displaces the three strikes regime's operation if the otherwise required sentence is disproportionately severe.

[325] As well, the scheme of s 86D is inconsistent with the exception. The section provides a "manifestly unjust" carve-out to what is otherwise the mandatory requirement to order that the sentence be served without parole.[410] In this context, the absence of any carve-out from the obligation to impose the maximum sentence is telling. An obvious reason why a requirement to serve the maximum sentence without parole would be "manifestly unjust" is because such a sentence would be disproportionately severe. In light of the absence of a "manifestly unjust" carve-out and the exclusion of s 8(h) already referred to, it makes no sense to attribute to Parliament the purpose of providing a disproportionately severe treatment exception to the maximum sentence requirement.

[326] During the parliamentary process it was recognised that, under the regime then proposed, there was scope for second and third strike sanctions to be imposed on some who might not be in the group of offenders intended to be targeted. As explained in the reasons given by the Chief Justice and Arnold J, the response was the putting in place of administrative arrangements to ensure a screening by Crown Solicitors of prosecutions in respect of strike offences. I have distinct reservations as to whether this was a sensible and principled way of addressing concerns about inappropriately harsh outcomes.[411] But more importantly for present purposes, the apparent acceptance of this arrangement by Parliament reinforces the view that s 86D should

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409 That s 8(h) of the Sentencing Act does not refer to "torture" or use the adjectives "cruel" or "degrading" reflects the reasonable assumption that courts are unlikely to impose sentences of "torture" or which are "cruel" or "degrading".

410 Sentencing Act, s 86D(3).

411 Rule of law considerations suggest that such concerns should have been addressed within the legislation rather than left to ad hoc administrative arrangements.

be construed as meaning what it says. If Parliament's understanding (and its purpose) was that sentencing judges must not impose disproportionately severe maximum sentences, there was little need for upstream administrative screening by Crown Solicitors. And if the parliamentary purpose had been to set the courts as a long-stop against the possibility that the Crown Solicitor might get it wrong, that would have been provided for in the legislation.

[327] There are situations in which the principle of legality has resulted in rights-protecting exceptions being read into statutory provisions. Cases cited by Arnold J are illustrations. In particular, generally-expressed powers of search and compulsory production that do not expressly address whether they apply to material which is subject to legal professional privilege have been held to be subject to an exception in respect of such material.[412] In such circumstances it may be very reasonable to conclude that Parliament did not contemplate that such generally-worded provisions would encroach on well-recognised rights.

[328] I do not see these cases as providing assistance in the present context. Section 86D is not a generally-worded provision. It is instead extremely precise and peremptory. Its purpose was to require sentences to be imposed which were necessarily going to be disproportionate – and sometimes significantly so – by reference to ordinary sentencing principles. Whether a sentence which is significantly disproportionate by reference to ordinary sentencing practice is also "disproportionately severe" for the purposes of s 9 of the Bill of Rights is, at least at the margin, very much a matter of appreciation. Section 86D thus addresses at least the general area of concern (that is, disproportionate sentences) in a way in which the cases relied on by Arnold J did not.[413] Furthermore, s 86D is expressed in such peremptory language as to make it clear that there are to be no exceptions to the rule it provides. The expressions "Despite any other enactment", "on any occasion" and "the High Court must" seem to me to admit of no ifs and no buts.

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412 See *Rosenberg v Jaine* [1983] NZLR 1 (HC); *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA); and *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326.

413 In neither of the two cases outlined at [210]–[211] in the reasons given by Arnold J (being *West-Walker*, above n 412, and *Auckland District Law Society*, above n 412) was there any indication in the legislation that issues of privilege had been considered and thus no indication that the statutory purpose extended to overriding such privilege.

[329] There are suggestions in some of the reasons of the majority that the overriding of a right recognised by the Bill of Rights requires express reference to that right and to it being overridden.[414] To this suggestion, I have three responses:

(a) There are many ways in which meaning can be conveyed. As will be apparent, I consider that the language of s 86D is crystal clear. I do not think it appropriate to impose, in the guise of an interpretative principle, what is likely to become a manner and form provision: that is, that Parliament can achieve certain legal consequences only by resort to a particular verbal formula.

(b) Such a requirement does apply under s 33 of the Canadian Charter of Rights and Freedoms (usually referred to as the "notwithstanding clause"). Inclusion of such a provision was an option when New Zealand adopted the Bill of Rights in 1990. For the courts now to introduce a functional equivalent of the notwithstanding clause goes beyond what I see as their legitimate mandate under s 6 of the Bill of Rights.

(c) It is not consistent with *Hansen*. Section 6(6) of the Misuse of Drugs Act did not refer specifically to, and explicitly override, s 25(c) of the Bill of Rights. But it was nonetheless held to apply in accordance with its natural wording.[415]

[330] The difference between my approach and that of the majority turns on me having a more restricted view of what constitutes a reasonably possible interpretation. I see this as limited to what can be justified by reference to the text of the statute, allowing for purpose and applying ordinary principles of interpretation. If the interpretation contended for is not a starter on that approach, I see its adoption via s 6 as statutory revision, not interpretation.

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414 See Winkelmann CJ's reasons at [119] and the reasons given by Arnold J at [218].

415 Reference may also be made to *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774. In that case, a generally-expressed power to make rules directed to the safety of racing authorised the making of a rule requiring the provision of urine samples for drug analysis; this notwithstanding the absence of express reference to s 21 of the Bill of Rights.

[331] One final point is that s 86D, as interpreted by the majority, will provide some difficulties or uncertainties in application. On the logic of that interpretation, I can see two possible approaches, neither of which are particularly satisfactory:

(a) On the first, the High Court Judge should have imposed a sentence which was as harsh as it could possibly be without infringing s 9 of the Bill of Rights. This would be a pretty strange exercise for a sentencing judge.

(b) On the second, the High Court Judge should have treated the exception as disapplying s 86D. Two versions of this approach have been suggested: one that he should have sentenced the appellant in accordance with ordinary principles;[416] the other that a sterner than usual response may have been appropriate.[417] I see neither version as particularly respectful of the legislative scheme.

[332] Accordingly, I construe s 86D as meaning what it says.

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416 See the reasons given by Arnold J at [231] and Glazebrook J's reasons at [252].
417 See Winkelmann CJ's reasons at [138].