NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA286/2018
[2020] NZCA 292

BETWEEN	DANIEL CLINTON FITZGERALD Appellant
AND	THE QUEEN Respondent

Hearing:	18 September 2019 (further submissions received 9 December 2019)
Court:	Clifford, Collins and Goddard JJ
Counsel:	K F Preston and A C R M Jeffares for Appellant C A Brook and A D H Colley for Respondent
Judgment:	15 July 2020 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal against conviction and sentence is dismissed.

B The application for leave to appeal on a question of law is declined.

REASONS

Clifford and Goddard JJ	[1]
Collins J (dissenting)	[95]

CLIFFORD AND GODDARD JJ

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Background

Mr Fitzgerald's condition

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

The offences committed by Mr Fitzgerald

[2] On 3 December 2016 Mr Fitzgerald was walking down Cuba St in Wellington. He was slightly intoxicated. Two women were walking together in the other direction. He went up to one of them, told her he wanted to kiss her, and tried to kiss her on the

lips. She moved her face away from Mr Fitzgerald, but he managed to kiss her on the cheek.

[3] The first victim's friend tried to pull Mr Fitzgerald away by the arm. He grabbed her by the arms, pushed her against a nearby wall and held her there for a moment. Then he let go of her and kept walking along Cuba St.

[4] One victim estimated the incident lasted for about one minute. The other thought perhaps two minutes. It was on any view brief. However it was undoubtedly a distressing incident for both victims. In her victim impact statement the second victim, who was a particularly vulnerable person, described the continuing emotional consequences of the assault she suffered. We do not have a victim impact statement from the first victim in relation to the indecent assault she suffered.

High Court trial and sentencing

[5] Mr Fitzgerald was arrested shortly afterwards. He was charged with indecent assault of the first victim, common assault of the second victim, and breach of an extended supervision order (by possessing and/or consuming alcohol and cannabis). Following an inquiry under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) he was found to be fit to stand trial.[1] At a Judge-alone trial before Simon France J he was found guilty on all three charges.[2] He then appeared for sentence before Simon France J.[3] On the assault charge he was convicted and sentenced to three months' imprisonment. He was convicted and discharged for the breach of the supervision order.

[6] The indecent assault — an attempted kiss on the lips, an actual kiss on the cheek — involved conduct at the low end of the range for that offence. As the very experienced High Court Judge observed, standing alone, and putting to one side aggravating factors relating to the offender, it would not normally attract a jail term.[4]

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1 *R v Fitzgerald* [2017] NZHC 3128 [Fitness judgment].
2 *R v Fitzgerald* [2018] NZHC 465 [Verdicts judgment].
3 *R v Fitzgerald* [2018] NZHC 1015 [Conviction and sentencing notes].
4 At [21].

A community-based sentence would be likely.[5] But the three strikes regime in the Sentencing Act 2002 applied, as Mr Fitzgerald had two previous indecent assault convictions.[6] The circumstances of these two convictions are summarised in an earlier propensity ruling referred to by the Judge:[7]

> [13] The propensity evidence consists of previous indecent assault offending by Mr Fitzgerald. … In 2012 … Mr Fitzgerald knocked the victim to the ground which caused her skirt to ride up. Mr Fitzgerald fell on top of her and then buried his face in her buttock area while putting his hands there as well. Finally, in 2015 Mr Fitzgerald in short succession slapped or grabbed three women on the buttocks as they walked past him.

[7] Mr Fitzgerald was sentenced to 11 months' imprisonment for the 2012 offence, and four months' imprisonment for the 2015 offence.[8] These were both more serious than the 2016 offending.

[8] Section 86D(2) of the Sentencing Act provided that if Mr Fitzgerald was convicted of a third strike offence, he had to be sentenced to the maximum term of imprisonment prescribed for the offence. The maximum sentence for indecent assault is seven years' imprisonment.[9] If Mr Fitzgerald was convicted of that offence, the Judge had no discretion: he was required to impose a sentence that bore no relationship at all to the gravity of the offending, or to the circumstances of the offender. Some provisions of the three strikes regime contain a "safety valve" that enables the Court to decline to impose the sanctions contemplated by that regime if those sanctions would be manifestly unjust. But there is no safety valve in s 86D(2) for sentences imposed in relation to third strike offences.

[9] Mr Fitzgerald had sought a discharge without conviction under s 106 of the Sentencing Act. If he was not convicted, the mandatory sentence provision would not bite. Section 106(1) provides that a court may discharge a person who is found guilty of an offence without conviction —

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5 The Judge referred to *Stephenson v Police* [2015] NZHC 3101 where a sentence of nine months' supervision was imposed on appeal for one charge of indecent assault where the appellant followed a stranger on the street then grabbed her buttocks, which is more serious conduct than in the present case.

6 Sentencing Act 2002, ss 86A–86I.

7 Verdicts judgment, above n 2.

8 *Police v Fitzgerald* DC Palmerston North CRI-2012-054-3026, 30 November 2012 [First strike judgment]; and *Police v Fitzgerald* [2015] NZDC 5002 [Second strike judgment].

9 Crimes Act 1961, s 135.

> …unless by any enactment applicable to the offence the court is required to impose a minimum sentence.

[10] Section 107 sets the threshold for when a court can discharge a person without conviction under s 106. A court must not do so 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.

[11] The Judge held that he could not discharge Mr Fitzgerald without conviction under s 106. The three strikes provision was an enactment applicable to the offence Mr Fitzgerald had committed which required the Court to impose a minimum sentence: in this case, seven years' imprisonment. The exception in s 106 applied and prevented the Court from granting a discharge.[10]

[12] The Judge therefore convicted Mr Fitzgerald of indecent assault and sentenced him to seven years' imprisonment. The Judge declined to make an order that this sentence be served without parole. Section 86D(3) requires such an order to be made unless it would be manifestly unjust given the circumstances of the offence and of the offender. The Judge considered that it would be manifestly unjust for Mr Fitzgerald to serve a seven year sentence without parole for this offence.[11]

Mr Fitzgerald's appeal

[13] Mr Fitzgerald argues that s 106 does apply. This Court can and should discharge him without conviction.[12] If he is convicted, as he has been, the consequences (seven years' imprisonment) will be out of all proportion to the gravity of his offending. The Judge was wrong to find that the three strikes regime is an enactment "applicable to the offence" that requires a minimum sentence. It is not an enactment that applies to the *offence* he committed. Rather, it is an enactment that applies to certain *offenders*: those who have two strikes recorded against them.

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[10] Conviction and sentencing notes, above n 3, at [11]–[16].
[11] At [27].
[12] Criminal Procedure Act 2011, s 251(2).

[14] Mr Fitzgerald says the High Court Judge's approach is inconsistent with the right not to be subjected to disproportionately severe punishment, which is guaranteed by s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).

[15] The Crown says the Judge was right to find that the s 106 power was not available. The three strikes regime applied to the third strike offence that Mr Fitzgerald committed. It required a minimum sentence — seven years' imprisonment. The Judge was required to impose that (minimum) sentence. He could not grant a discharge without conviction. The Judge's interpretation of s 106 is the only viable reading of that provision. The Court must apply the legislation in accordance with that interpretation, even if it is inconsistent with NZBORA.

A declaration of inconsistency with NZBORA?

[16] We called for further submissions on whether this Court could, and should, make a declaration that s 86D of the Sentencing Act is inconsistent with NZBORA.

[17] Mr Fitzgerald submits that it is open to the Court to make such a declaration, and that we should do so. The Crown submits that such a declaration cannot be made in the context of a criminal appeal before this Court. Nor, the Crown argues, is there any inconsistency with NZBORA.

[18] We return to this issue at [76] below.

Sentencing Act — relevant provisions

[19] The three strikes regime applies to offenders who are convicted of "serious violent offences".[13] A list of some 40 offences that are regarded as serious violent offences for this purpose is set out in s 86A. Some of the listed offences are inherently very serious — for example, murder and manslaughter. Others embrace a wide spectrum of conduct — for example, indecent assault and sexual conduct with a young person under 16. A person who is an accessory to the commission of one of the listed offences, and as a result is convicted of that offence, also comes within the regime. So the term "serious violent offence" as it is used in these provisions embraces a wide

13 Sentencing Act, ss 86A–86I.

range of offending. It can include conduct that does not involve any violence at all, let alone serious violence.[14] To avoid the misleading connotations of the "serious violent offence" label, we will refer to the relevant offences as "listed offences".

[20] On a "first strike", defined in the Act as a "stage-1 offence", an offender who commits a listed offence is sentenced in the ordinary way. They receive a "first warning" about the operation of the three strikes regime.[15]

[21] "Second strikes", defined in the Act as "stage-2 offences", are listed offences committed by a person who has received a first warning. On a second strike an offender who commits a listed offence other than murder is sentenced in the ordinary way. If they are sentenced to a term of imprisonment, the Judge is required to order that the offender serve the full term of the sentence, without parole.[16] The offender is given a "final warning" about the consequences of committing a further listed offence.

[22] "Third strikes", defined in the Act as "stage-3 offences", are listed offences committed by an offender who has received a final warning. Section 86D of the Sentencing Act governs the sentences the court must impose for stage-3 offences other than murder. As relevant, it provides:

> **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.
>
> (4) Despite subsection (3), if the court sentences the offender for manslaughter, the court must order that the offender serve a minimum

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[14] For example the appellant in *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49 whose first strike offence as an 18-year-old was a conviction for sexual conduct with a young person under 16 in the context of a consensual relationship with his 14-year-old girlfriend.

[15] Sentencing Act, s 86B.

[16] Section 86C. This Court considered the implications of s 86C for sentencing on second strike offences in *Barnes v R*, above n 14.

period of imprisonment of not less than 20 years unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be manifestly unjust, in which case the court must order that the offender serve a minimum period of imprisonment of not less than 10 years.

(5) If the court does not make an order under subsection (3) … the court must give written reasons for not doing so.

…

[23] If an offender is convicted of murder, and that murder is a stage-2 or stage-3 offence, the offender must be sentenced to life imprisonment. The court must order that the offender serve that sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.[17]

[24] Section 86I confirms that the three strikes regime prevails over inconsistent provisions of the Sentencing Act:

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.

[25] The first issue raised by this appeal is the relationship between these provisions and ss 106 and 107 of the Sentencing Act, which provide:

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.

…

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.

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17 Section 86E. This Court considered the interpretation and application of s 86E in *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602.

Interpreting legislation in light of NZBORA

[26] Legislation must be interpreted having regard to its text and purpose. These are the twin drivers of interpretation.[18] The text of a provision is often capable of being read in more than one way. The purpose of a provision — ascertained from its immediate and general legislative context and its wider social, commercial or other objectives — may help the court to choose between competing readings of the text, or may suggest a different reading that was not immediately apparent on the face of the text. The task of a court interpreting a provision is usually to identify the reading of the provision that represents the best fit with that provision's text and purpose.

[27] NZBORA provides further guidance to the court on how legislation should be interpreted where the rights and freedoms affirmed in NZBORA are engaged. The court is directed to prefer interpretations of legislation that are consistent with those rights and freedoms. But the role of the court remains one of interpretation. The court is not permitted to decline to give effect to legislation enacted by Parliament, or to rewrite the legislation by adopting "interpretations" that are in truth exercises of legislative power. The relevant provisions of NZBORA read as follows:

> **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.
>
> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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[18] Interpretation Act 1999, s 5; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

> **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.

[28] Section 6 of NZBORA recognises the realities of the interpretation process. It is often the case that a provision in an enactment can plausibly be read in more than one way. Different indications found in a provision's text, and in its immediate and wider purpose, can (and often do) point in different directions. Confronted with a number of possible readings of a provision, a court will, as we have said, normally seek to find the reading of the provision that represents the best fit with the provision's text and purpose. But s 6 of NZBORA may require a different approach. If the reading of the provision that represents the best fit with that provision's text and purpose would be inconsistent with NZBORA, and there is another available reading that is consistent (or less inconsistent) with NZBORA, s 6 requires the court to prefer that other reading.

[29] The direction to prefer the more rights-consistent available reading applies whatever the Parliamentary record may suggest about the intentions of particular legislators, or legislators generally, as this Court emphasised in *R v Poumako*:[19]

> [37] These possible constructions are to be considered by reference to s 6 of the Bill of Rights Act. The meaning to be preferred is that which is consistent (or more consistent) with the rights and freedoms in the Bill of Rights. It is not a matter of what the legislature (or an individual member) might have intended. The direction is that wherever a meaning consistent with the Bill of Rights can be given, it is to be preferred. The legislature's intention in this regard is clear.

[30] However as s 4 makes plain, s 6 does not authorise a court to treat a provision as invalid, or decline to apply it, or interpret it in a manner that is in effect an amendment of the statute. It is not open to the court to exercise, under the guise of interpretation, the legislative power that our constitutional arrangements entrust to Parliament. Section 6 authorises — and requires — the court to adopt a more rights-consistent reading of an enactment if and only if the enactment "can be given"

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19 *R v Poumako* [2000] 2 NZLR 695 (CA). For a helpful discussion see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [7.12.6]–[7.12.19]. The quoted passage from *R v Poumako* refers to the intention of the legislature, but for the difficulties with that metaphor see Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 200–203; and Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford, 1999) at ch 6.

that meaning. Identifying the boundaries of this interpretive exercise is a conceptually difficult and practically challenging exercise that necessarily involves a substantial degree of judgement.

[31] At the hearing of this appeal we formed the view that the High Court Judge's reading of the Sentencing Act provisions in issue in this case was the most natural available reading. But as we explain below, that reading of the Sentencing Act leads to a result that is manifestly unjust and inconsistent with NZBORA. If there is another available reading that does not lead to that result, it should be preferred.

A seven year sentence is manifestly unjust in this case

[32] As noted above, some provisions in the three strikes regime contain a safety valve that enables the court imposing a sentence to mitigate the severity of the default consequences prescribed by that regime. In s 86D itself, subs (3) permits the court to decline to make an order that the sentence be served without parole if that would be manifestly unjust. And s 86E(2)(b) provides that the court may decline to order that the life sentence imposed on a person convicted of murder as a stage-2 or stage-3 offence must be served without parole, if that outcome would be manifestly unjust.[20]

[33] In *R v Harrison* a Full Court of this Court considered the scope of the s 86E safety valve. The Court explained that the safety valve provides the means by which the courts can ensure that punishment under s 86E is not disproportionate, and does not contravene s 9 of NZBORA.[21] The Court identified as (non-exclusive) factors relevant to assessing whether a s 86E sentence would be manifestly unjust: [22]

(a) the sentence that would have been imposed but for the three strikes regime;

(b) whether the offender has any, or limited, ability to understand the relevance and importance of a first or final warning;

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[20] See also s 86E(4).
[21] *R v Harrison*, above n 17, at [94], [101], and [106]–[111].
[22] At [108(d) and (e)].

(c) whether the factual matrix of the qualifying offence or offences, or of the index offence, points to a higher or lower level of culpability; and

(d) whether the offender is likely to re-offend such that there is a need for community protection.

[34] If s 86D(2) contained a safety valve provision that enabled a court to decline to impose the maximum sentence for the offence where it would be manifestly unjust to do so, the same factors would be relevant. We consider that the safety valve would plainly apply in the present case. The sentence imposed on Mr Fitzgerald is manifestly unjust having regard to the circumstances of the offence and of the offender:

(a) The offence was, as the High Court Judge noted, at the low end of the range of conduct that amounts to indecent assault. It would not of itself be sufficiently serious to merit a sentence of imprisonment.

(b) Mr Fitzgerald's ability to regulate his behaviour in the manner that our society expects is severely compromised by his longstanding mental health conditions. This bears directly on his culpability.[23] Section 9(2)(e) of the Sentencing Act recognises this link between mental capacity and culpability by requiring a sentencing court to take into account, as a mitigating factor, "that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding".

(c) Mr Fitzgerald's mental health condition also renders largely inapplicable the deterrence rationale that underpins the three strikes regime: that offenders understand and can respond to the warnings they are given.[24] It is profoundly unjust to punish Mr Fitzgerald more severely because he had received warnings which his longstanding mental health condition impaired his ability to act on.

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23 *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]–[70].

24 *R v Harrison*, above n 17, at [96].

(d) A report prepared by a consultant psychiatrist under s 38 of the CPMIP Act in August 2017 advised the High Court that Mr Fitzgerald was becoming "more unwell in Prison … requiring not only more anti-psychotic medication but also increasing doses of anxiolytic medication". The psychiatrist concluded that Mr Fitzgerald would be best placed in a rehabilitation unit under an in-patient order made under s 34(1)(b) of the CPMIP Act. That would enable him to receive the care he needs, and "[i]n time … [would be] likely to increase his quality of life and reduce [the] likelihood of negative behaviours". But that option is precluded by s 86D of the Sentencing Act: if Mr Fitzgerald is convicted, he must be sentenced to seven years' imprisonment. Mr Fitzgerald's impaired mental health and vulnerability mean that a sentence of imprisonment, even if otherwise appropriate, would be disproportionately severe for him. That is a factor that the courts would normally be required to take into account under s 8(h) of the Sentencing Act, were it not for the mandatory sentence required by s 86D.

(e) There is clearly a risk of Mr Fitzgerald re-offending, in light of his record. But his offending is not at a level that requires or justifies a (lengthy) prison sentence in order to protect the community: other sentencing responses are more appropriate in the short term, and are more likely to reduce the prospect of re-offending in the longer term.

[35] However s 86D(2), as we have already observed, contains no safety valve. At the Committee of the Whole House stage of the Sentencing and Parole Reform Bill, the Opposition proposed inserting a safety valve in the clause that became s 86D(2). The proposed amendment would have added to this provision 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."[25] That proposed amendment was rejected.[26] In the course of the debate it was expressly acknowledged by the Bill's proponents that without this amendment, s 86D(2) could produce disproportionate

[25] (2010) 663 NZPD 10913.

[26] At 10926. The reasons given by the Minister responsible for the Bill for the Government's decision not to support the amendment were reduced certainty of the third strike penalty, and reduced deterrent force — see 10922.

sentences: this prospect was clearly identified at the time the three strikes regime was enacted.[27]

[36] The result is that s 86D(2) requires the courts to impose the maximum sentence on a person convicted of a stage-3 offence even where that would be a manifestly unjust result. The risk that a court will be compelled to impose a manifestly unjust and disproportionate sentence on a person convicted of a stage-3 offence is greatly increased by the wide range of conduct that qualifies as a listed offence, as this Court explained in *R v Harrison*.[28] In *Harrison* the Court observed that the risk of arbitrary or wholly disproportionate outcomes under the three strikes regime is potentially high. The potential for injustice and damage to the credibility of the three strikes policy had been greatly increased by the enlargement of the qualifying catchment for strike offences. The Bill as introduced limited strike offences to offences that attracted a sentence of at least five years' imprisonment.[29] At the Select Committee stage the Bill was amended to provide for the approach described above, with any conviction for a listed offence qualifying as a strike regardless of the seriousness of the offending and regardless of the sentence actually imposed.[30] In *Harrison* the Court noted that neither of the appellants in that case — who were being sentenced for stage-2 offences — would have been caught by the regime under the initial form of the Bill.[31] The same is true of Mr Fitzgerald: under the initial form of the Bill, he would have no previous strikes recorded against him and the current offence also would not be a strike offence.

[37] Against that backdrop, we turn to the issue of whether imposing a sentence of seven years' imprisonment on Mr Fitzgerald is inconsistent with NZBORA.

Applying s 9 of NZBORA in this case

[38] The right that is engaged in the present case is the right not to be subjected to disproportionately severe punishment. Section 9 of NZBORA reads as follows:

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27 At 10940. See also the observations of the Minister responsible for the Bill on the third reading at (25 May 2010) 663 NZPD 11227.
28 *R v Harrison*, above n 17, at [87]–[89].
29 Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at 1.
30 Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 2–3.
31 *R v Harrison*, above n 17, at [89].

> **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.

[39] NZBORA was enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).[32] Section 9 is based on art 7 of the ICCPR. The reference to "disproportionately severe" treatment is not found in art 7, which provides:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[40] The White Paper that preceded NZBORA explained the rationale for the addition of this phrase:[33]

> 10.162 … The reference to "disproportionately severe" treatment or punishment is intended to ensure not only that the courts can review any type or mode or description of punishment or treatment on the ground that it is per se cruel or degrading, but that they can also review the appropriateness of any treatment or punishment in particular circumstances. Thus they would have power to strike down a punishment imposed by Parliament on the grounds that its harshness and the severity of its consequences are manifestly excessive in relation to the offence involved. The American courts have held that this power is open to them under the equivalent provision in the American Bill of Rights (the Eighth Amendment).
>
> 10.163 The Canadian courts have considered the compatibility of mandatory minimum sentences with the parallel provision in the Charter. They have asked whether the punishment itself went beyond rational bounds or was obviously excessive and whether it was grossly disproportionate to the offence.

[41] As the Crown accepts, the rights protected by s 9 of NZBORA cannot be subject to justifiable limitations in the manner contemplated by s 5: punishment that is disproportionately severe is not capable of being justified.

[42] The courts have emphasised that s 9 sets a high threshold. In *Taunoa v Attorney-General*, a case concerned with treatment of prisoners, the judgments delivered by the Supreme Court referred to punishment or treatment that is

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

33 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 (citations omitted).

"grossly disproportionate to the circumstances", that goes "well beyond punishment or treatment which is simply excessive, even if manifestly so", that is "so excessive as to outrage standards of decency", that would "shock the national conscience", or the severity of which is "such as to cause shock and thus abhorrence to properly informed citizens".[34] This assessment must be made by reference to the values and standards of New Zealanders.[35]

[43] The threshold established by *Taunoa* is a high one. It is not enough that the punishment prescribed for Mr Fitzgerald is, as we concluded above, manifestly unjust or manifestly excessive. It must be grossly disproportionate, and such as to cause shock to properly informed citizens. We consider that the sentence imposed on Mr Fitzgerald crosses this high threshold. 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 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.

[44] The fact that Mr Fitzgerald is eligible for parole after serving one third of his sentence, because the Judge declined to make an order under s 86D(3), does not affect

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[34] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [91]–[92] per Elias CJ; [172]–[176] per Blanchard J; and [288]–[289] per Tipping J. See also *Vaihu v Attorney-General* [2007] NZCA 574, [2008] NZAR 83; leave to appeal to the Supreme Court declined: *Vaihu v Attorney-General* [2008] NZSC 19.

[35] *Taunoa v Attorney-General*, above n 34, at [279] and [289] per Tipping J.

this conclusion. Mr Fitzgerald must serve at least two years and four months in prison. He may be required to serve the balance of the seven year sentence. If he is paroled and breaches his parole conditions, he may be recalled to prison. This punishment is grossly disproportionate to the offence he committed, which as noted above would not normally attract a custodial sentence. We note that Mr Fitzgerald became eligible for parole in mid-2019, but was not paroled: he remains in custody some three and a half years into his sentence. His mental health is likely to make it more difficult for him to qualify for parole.

[45] Although the issue was not argued before us, it seems to us that there is also a good argument that this outcome is inconsistent with Mr Fitzgerald's right under s 19 of NZBORA to freedom from discrimination on the grounds of disability. The three strikes regime is predicated on the ability of recipients of first warnings and final warnings to understand and act on those warnings, and to regulate their conduct accordingly. It seems likely that New Zealanders with mental disabilities that affect their ability to understand and act on such warnings will be disproportionately exposed to the severe consequences prescribed for second and third strike offences, compared with New Zealanders who do not suffer from such a disability. Section 19 of NZBORA extends to indirect or "adverse effect" discrimination, where a law or practice is neutral on its face but has a disproportionate impact on a group because of a particular characteristic of that group.[36] But this argument was not advanced on behalf of Mr Fitzgerald, and it would be inappropriate for us to seek to determine it in the absence of full argument.

[46] As we explain in more detail at [76]–[78] below, it follows that s 86D(2) of the Sentencing Act, which requires the court to impose this sentence if Mr Fitzgerald is convicted of indecent assault, is inconsistent with NZBORA.

[47] But the immediate issue is what the inconsistency of this outcome with NZBORA means for the interaction of s 86D(2) and ss 106 and 107 of the Sentencing Act.

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36 Human Rights Act 1993, ss 21A(1)(b) and 65; and *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236.

Interpreting the relevant Sentencing Act provisions

[48] Section 86D(2) only applies if a conviction is entered. Nothing in s 86D requires a conviction to be entered. Nor does s 86I: if no conviction is entered s 86D does not apply, so there is no inconsistency of the kind to which s 86I is addressed.

[49] As noted above, the reason the High Court Judge considered he was not able to consider granting a discharge without conviction in the case of an offender convicted of a stage-3 offence is found in the language of s 106. The power to discharge an offender without conviction is not available if "by any enactment applicable to the offence the court is required to impose a minimum sentence". The Judge considered that s 86D(2) applied to the stage-3 offence committed by Mr Fitzgerald. It required the Judge to impose a minimum sentence: as the Judge reasoned, he was not free to impose a lesser sentence than seven years' imprisonment, so this operated as a minimum sentence.[37] The fact that the minimum was defined by reference to the maximum sentence for the offence of indecent assault did not affect that analysis.

[50] The alternative reading of s 106 that Mr Preston advances on behalf of Mr Fitzgerald is that the exception applies only in the very rare circumstances where the relevant substantive offence attracts a minimum sentence. The offence of indecent assault does not attract a minimum sentence. A person who has committed that offence can be discharged without conviction, putting to one side the operation of the three strikes regime. Nothing in the three strikes regime precludes a discharge without conviction where a person commits indecent assault as a stage-1 or stage-2 offence. It is only where a person who is convicted of indecent assault has previously received a final warning under the regime that the court is required to impose the maximum sentence for that offence. That mandatory consequence applies to certain offenders in certain circumstances, not to the offence as such. So, Mr Preston submits, it is not the kind of offence-specific minimum to which the restriction in s 106 applies.

[51] The Crown responds — and the Judge held — that in Mr Fitzgerald's case the offence of indecent assault was a stage-3 offence, and as such it attracted the

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[37] Conviction and sentencing notes, above n 3, at [13].

mandatory sentence prescribed for a stage-3 offence in s 86D(2). So, the Judge said, it is a minimum sentence of the kind to which the restriction in s 106 refers.

[52] The Judge's interpretation of the interaction between ss 106 and 86D(2) is certainly an available reading of those provisions. But reading the provisions in this way would mean that the Court would be required to impose the maximum sentence for an offence on a person to whom s 86D(2) applies in circumstances where that punishment is grossly disproportionate and inconsistent with s 9 of NZBORA. Against that backdrop, if s 106 can plausibly be read in a way that does not apply to the mandatory sentences prescribed by s 86D(2), s 6 of NZBORA requires this Court to do so.

[53] However it is not open to the Court to do an "end run" around s 86D(2), and engage in the essentially legislative exercise of creating an exception to that provision via s 106 in circumstances where the legislature expressly chose not to include a safety valve provision in s 86D(2). The reading contended for by Mr Preston can be adopted only if the Sentencing Act can reasonably be given that meaning, without stepping over that boundary.

[54] The text of s 106 can be read in this way. The phrase "enactment applicable to the offence" can be read as referring to the substantive offence committed by the offender. But there are strong contrary indications in the wider statutory context, and in the legislative history.

[55] It is clear that in s 107, which asks whether the consequences of a conviction would be out of all proportion to the gravity of the offence, the focus is on the particular offence committed by the particular offender — not on the statutory provision creating the offence in question. It would be odd if the "offence" referred to in s 107, the gateway provision for s 106, differed from the "offence" referred to in s 106.

[56] More generally, it is difficult to see why Parliament would seek to exclude from s 106 (and from the s 108 power to convict and discharge) a person who commits an offence which always attracts a minimum sentence, but not a person who commits an

offence which attracts a minimum sentence having regard to the circumstances of the offence and the offender. The rationale for the exclusion appears to be to ensure that minimum sentences prescribed by Parliament cannot be avoided via s 106 or s 108. It is not easy to identify any coherent policy reason for excluding some minimum sentences from such an exclusion, simply because they are triggered by factors specific to the circumstances of the offence or of the offender.

[57] That reading of the exception is also consistent with the broader scheme of the Sentencing Act. Section 8(g) provides that a court must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in s 10A — with the least restrictive being discharge without conviction under s 106. Section 11 provides:

> **11 Discharge or order to come up for sentence if called on**
>
> (1) If a person who is charged with an offence is found guilty, or pleads guilty, before entering a conviction and imposing a sentence the court must consider whether the offender would be more appropriately dealt with by—
>
> (a) discharging the offender without conviction under section 106; or
>
> (b) convicting and discharging the offender under section 108; or
>
> (c) convicting the offender and ordering the offender, under section 110, to come up for sentence if called on.
>
> (2) If 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, then—
>
> (a) despite subsection (1), a court is not obliged to consider whether the offender would be more appropriately dealt with in the manner described in any of paragraphs (a), (b), or (c) of that subsection; but
>
> (b) the court is not precluded from dealing with the offender in that manner if the court thinks that it is appropriate in the circumstances.

[58] Section 11 requires a court to consider, before entering a conviction and imposing a sentence, whether the offender would be more appropriately dealt with by less restrictive options such as a discharge without conviction unless a provision

applicable to the particular offence provides a presumption in favour of imposing some other sentence. Where such a presumption applies, the court is not required to consider those less restrictive options but is not precluded from doing so. The reference to a presumption found in a "provision applicable to the particular offence" is most naturally read as referring to a provision applicable to the particular offence committed by that particular offender. The rationale for subs (2) is that where such a presumption exists, the less restrictive outcomes referred to in subs (1) are not the appropriate starting point. That is just as true if the presumption applies to the particular offence committed by the particular offender as it would be if the presumption applied to all persons committing the offence in question. Either way, the logical starting point is the presumption, not the subsection (1) outcomes. It might be suggested that the phrase "provision applicable to the *particular* offence" used in s 11 reflects a deliberate difference from the phrase "enactment applicable to the offence" in s 106, with the latter having a different (and narrower) meaning. But the more natural reading of the two provisions is that they both reflect the same goal of giving full effect to other provisions in which Parliament has chosen to impose a presumptive or mandatory sentence in certain circumstances.

[59] The legislative history of s 106 provides further support for this reading of the s 106 exception. Since 1842, New Zealand courts have had a statutory power to discharge a defendant without conviction in relation to certain offences.[38] In 1879 a Royal Commission in the United Kingdom recommended the enactment of such a power in relation to all offences in the following terms:[39]

> **13 Discharge without verdict**
>
> In any case where the Court considers that the offence deserves no more than a nominal punishment, the Court may in its discretion direct the discharge of the accused person without taking any verdict, and such discharge shall have all the effects of an acquittal.

[60] Of that provision the Royal Commission said:[40]

> Section 13 gives the court power to discharge without conviction, persons who have committed acts which, though amounting in law to crimes, do not under

[38] Police Magistrates Ordinance 1842 5 Vict 4, cl 2.

[39] Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (C 2345, 1879) at 65.

[40] At 16.

> the circumstances involve any moral turpitude. … The conferring of such power on the judge but little enlarges the authority at present invested in him. He may now, on a conviction, award a punishment merely nominal, or discharge the person convicted on his own recognizance.

[61] In New Zealand this recommendation was considered by the Statutes Revision Commission. Its 1883 report eventually led to the enactment of s 17 of the Criminal Code Act 1893, which provided:

> 17. (1.) When the Court, on perusal of the depositions returned in any case, considers that the offence charged deserves no more than a nominal punishment, and that it is unnecessary that a conviction should be obtained, it may in its discretion direct that no bill shall be preferred by the person, if any, who is bound by recognisances to prosecute; or, if a bill has been found before the Grand Jury, it may direct that the accused shall not be arraigned thereon; and in either case it may direct the discharge of the accused if in custody:
>
> (2.) Or if the Court at any stage of the trial should consider as aforesaid, it may direct the discharge of the accused without any verdict.
>
> (3.) Such discharge shall have all the effect of an acquittal of the accused in respect of the offence for which he was committed for trial, held to bail, or indicted.

[62] There was no limit on the power to discharge the accused without verdict along the lines of the exception in the current s 106.

[63] The precursor to the exception in s 106 appears to have made its first appearance in 1954. Section 42(1) of the Criminal Justice Act 1954 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". There was no corresponding restriction on the power conferred on the Supreme Court by s 42(2) to grant a discharge in respect of an offender appearing for sentence on an indictable offence, instead of sentencing that offender.

[64] The exception then appeared in relation to all categories of offence and all courts in s 19 of the Criminal Justice Act 1985, the immediate precursor to our current 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.
>
> …

[65] It seems likely that the reference to minimum penalties in this provision was aimed primarily at the penalties that could be imposed under the Transport Act 1962 and its successors, which set minimum periods for which a person would be disqualified from driving following conviction for certain offences.[41] Some of the prescribed "obligatory disqualification" periods applied to every person who committed a particular offence. Others applied on second or subsequent convictions for the same offence within a period of seven years from the date of the immediately preceding conviction.[42] It would be odd if the s 19 exception applied to the former class of penalty, but not the latter.

[66] That was the view this Court took of s 19 in *R v Eteveneaux*.[43] Mr Eteveneaux had been found guilty of driving while disqualified. This was his second conviction for that offence. Section 84(2A) of the Criminal Justice Act 1985 provided that where a person committed one of a number of specified offences twice within four years, the court was required to order that the motor vehicle involved be confiscated unless the making of such an order would result in extreme hardship to the offender or undue hardship to any other person. An order for confiscation of Mr Eteveneaux's motorcycle was made in the District Court. His appeal to the High Court was unsuccessful. On appeal to this Court, counsel for Mr Eteveneaux argued that s 84(2A) was not a minimum penalty for the purposes of s 19. Rather, she submitted, s 84(2A) "is a provision which arises when and only when an offender has been convicted of the second offence … the minimum penalty did not apply to the offence simpliciter, ie to driving while disqualified as such".[44]

[67] In its oral judgment the Court said:[45]

41 Transport Act 1962, ss 31 and 32.
42 See in particular sch 3, pt III.
43 *R v Eteveneaux* (1999) 16 CRNZ 601 (CA) at [10].
44 At [10].
45 At [10].

> That is so, but 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.

[68] That interpretation of s 19 was adopted by this Court shortly before the Sentencing and Parole Reform Bill which led to the Sentencing Act 2002 was introduced in 2001.

[69] As introduced, the Sentencing and Parole Reform Bill 2001 included a power to discharge without conviction in similar terms to s 19 of the 1985 Act, including an exception that precluded discharge where an enactment applicable to the offence provided for a minimum penalty.[46] The Select Committee considering the Sentencing and Parole Reform Bill recommended removing the restriction. The Committee took the view that the existence of a minimum penalty provision should not prevent a discharge without conviction, but the court should be able to make orders imposing penalties in conjunction with a discharge. The Committee gave the example of a "drink-driving case, in which an offender may lose their job if convicted, but the court should still be able to disqualify them from driving".[47]

[70] The current form of the restriction, referring to a minimum sentence, was then inserted by a Supplementary Order Paper at the Committee of the Whole House stage.[48] The Supplementary Order Paper inserted the same proviso in what is now s 108, which confers on the court the power to convict and discharge an offender instead of imposing a sentence where a conviction is sufficient penalty in itself.

[71] The rationale for restoration of the exception in this modified form is not apparent from the Parliamentary record. The only minimum sentence provisions (as distinct from minimum penalty provisions) on the New Zealand statute book at the time related to certain acts of treason (which attracted a mandatory life sentence under s 74(1) of the Crimes Act 1961), and certain acts of piracy (which also attracted a mandatory life sentence under ss 92–94 of the Crimes Act). Before the Sentencing

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[46] Sentencing and Parole Reform Bill 2001 (148-1), cl 95.
[47] Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 21.
[48] Supplementary Order Paper 2002 (262) Sentencing and Parole Reform Bill 2001 (148-2) at 12.

Act was enacted, New Zealand law also prescribed a mandatory life sentence for murder. But s 102 of the Sentencing Act takes a different approach. It provides for a presumption of life imprisonment: an offender convicted of murder must be sentenced to life imprisonment unless, given the circumstances of the offence and the offender, that sentence would be manifestly unjust. A presumption of this kind would not normally be described as a minimum sentence. So it seems the exception restored in s 106 applied only to two very rare classes of offence, and would have been expected to have little operation in practice. And it seems that at the time s 106 was enacted with the exception in its current form, the only minimum sentences on the statute book were minimum sentences for certain substantive offences: there were no minimum sentences that applied only to particular categories of offender. But it is difficult to draw any particular inference from that circumstance. Rather, it seems to us that the concept of a "minimum" sentence applicable to an offence was likely to have been understood as corresponding to the concept of a minimum penalty applicable to an offence — that is, as extending to a minimum sentence prescribed for certain offenders, or certain categories of offending.

[72] We return to the question of whether the reading Mr Preston contends for is available. It is, as we said, open on the text. But all the contextual indications point the other way. The proposed reading would at best be a very strained one. Adopting that strained interpretation of s 106 would create a safety valve in relation to s 86D(2) that would operate along similar lines to the safety valve that Parliament expressly considered and rejected. That is a strong indication that its adoption would fall on the wrong side of the line drawn by ss 4 and 6 of NZBORA.

[73] We also consider that this reading of s 106 would lead to peculiar and arbitrary outcomes inconsistent with the wider scheme of the Sentencing Act. Applying s 106 to third strike offenders for whom a sentence prescribed by s 86D(2) would be disproportionately severe seems likely to result in a discharge without conviction in cases where a conviction is clearly called for, and imposing a (less onerous) sentence would be the most appropriate outcome. The s 107 threshold would be met in such a case: a sentence that is disproportionately severe, applying the high threshold in *Taunoa*, would by definition be a consequence that meets the s 107 test of being out of all proportion to the gravity of the offence. And if the s 106 discretion is available,

a discharge without conviction is the only way that an outcome consistent with NZBORA could be achieved: so the court would be required by NZBORA to exercise the power to discharge the offender without conviction. Absent s 86D(2), the offender would not qualify for a discharge without conviction under s 106, or for that matter a conviction and discharge under s 108. It would be odd if the enactment of s 86D(2) resulted in a more favourable outcome for this class of offender. A reading of the Sentencing Act that produces that result is not in our view a tenable reading of that statute taken as a whole.

[74] In summary, we have striven to identify a tenable reading of s 106 that would enable the courts to avoid imposing a sentence on Mr Fitzgerald that is manifestly unjust and disproportionately severe, in breach of his NZBORA rights. We have reluctantly concluded that this course is not open to us. The reading contended for by Mr Preston is too strained to be tenable. It is outside the domain of what is permitted under s 6 of NZBORA.

[75] It follows that the s 106 exception applies. A discharge without conviction is not available in this case. That result brings squarely into focus the question of how the breach of Mr Fitzgerald's NZBORA rights can most appropriately be vindicated.

Section 86D(2) is inconsistent with NZBORA

[76] We have already concluded that s 86D(2) is capable of producing results that are inconsistent with s 9 of NZBORA, as it has for Mr Fitzgerald in the present case. The Crown says that does not mean that s 86D(2) is inconsistent with NZBORA, as the application of s 86D(2) will not invariably amount to disproportionately severe punishment. We do not consider that is the correct approach when assessing whether a mandatory sentence provision is consistent with s 9 of NZBORA. Rather, the question is whether there are realistic scenarios in which the provision will require the court to impose a sentence that is grossly disproportionate and inconsistent with s 9. A provision that mandates outcomes that are inconsistent with NZBORA in realistic scenarios is itself inconsistent with NZBORA. The fact that the provision will produce unobjectionable results in other scenarios does not save it.

[77] That approach is consistent with the approach adopted by the Supreme Court of Canada when assessing whether mandatory sentence provisions are inconsistent with the Canadian Charter of Rights and Freedoms.[49] In *R v Lloyd* the majority judgment, delivered by McLachlin CJ, summarised the framework applied in Canada as follows:[50]

> [22] The analytical framework to determine whether a sentence constitutes a "cruel and unusual" punishment under s 12 of the *Charter* was recently clarified by this Court in *Nur*. A sentence will infringe s 12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender. A law will violate s 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others.

[78] The Supreme Court of Canada has recognised that when considering whether reasonably foreseeable applications of a provision will result in grossly disproportionate sentences, the court may consider realistic hypothetical scenarios.[51] But we do not need to identify a hypothetical scenario in which s 86D(2) would produce a grossly disproportionate sentence. This is such a case. Examples could readily be multiplied.

[79] McLachlin CJ went on to make some observations about the circumstances in which a mandatory minimum sentence is likely to be open to challenge on the grounds of inconsistency with the right not to be subject to disproportionately severe punishment:

> [35] As I have already said, in light of *Nur*, the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.
>
> [36] Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and

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49 *R v Nur* 2015 SCC 15, [2015] 1 SCR 773; and *R v Lloyd* 2016 SCC 13, [2016] 1 SCR 130.

50 *R v Lloyd*, above n 49 (citations omitted).

51 *R v Nur*, above n 49, at [73]–[76].

> constitutional infirmity in other countries. It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law. It is for the legislature to determine the parameters of the residual judicial discretion. The laws of other countries reveal a variety of approaches: *Criminal Law Amendment Act, 1997* (S Afr), No 105 of 1997, s 51(3)(*a*); *Firearms Act 1968* (UK), 1968, c 27, s 51A(2); *Violent Crime Reduction Act 2006* (UK), 2006, c 38, s 29(4); *Powers of Criminal Courts (Sentencing) Act 2000* (UK), 2000, c 6, ss 109(3), 110(2) and 111(2); *Sentencing Act* (NT), s 78DI; *Sentencing Act 1991* (Vic), s 10(1); *Sentencing Act 2002* (NZ), ss 86E, 102 and 103; *Criminal Law (Sentencing) Act 1988* (SA), s 17; 18 USC § 3553(f) (2012); *Penal Code* [*Brottsbalken*] (Swed), c 29, s 5. There is no precise formula and only one requirement — that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment.
>
> (Citation omitted.)

[80] These observations are equally applicable in New Zealand. We note that at [36] McLachlin CJ referred to s 86E of the New Zealand Sentencing Act as an example of a safety valve that ensures consistency with relevant rights. If s 86D(2) included a safety valve of this kind, there would be no inconsistency with NZBORA.

Should we make a declaration of inconsistency?

[81] As mentioned earlier, after hearing the appeal we called for further submissions on whether, if this Court concluded that s 86D(2) is inconsistent with NZBORA, it would be appropriate for the Court to grant a declaration of inconsistency. Mr Preston filed further submissions in which he sought such a declaration. His submissions also advised that — out of an abundance of caution and to address possible jurisdictional issues — he proposed to file, on behalf of Mr Fitzgerald, an application for leave to appeal on a question of law under sub-pt 8 of pt 6 of the Criminal Procedure Act 2011 (CPA). That application was subsequently received.

[82] In a reply memorandum the Crown noted the proposed question of law appeared to be the focus of the issues already before the Court. Moreover, whilst the Crown's position remained there was no jurisdiction to make a formal declaration in criminal proceedings, it accepted the Court could comment on, or make findings as to, inconsistency with NZBORA in the course of its judgment. That was so, the Crown

acknowledged, whether the Court was considering an appeal against conviction and sentence or an appeal on a question of law. Accordingly, the Crown suggested the application should be rejected or dismissed. At a subsequent telephone conference, and given the Crown's acknowledgement of the issues already before the Court, the parties agreed that the application did not require further consideration. Any issue it might have raised was, in effect, already before the Court. Furthermore, the parties also agreed no further oral hearing was considered necessary on the declaration issue. We proceeded accordingly.

[83] As noted, Crown says that even if we conclude that s 86D(2) is inconsistent with NZBORA, a formal declaration of inconsistency should not be made. The Crown submits that it is not open to an appellant in a criminal appeal to seek a declaration of inconsistency. Rather, the Crown says, the appropriate course is for a declaration of inconsistency to be sought in a civil proceeding.

[84] The Supreme Court has confirmed that a declaration of inconsistency is an available remedy in civil proceedings.[52] But New Zealand courts have yet to finally determine whether a declaration of inconsistency is an available remedy in criminal proceedings.[53]

[85] In this case there is the further issue that a declaration was not sought in the High Court: the issue arose for the first time in the course of argument in this Court. The Crown says that it is not open to this Court to make a declaration of inconsistency in the context of an appeal against conviction or sentence under the CPA.[54] The CPA sets out in some detail the orders that may be made in determining such appeals.[55] A declaration of inconsistency is not one of the available outcomes expressly contemplated by that Act, except perhaps where an appeal against conviction is

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

53 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [13]–[15]; *Belcher v Chief Executive of the Department of Corrections* [2007] NZSC 54 at [7]–[8]; *R v Chatha (No 2)* [2008] NZCA 466 at [32]; *McDonnell v Chief Executive of Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [114]–[131]; and *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [148].

54 Mr Fitzgerald's appeal is described as an appeal against conviction and sentence, as contemplated by *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [7]–[8] and [16]. But his appeal is in substance an appeal against conviction only, as there is no challenge to his sentence if the conviction stands.

55 Criminal Procedure Act 2011, ss 233 and 251.

allowed and the conviction is set aside: in those circumstances s 233(3)(e) provides for the court to make any other order it considers justice requires. But in this case we have decided that the conviction should not be set aside, so the power conferred by s 233(3)(e) is not available. That raises the question whether, where an appeal against conviction under the CPA is dismissed, this Court can grant a declaration of inconsistency.

[86] The Crown identified a number of other difficulties with this Court considering the grant of a declaration of inconsistency as a matter of first impression. There may be cases where evidence is required to determine whether a provision is inconsistent with NZBORA; for example, where the Crown wishes to argue that the provision is justified under s 5 of NZBORA. Discovery may be required in some cases. There would be no appeal as of right from the determination by this Court. It is also generally undesirable for this Court to engage in determining significant public law issues without the benefit of a judgment from the High Court. Some of the difficulties identified by the Crown are not relevant to the present appeal. The question of inconsistency with NZBORA can be, and has been, determined without the need for discovery or further evidence. But other concerns raised by the Crown have more force.

[87] As against this, it can be argued that a declaration provides important vindication of an appellant's rights. That vindication is arguably more, not less, important where s 4 of NZBORA applies with the result that the Court is required to give effect to a rights-infringing statute, and dismiss the appeal. Where the Court hearing a criminal appeal concludes that a statute is inconsistent with NZBORA, it is not easy to see what practical purpose is served by requiring the appellant to commence separate civil proceedings in order to obtain a formal declaration of inconsistency. There are obvious barriers to doing so, not least the cost of such proceedings and uncertain access to legal aid: the ability to obtain a declaration in the context of a criminal appeal would undoubtedly enhance access to justice.[56] In

[56] See Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 627.

Attorney-General v Taylor the Supreme Court confirmed that the grant of a declaration serves a useful purpose over and above an indication of inconsistency.[57]

[88] These are important issues that remain to be considered by this Court. It would in our view be desirable for a full court of this Court to hear and determine an appeal which squarely raises the question whether a declaration of inconsistency can be sought in the context of an appeal under pt 6 of the CPA.

[89] We considered whether to refer that question to a full court in this case under s 47(4) of the Senior Courts Act 2016. But after much reflection, we have decided that it would not be appropriate to do so. Mr Fitzgerald did not initially seek a declaration of inconsistency. The issue only arose after his appeal had been heard, in response to an inquiry from the Court. In this judgment we determine the only issue that Mr Fitzgerald initially sought to raise in his appeal to this Court. In doing so we have given a clear indication that s 86D(2) is inconsistent with NZBORA. It seems to us that it would be artificial to segment the appeal by making an order under s 47(4), with the substantive appeal against conviction and sentence effectively determined and an indication of inconsistency given by this Court before the Full Court heard and decided the question referred to it. It would be preferable for the question of availability of a declaration of inconsistency in a criminal appeal to be determined by a full court in circumstances where the entire appeal is before that Court, and the issue can be addressed in context.

[90] Nor do we consider that a declaration of inconsistency would provide any real benefit to Mr Fitzgerald over and above the indication already provided, in this case. Our judgment confirms that although Mr Fitzgerald's continuing imprisonment is required by the Sentencing Act, and is therefore lawful, it is inconsistent with his rights under NZBORA. That indication might for example be relied on by Mr Fitzgerald to seek a further consideration of parole in the near future, in advance of his next scheduled date for consideration of parole (31 March 2021). That indication may also be seen as a relevant factor when the Parole Board next considers whether to grant

57 *Attorney-General v Taylor*, above n 52. The practical relevance of a declaration would be underscored if legislation is enacted along the lines contemplated by the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1), providing for the Executive and Parliament to consider, and, if they think fit, respond to a declaration of inconsistency.

parole.[58] It will also be a relevant factor for the Executive when considering the appropriate support to be provided to Mr Fitzgerald to enable him to obtain parole. A formal declaration is not necessary for those purposes.

[91] In these circumstances we have decided that it is not necessary for this Court to determine, in the context of Mr Fitzgerald's appeal, the issues identified above concerning the availability of a declaration of inconsistency.

[92] We therefore dismiss the appeal against conviction and sentence, and formally decline the application for leave to appeal on a question of law.

Result

[93] The appeal against conviction and sentence is dismissed.

[94] The application for leave to appeal on a question of law is declined.

COLLINS J

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Introduction

[95] This judgment focuses upon two issues:

(a) Whether s 86D(2) of the Sentencing Act imposes a minimum sentence within the meaning of the proviso to s 106 when Mr Fitzgerald was convicted for a third time of committing an indecent assault. If it does,

[58] *Miller v Parole Board* HC Wellington CRI-2004-485-37, 11 May 2004 at [44].

then Mr Fitzgerald is required to be sentenced to seven years' imprisonment, which is the maximum period of imprisonment for indecent assault. That result must follow even though such a sentence is grossly disproportionate to Mr Fitzgerald's offending and is manifestly unjust.

(b) If, however, s 86D(2) and the proviso to s 106 of the Act can be interpreted in a way that is consistent with s 9 of the NZBORA so as to alleviate the consequences I have summarised at [95(a)], then it is necessary to consider whether or not a discharge without conviction is appropriate in Mr Fitzgerald's case.

Background

[96] It is not necessary to reiterate all of the background. That task has been admirably performed by my colleagues. I confine myself to the following three points.

[97] First, this appeal concerns only Mr Fitzgerald's conviction for indecent assault. The circumstances of that assault was an unwanted kiss on the cheek of the first victim, a woman whom Mr Fitzgerald did not know. The first victim has not filed a victim impact statement and accordingly, there is no information about how she was affected by Mr Fitzgerald's conduct.

[98] The most concerning feature of Mr Fitzgerald's offending on 3 December 2016, was the way he responded to the attempts by the first victim's friend to restrain him. Mr Fitzgerald pushed her, the second victim, against a wall and held her there. She was a vulnerable woman, who was distressed by Mr Fitzgerald's actions. The offending against the second victim resulted in a charge of assault for which Mr Fitzgerald was sentenced to three months' imprisonment. That offence is not covered by the three strikes regime.

[99] Second, Mr Fitzgerald is a very troubled man, who has presented numerous challenges for the courts. His offending in 2012, which attracted his first strike warning, was serious. On that occasion, Mr Fitzgerald chased a woman, pushed her to the ground and placed his face and hands onto her buttocks as she screamed for

help. When sentencing Mr Fitzgerald to 11 months' imprisonment, the District Court Judge referred to Mr Fitzgerald's history of psychiatric illness and the lack of support for him in the community.[59] Mr Fitzgerald showed, however, signs of promise and a willingness to not offend again. This was reflected in the District Court Judge's sentencing notes when, after explaining the first strike warning, she said she was confident Mr Fitzgerald would not appear again before the courts.[60] Regrettably, however, Mr Fitzgerald appears to be unable to learn from his experiences. Mr Fitzgerald's second strike offence was also for indecent assault. His offending on that occasion involved him slapping the buttocks of three women as they walked past him. That offending attracted a sentence of four months' imprisonment.[61]

[100] Third, while any form of indecent assault is inherently serious, Mr Fitzgerald's offending on 3 December 2016 was at the lowest end of the spectrum of indecent assaults. By itself, his conviction for the indecent assault upon the first victim would not attract a custodial sentence.

Legislative provisions

[101] For ease of reference, I set out the key legislative provisions starting with the relevant sections of the Sentencing Act governing a discharge without conviction:

> **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*.
>
> (Emphasis added.)
>
> …
>
> **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.

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59 First strike judgment, above n 8, at [5]–[7].

60 At [21].

61 Second strike judgment, above n 8.

[102] Next, I set out the key provisions of the three strikes regime that was inserted into the Act in 2010:

> **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.
>
> …

[103] Section 86I states that the three strikes regime prevails over any other inconsistent provisions in the Act. That section 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.

[104] Finally, I set out the principal interpretation provisions in the NZBORA:

> **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.
>
> …
>
> **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.

[105] I have omitted s 5 of the NZBORA from this judgment because I agree with my colleagues that the breaches of the rights afforded to Mr Fitzgerald by s 9 of the NZBORA cannot be justified.

A rights consistent interpretation of ss 106 and 86D of the Sentencing Act

[106] One of the effects of ss 4 and 6 of the NZBORA is that the courts cannot decline to apply a provision of any enactment solely because the provision in question is inconsistent with the NZBORA. Where, however, an enactment can be interpreted in a way that is consistent with the rights affirmed by the NZBORA then that interpretation is to be preferred.[62]

[107] The extent to which courts may venture when interpreting legislation in a way that is consistent with human rights legislation has tested the limits of statutory interpretation in cognate jurisdictions. For example, s 3 of the Human Rights Act 1998 (UK) requires all legislation to be read and applied in a way that is compatible with the European Convention on Human Rights "[s]o far as it is possible to do so". In *R v A (No 2)*, Lord Steyn explained that the effect of s 3 of the Human Rights Act renders it necessary on occasions "to adopt an interpretation which linguistically may appear strained".[63]

[108] Similarly, in *Ghaidan v Godin-Mendoza*, Lord Nicholls said:[64]

> … to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation… [provided] [t]he meaning imported by application of section 3 [is] compatible with the underlying thrust of the legislation being construed.

[109] Lord Millett, who dissented in relation to the result in *Ghaidan*, offered the following comments to illustrate the wide boundaries of s 3:[65]

> Words cannot *mean* their opposite; "black" cannot *mean* "not black". But they may *include* their opposite. In some contexts it may be possible to read "black" as meaning "black or white"; in other contexts it may be impossible to do so. It all depends on whether "blackness" is the essential feature of the statutory scheme; and while the court may look behind the words of the statute

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[62] *R v Poumako*, above n 19, at [37].
[63] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [44].
[64] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [32] and [33].
[65] At [70].

> they cannot be disregarded or given no weight, for they are the medium by which Parliament expresses its intention.

[110] Lord Steyn suggested in *R v A (No 2)* and *Ghaidan* that s 3 of the Human Rights Act may be broader than s 6 of the NZBORA.[66] In *R v Hansen*, however, Elias CJ said she was "unable to accept that there is any material difference between the New Zealand and the United Kingdom models".[67] McGrath J also noted "the language of s 6 of the New Zealand Bill of Rights is not materially different from the equivalent interpretative instruction in s 3 of the United Kingdom Act".[68]

[111] The limits on the approach to be taken under s 6 sit within the interpretation exercise that judges are required to undertake. As s 5 of the Interpretation Act 1999 makes clear, the meaning of legislation is to be ascertained by reference to its text and purpose. Words can be interpreted to contain a range of meanings, but statutes cannot be rewritten by the courts. Thus, it is not possible for a court in New Zealand to interpret s 86D(2) so as to devise a safety valve within that provision, or otherwise "modify [the] legislation".[69] Section 6 is not a "concealed legislative tool".[70] Nevertheless, where two interpretations of a statute are possible, the courts should adopt the interpretation which gives most effect to the NZBORA.

[112] This approach to interpretation, which gives primacy to the rights affirmed by the NZBORA, is reinforced in the circumstances of this case where a citizen's liberty is at issue. Historically, penal statutes have been required to be construed narrowly.[71] This is consistent with the obligations upon New Zealand courts to impose the least restrictive outcome that is appropriate when sentencing an offender.[72]

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66 *R v A (No 2)*, above n 63, at [44]; and *Ghaidan v Godin-Mendoza*, above n 64, at [44].
67 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [13].
68 At [243].
69 At [246].
70 At [156].
71 Sir William Blackstone *Commentaries on the Laws of England* (15th ed, A Strahan, London, 1809) vol I at 87.
72 Sentencing Act, s 8(g).

Text and purpose of s 86D(2) of the Sentencing Act

[113] On its face, s 86D(2) of the Act requires a judge sentencing a defendant for their "third strike offence" to impose the maximum term of imprisonment prescribed for that offence.

[114] This interpretation is supported by the legislative history to s 86D(2) of the Act. During the passage of the Sentencing and Parole Reform Bill 2009 the Opposition moved an amendment to what became s 86D(2). If it had been adopted, the amendment would have permitted a court to avoid imposing the maximum sentence on a third strike offender where the circumstances of the offence and the offender would have made it manifestly unjust to impose the maximum sentence.[73] In speaking against the proposed amendment, the Minister of Corrections, the Hon Judith Collins, explained that:[74]

> [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. [The proposed amendment] 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.

[115] Thus, it is apparent that when it enacted s 86D(2), Parliament was intent upon:

(a) imposing maximum penalties on third strike offenders who committed "very serious offences"; and

(b) achieving certainty in sentencing outcomes for those who committed "very serious offences".

[116] Any suggestion Parliament intended s 86D(2) would apply to defendants whose offending was not serious and at the lowest end of the spectrum of culpability, requires an acceptance of the proposition that Parliament intentionally imposed a very harsh and indiscriminate punishment regime when it passed s 86D(2). I would not wish to attribute such malevolence to a New Zealand Parliament.

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73 (18 May 2010) 663 NZPD 10913.
74 (18 May 2010) 663 NZPD 10922.

[117] Nevertheless, an inadvertent consequence of Parliament's desire for certain outcomes for those who commit "very serious offences" is that s 86D(2) cannot be interpreted in a way that is consistent with Mr Fitzgerald's rights under s 9 of the NZBORA.

Text and purpose of s 106 of the Sentencing Act

[118] The proviso to s 106 of the Sentencing Act can be traced to s 42(1) of the Criminal Justice Act 1954. When that section was enacted, magistrates were empowered to discharge without conviction any person charged with an offence "unless by any enactment applicable to the offence a minimum penalty [was] expressly provided for".

[119] The concept of a "minimum penalty" was well understood when s 42 of the Criminal Justice Act 1954 was enacted. It encompassed penalties such as the minimum periods of disqualification that accompanied certain driving offences, like those set out in s 41 of the Transport Act 1949.

[120] Sections 42(1) and (2) of the Criminal Justice Act 1954 were enacted as s 19 of the Criminal Justice Act 1985. When s 106 of the Act was passed, the reference to "minimum penalty" was, however, changed to "minimum sentence".

[121] The Select Committee that was considering cl 95 of the Sentencing and Parole Reform Bill, which became s 106 of the Act, removed the proviso from the clause. The Committee explained this proposed amendment in the following way:[75]

> Most of us recommend an amendment to cl 95 allowing the court to discharge without conviction an offender where there is a minimum penalty for the offence and also impose a penalty. An example of this is a drink-driving case, in which an offender may lose their job if convicted, but the court should still be able to disqualify them from driving.

[122] The proviso was reinstated at the Committee of the Whole House stage of the Bill's passage. At that point the change was made from "minimum penalty" to "minimum sentence". The proviso to s 106 is now usually interpreted as meaning that

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75 Sentencing and Parole Reform Bill (148-2) (select committee report) at 21.

a defendant can be discharged without conviction and at the same time be subject to an order that involves the imposition of a minimum penalty, such as a statutory period of disqualification.[76]

[123] The reference to a "minimum sentence" in s 106 of the Act could only have related to a very narrow band of offences when s 106 was enacted. As my colleagues have explained, the only minimum sentences prescribed in New Zealand were sentences of life imprisonment for treason[77] and certain types of piracy.[78] A mandatory sentence of life imprisonment was also prescribed for those convicted of murder.[79] That mandatory sentence was, however, changed by s 102 of the Act, which now provides for a presumption of life imprisonment unless that sentence would be manifestly unjust. Thus, today, the only offences that expressly provide for a minimum sentence are treason and certain acts of piracy.

Can ss 86D(2) and 106 of the Sentencing Act be interpreted in a way that is consistent with s 9 of the NZBORA?

[124] My colleagues have been persuaded that the High Court Judge had no option other than to conclude that s 86D(2) required the imposition of the maximum sentence prescribed for indecent assault and that, as the maximum sentence was also the minimum sentence, the proviso to s 106 means there was no jurisdiction to discharge Mr Fitzgerald without conviction.

[125] The countervailing submission, advanced on behalf of Mr Fitzgerald is that the proviso to s 106 of the Act only applies where the substantive offence imposes a minimum sentence. On this approach, treason and certain piracy offences are the only offences caught by the proviso.

[126] Both interpretations summarised at [124] and [125] are available. The reason why the interpretation advanced on behalf of Mr Fitzgerald is available, hinges on the phrase "any enactment applicable to the offence" in the proviso to s 106 of the Act.

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76 *Police v Stewart* (2004) 22 CRNZ 35 (HC); and *Waight v Police* HC Auckland CRI-2006-404-465, 24 May 2007 at [27]–[28].

77 Crimes Act, s 74(1).

78 Section 94(a).

79 Crimes Act, s 172 (repealed).

[127] When s 106 was enacted, the words "any enactment applicable to the offence" could only have referred to the specific sentence provisions relating to an offence. There were no generic sentencing provisions similar to the three strikes regime at the time s 106 was enacted. Thus, when Parliament passed s 106 it must have intended the proviso would have limited application.

[128] The parliamentary records show that when Parliament enacted s 86D(2) it made no reference to s 106 of the Act. Had Parliament intended to restrict the long-established powers of the courts to discharge a defendant without conviction, it would have clearly done so. This observation is particularly relevant when regard is had to Parliament's dual aims when it passed s 86D(2), namely:

(a) imposing the maximum penalty on "very serious" offenders; and

(b) achieving certainty in sentencing in cases that involve "very serious" offending.

In pursuing those objectives, Parliament chose not to refer to the power to discharge a defendant without conviction. The fact there was no reference to s 106 when s 86D(2) was passed strengthens the argument that Parliament did not intend to circumscribe the well-entrenched jurisdiction of the courts to discharge defendants without convictions in appropriate cases. It is not surprising Parliament did not refer to s 106 when it enacted the three strikes regime because, the purpose of the three strikes provisions was to impose a more severe sentencing regime on those who repeatedly committed "very serious offences". Persons who would normally be considered eligible to be discharged without conviction were not intended to be affected when s 86D(2) was passed.

[129] It is clear Parliament deliberately decided that s 86D(2) would not have a safety valve. However, adopting an approach that allows s 106 of the Act to be available in this case does not involve grafting a safety valve onto s 86D(2). Instead, the interpretation of s 106 that I favour allows that section to continue to be applied as Parliament intended as a stand alone provision, unaffected by the generic three strikes

regime. It also recognises that when Parliament passed s 86D(2) its focus was upon "very serious" offenders.

[130] This interpretation of s 106 also does not offend s 86I of the Act because, as recognised by the High Court Judge and my colleagues, if s 106 is available in Mr Fitzgerald's circumstances, then that section stands alongside and not in conflict with s 86D(2). This is because ss 86B to 86E, the sections referred to in s 86I, are sentencing provisions that are only engaged following a conviction. A discharge without conviction is an acquittal and once granted no sentence can be imposed. Although s 86I is framed broadly, it should properly be interpreted as referring to any inconsistencies between ss 86B to 86E and other sentencing provisions following conviction. This is particularly so in the present circumstances because, as previously emphasised, Parliament did not intend to affect s 106 when it enacted the three strikes regime.

[131] Importantly, the interpretation of s 106 that I support allows for breaches of s 9 of the NZBORA to be addressed in a meaningful way that gives primacy to the rights affirmed by the NZBORA. Mr Fitzgerald's circumstances are an unprecedented breach of s 9 because, as all in this Court acknowledge, the sentence that has been imposed is out of all proportion to his offending and manifestly excessive. The discharge power must therefore be interpreted in a way that allows for the breaches of Mr Fitzgerald's rights under s 9 of the NZBORA to be properly addressed.

[132] As this approach to the meaning of the proviso in s 106 is consistent with the rights affirmed by s 9 of the NZBORA, it is the interpretation that should prevail.

Should Mr Fitzgerald be discharged without conviction?

[133] Having concluded there is jurisdiction under s 106 to discharge Mr Fitzgerald without conviction, it is now necessary to determine if that jurisdiction should be exercised in his favour.

[134] It is well established that determining a discharge without conviction involves the Court engaging in a three-step process:[80]

(a) identifying the gravity of the offence;

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

(c) determining whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.

[135] The correct application of ss 106 and 107 should not be conflated with the assessment of a person's rights under s 9 of the NZBORA. A finding that a defendant's rights under s 9 of the NZBORA have been breached through the application of s 86D(2) of the Act to their circumstances does not necessarily mean they are eligible for a discharge without conviction. Discharges without conviction are to be assessed against the criteria I have summarised in [134]. In particular, the gravity of the offence and the offending is a key factor in determining an application for a discharge without conviction.

[136] The gravity of the offence and offending is collaterally relevant to an assessment under s 9 of the NZBORA only because the gravity of the offence and the offending are intricately linked to the sentence in issue. This point is illustrated by the hypothetical example of a defendant who is convicted of rape in circumstances where that conviction constitutes his third strike offence. Absent the three strikes regime the defendant would be sentenced to a lengthy period of imprisonment (for present purposes let us assume eight years). Under the three strikes regime he would be required to be sentenced to 20 years' imprisonment, the maximum sentence for rape. He may be able to argue the difference between eight years and 20 years' imprisonment engages his rights under s 9 of the NZBORA. The gravity of the offence

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80 *Scott v R* [2019] NZCA 261 at [79]; *Prasad v R* [2018] NZCA 537 at [11]; and *R v Hughes* [2008] NZCA 546, [2004] 3 NZLR 222 at [41].

and his offending would, however, pose a considerable challenge if he tried to argue that he should be discharged without conviction.

[137] In sharp contrast to the example provided at [136], the gravity of Mr Fitzgerald's offending was at the lowest end of the spectrum of indecent assault. This factor weighs heavily in favour of a discharge without conviction.

[138] The direct and indirect consequences of a conviction for Mr Fitzgerald are profoundly serious. Unless he is discharged without conviction he will be required to serve a sentence of seven years' imprisonment. The fact he is eligible for parole does not undermine the gravity of the consequences of a conviction for Mr Fitzgerald. In a decision dated 18 June 2020 the Parole Board declined Mr Fitzgerald's most recent application for parole so as to enable him to continue with psychological rehabilitation to reduce his risk of further offending. We do not know if such a programme could be completed by Mr Fitzgerald in the community. What is clear is that Mr Fitzgerald has already served a sentence in excess of three years and six months' imprisonment. That in itself is a manifestly unjust outcome.

[139] The direct and indirect consequences of a conviction are, in the circumstances of this case, out of all proportion to the gravity of Mr Fitzgerald's offending. Under normal circumstances, he would in all likelihood, have been dealt with by way of a non-custodial sentence in relation to his indecent assault on the first victim. Mr Fitzgerald's personal circumstances, including his psychiatric history and inability to manage his conduct compound the injustice of him serving a sentence of imprisonment for this offending.

[140] The approach I favour does not open a floodgate that flushes away the effects of s 86D(2) of the Act. The unique circumstances of this case are unlikely to provide a precedent. Those circumstances, which are fully traversed at [34], include the fact:

(a) Mr Fitzgerald has been sentenced to seven years' imprisonment in circumstances where his offending would not normally attract a custodial sentence; and

(b) he is a very vulnerable man with multiple psychiatric and psychological challenges.

[141] I would therefore allow the appeal and discharge Mr Fitzgerald without conviction.

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