NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAME AND IDENTIFYING PARTICULARS OF G REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA717/2022
[2023] NZCA 93

BETWEEN	COMMISSIONER OF POLICE First Appellant
	CHIEF EXECUTIVE OF THE DEPARMENT OF CORRECTIONS Second Appellant
AND	G First Respondent
	WELLINGTON DISTRICT COURT Second Respondent

Hearing:	2 February 2023
Court:	Cooper P, Miller and Courtney JJ
Counsel:	A M Powell, M W McMenamin and I M C A McGlone for Appellants First Respondent in person A P Lawson for Second Respondent D A Ewen as counsel assisting the Court
Judgment:	26 April 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the High Court quashing the determination of the Commissioner that G was a returning prisoner under s 17(1) of the ROMI Act is set aside.

C The order made by the High Court that the Commissioner pay reasonable disbursements to G is set aside.

REASONS OF THE COURT

(Given by Cooper P)

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Introduction

[1] The Commissioner of Police (the Commissioner) appeals[1] against a judgment of the High Court declaring unlawful a determination by the Commissioner that the

[1] The Chief Executive of the Department of Corrections also appeals but did not raise any arguments separate to those of the Commissioner.

first respondent G was a returning prisoner for the purposes of the Returning Offenders (Management and Information) Act 2015 (the ROMI Act).[2]

[2] G is a New Zealand citizen who had been living in Australia when convicted on charges of supplying a prohibited drug in commercial quantities, for which he was sentenced to an effective term of eight years' imprisonment on 11 September 2015. This was a little over two months before the enactment of the ROMI Act on 18 November 2015. G was subsequently returned to New Zealand by the Australian authorities on 10 October 2019. Having been advised of that prospect, the Commissioner made a determination that G was a returning prisoner for the purposes of the ROMI Act. When he landed in Wellington, G was served with a determination notice under the Act attaching standard release conditions to which he was automatically subject, together with an application to impose three interim special conditions, which had been filed in the District Court two days prior to his arrival.

[3] In the High Court Gwyn J held that the Commissioner should not have determined that G was a returning prisoner because that amounted to the retrospective imposition of a penalty and double jeopardy, contrary to G's rights under the New Zealand Bill of Rights Act 1990.[3] These consequences, she held, were the result of the Commissioner impermissibly applying the provisions of the ROMI Act.[4] In addition to declaring the determination unlawful, the Judge quashed the Commissioner's decision to make it.[5]

[4] That was sufficient to resolve the proceeding against the Commissioner, but the Judge also concluded that the terms of the ROMI Act obliged the Commissioner to give G the opportunity to be heard before making the determination. This allegation had not been pleaded, but G made submissions to that effect which the Judge upheld, finding that s 27(1) of the Bill of Rights Act had been breached.[6]

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2 *G v Commissioner of Police* [2022] NZHC 3514 [High Court judgment]. G has permanent name suppression by order of the District Court: see *Chief Executive of the Department of Corrections v G* [2020] NZDC 10559 [District Court special conditions judgment]. We have accordingly anonymised his name in this judgment.

3 At [58], [72]–[73], [101] and [111].

4 At [81] and [92].

5 At [156(a)–(b)].

6 At [139]–[140].

[5] The Commissioner claims on appeal that the High Court judgment is affected by errors of law. The second respondent, the Wellington District Court, abides the decision of the Court.

[6] We note that since this appeal was heard, Parliament has passed the Returning Offenders (Management and Information) Amendment Act 2023 (the Amendment Act), which is said to be intended to ensure the continued application of the Act to those whose offending predated the Act's commencement.[7] The Amendment Act expressly provides for the retrospective application of the ROMI Act to persons in G's position, even where that would be inconsistent with other law including the High Court's decision, s 12 of the Legislation Act 2019, ss 6(1) and (2) of the Sentencing Act 2002 and ss 25(g) and 26(2) of the Bill of Rights Act.[8] However, these amendments do not affect the rights of any parties in the present appeal.[9] Accordingly, we consider the appropriate course to follow is to apply the law as it stood prior to the Amendment Act without reference to the Amendment Act. Where it is necessary to set out the ROMI Act, we do so in the form it took prior to the Amendment Act.

Summary

[7] In this judgment, we address the relevant facts including the circumstances in which G was deported from Australia and became subject to a determination by the Commissioner that he was a returning prisoner to whom the ROMI Act applied. We summarise the relevant aspects of the scheme of the ROMI Act and record the reasons the Judge gave for deciding that the Commissioner acted unlawfully in making the determination.

[8] We then address the principal issues that arise for decision:

(a) whether the determination was properly to be considered as the imposition of a penalty;

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7 Returning Offenders (Management and Information) Amendment Bill 2023 (231-1) (explanatory note) at 1.

8 Returning Offenders (Management and Information) Act 2015 [ROMI Act], ss 3A and 3B.

9 Schedule 1, cl 9.

(b) whether the determination amounted to the imposition of an increased penalty (for the purposes of s 6 of the Sentencing Act 2002 or s 25(g) of the Bill of Rights Act) after G was convicted and imprisoned for drug offending in Australia;

(c) whether there was a clear legislative intent that the ROMI Act should apply from the date of its enactment;

(d) whether the Commissioner was obliged to give G an opportunity to be heard before making the determination that he was a returning prisoner for the purposes of the ROMI Act; and

(e) whether the release conditions to which G became subject following the determination (including special conditions imposed by the District Court) were imposed in breach of the Bill of Rights Act.

[9] For the reasons we give we conclude in agreement with the Judge that application of the ROMI Act regime results in the imposition of restrictions in the nature of penalties. But on the other issues we have reached different conclusions from those of the Judge. We do not accept that the determination resulted in the imposition of an increased or second penalty on G. We reject the Judge's conclusion that making the determination was analogous to the imposition of a sentence on G.

[10] We hold further that there was a clear legislative intent that the ROMI Act be applied to all returning prisoners as defined in the Act from the date of its enactment, regardless of when they were convicted and sentenced overseas. We disagree with the Judge's conclusion that the Commissioner was obliged to give G an opportunity to be heard before the determination was made. We hold that the statutory scheme adequately protects the right to natural justice in s 27(1) of the Bill of Rights Act by the opportunity it provides for an application to be made to the Commissioner to review the determination, and by the preservation of the right to make an application for review to the High Court.

[11] Finally, we find that the other rights breaches of which G complained are the consequences of properly construing the ROMI Act. Given this conclusion, the finding the Judge made about the consequential rights breaches falls away.

Relevant facts

[12] There is no dispute of substance about the primary facts.

[13] The Judge found that G immigrated to New Zealand with his parents and two siblings in 1991, when he was five. He became a New Zealand citizen in 1996, then moved to Australia with his family, aged 11 years, in 1997. The rest of G's family remain in Australia.

[14] After a jury trial lasting over eight weeks, G was found guilty on 25 August 2014 on two charges of supplying a large commercial quantity of a prohibited drug contrary to the Drug Misuse and Trafficking Act 1985 (NSW). One charge related to "nexus" tablets and the other to "ecstasy" or MDA tablets. G was remanded in custody and sentenced on 11 September 2015 to what is called an "aggregate sentence of imprisonment" under s 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW). The term of imprisonment was eight years, with a non-parole period of five years and six months. Taking into account pre-sentence custody, the non-parole period would end on the day of his release to be returned to New Zealand, 10 October 2019.[10]

[15] On 25 September 2019 the Australian Border Operations Centre notified the New Zealand Police of G's deportation, stating he would arrive in New Zealand on 10 October 2019.[11] On 26 September a delegate of the Commissioner signed a determination notice under s 19 of the ROMI Act, stating that G had been determined to be a returning prisoner for the purposes of the Act.

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10 See District Court special conditions judgment, above n 2, at [5]. The full term of the sentence would have expired on 10 April 2022.

11 There is an agreed protocol pursuant to which the Australian authorities provide advance notice of deportees about to be returned to New Zealand.

[16] The Chief Executive of the Department of Corrections (the Chief Executive) applied to the District Court for interim special conditions to be applied to G, on 8 October 2019. G arrived at Wellington Airport on 10 October and was served with the determination notice alongside the Chief Executive's application for interim special conditions (which had not at that point been granted by the District Court). The notice read, relevantly, as follows:[12]

> Determination Notice under section 19 of the
> Returning Offenders (Management and Information) Act 2015
>
> To [G]
>
> On Thursday, 10 October 2019 you were removed from Australia under s501 of the Australian Migration Act 1958.
>
> As a consequence of your conviction(s) in Australia and your removal from Australia you are determined to be a "returning prisoner" for the purposes of the Returning Offenders (Management and Information) Act 2015 (the Act).
>
> You will be subject to a 2 Years period of release conditions upon your return to New Zealand starting immediately upon service of this notice. The full set of standard release conditions that will apply to you is at the end of this Determination Notice.
>
> Your qualifying conviction(s) that determine the length of time you will be supervised for are:
>
> 2 x Supply prohibited drug·- Large quantity
>
> 1/ You are required under section 9 of the Act to:
> - tell a constable the address of the place you will be residing at and any address you intend to stay.
> - have your fingerprints and photograph taken by a constable.
>
> Police are authorised to detain you and use reasonable force to take your fingerprints and photograph. It is an offence to fail to comply with a constable's directions exercising powers under section 10 and 11 and an offence to provide false or misleading information. Both of these offences are punishable by a term of Imprisonment for not more than 6 months and/or a fine not exceeding $5,000.
>
> 2/ You may be required to supply a DNA bodily sample to the New Zealand Police.
>
> 3/ As soon as possible, but no later than 72 hours of receiving this determination notice you must report to a probation officer at the Manukau

[12] The remainder of the notice addressed the consequences of breaching the release conditions and specified that G could apply for a review of the Commissioner's determination on grounds matching those set out in s 22(1) of the Returning Offenders (Management and Information) Act, which we set out below at [42].

probation service centre, or another probation service centre as directed - contact details will be given to you.

4/ The Chief Executive of the Department of Corrections may apply to the District Court for one or more special conditions to be imposed on you, and the Court may impose such conditions.

…

[17] Attached to the notice were the standard release conditions. The standard release conditions stated:

Standard release conditions

You must comply with the following standard release conditions:

(a) You must report in person to a probation officer at the Manukau probation service centre, or another probation service centre as directed in the probation area in which you are to reside as soon as practicable, and not later than 72 hours, after the service of this notice; and

(b) You must report to a probation officer as and when required to do so by a probation officer, and must notify the probation officer of your residential address and the nature and place of your employment when asked to do so; and

(c) You must not move to a new residential address in another probation area without the prior written consent of the probation officer; and

(d) If consent is given under paragraph (c) you must report in person to a probation officer in the new probation area in which you are to reside as soon as practicable and not later than 72 hours after your arrival in the new area; and

(e) If you intend to change your residential address within a probation area, you must give the probation officer reasonable notice before moving from your residential address (unless notification is impossible in the circumstances) and you must advise the probation officer of your new address; and

(f) You must not reside at any address at which a probation officer has directed you not to reside; and

(fa) You must not leave or attempt to leave New Zealand without the prior written consent of a probation officer

(fb) You must, if a probation officer direct[s], allow the collection of biometric information

(g) You must not engage, or continue to engage, in any employment or occupation in which the probation officer has directed you not to engage or continue to engage; and

(h) You must not associate with any specified person, or with persons of any specified class, with whom the probation officer has, in writing, directed you not to associate with; and

(i) You must take part in a rehabilitative and re-integrative needs assessment if and when directed to do so by a probation officer.

Special conditions
You must also comply with any special conditions attached to this notice.

[18] As can be seen, the conditions subjected G to controls in relation to his place of residence, the nature of his employment and association with others. He could also be required to take part in rehabilitative and needs assessments.

[19] At the same time G was also served with a databank compulsion notice under the Criminal Investigations (Bodily Samples) Act 1995 (the Bodily Samples Act). The notice required him to give a bodily sample for a DNA profile databank. The notice began with a reference to s 14 of the ROMI Act and recorded that:

(a) G was required to give a bodily sample for a DNA profile databank because he had been convicted in Australia of an offence described as "supply prohibited drug - [l]arge quantity for conduct that constitutes an imprisonable offence in New Zealand";

(b) his conviction would, if entered in a New Zealand court, be a conviction to which pt 3 of the Bodily Samples Act applied; and

(c) his conviction was a ground of his removal or deportation from Australia to New Zealand.

[20] On 22 October 2019 the District Court imposed three interim special conditions sought by the Chief Executive. Then, on 12 June 2020 (by which time the interim conditions had lapsed following various extensions) two special conditions were imposed on G. These required G to undertake any counselling or program as directed by the probation officer with G's agreement, and not to possess, use or consume controlled drugs and/or psychoactive substances, except controlled drugs prescribed by a health professional. Judge Tuohy, who imposed the special conditions, did not consider the third of the interim conditions that had been imposed (that G reside at an address as directed by a probation officer and not move from the address without the prior written approval of a probation officer) to be necessary.[13]

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[13] At [36].

Judge Tuohy considered the standard conditions did all that was necessary to control the address where G would reside.[14]

[21] Judge Tuohy directed that these special conditions expire at the same time as the standard conditions, namely on 9 October 2021.[15]

[22] We turn next to discuss the statutory scheme.

The ROMI Act

[23] The ROMI Act was passed with great urgency. Introduced on 17 November 2015, it completed all its stages on that day and received the Royal assent on 18 November. Section 2 of the Act provided that it came into force on that day.

[24] Section 3 of the Act sets out its purpose as follows:

> The purpose of this Act is to obtain information from returning offenders and establish release conditions for offenders returning to New Zealand following a prison sentence of more than 1 year in an overseas jurisdiction.

[25] Section 5 states that the transitional, savings and related provisions (if any) as set out in sch 1 have effect according to their terms. Although some transitional provisions were later added, cl 1 of the schedule as enacted simply stated that there were no transitional, savings, or related provisions for the Act.

[26] Part 2 of the Act is headed "Returning offenders: management and information". Subpart 1 deals with "returning offenders". This term is defined in s 7 which provides:

> **7 Who is returning offender**
>
> A **returning offender**—
>
> (a) is a person who has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand and, being liable for deportation or

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14 At [34]–[36].
15 At [57].

removal as a result of that conviction, has returned to New Zealand; and

(b) includes a returning prisoner.

[27] Under s 9 the police are empowered "as soon as is reasonably practicable", to request a returning offender to provide identifying particulars.[16] For the purposes of taking the identifying particulars of a returning offender, a constable may detain the offender under s 10(1) on, or at any time within six months after, the offender's return to New Zealand. Reasonable force can be used if necessary to detain the offender.[17] Section 11 provides that a constable may take the identifying particulars of a person detained under s 10 but must do so in a manner that is reasonable in the circumstances, only using reasonable force if necessary to secure the identifying particulars.

[28] The purpose of ss 9 to 11 is stated in s 8. It is "to enable the Police to obtain information that may be used now or in the future by the Police for any lawful purpose". Consistently with this, s 12 states that the particulars provided may be entered, recorded and stored on a police information recording system.[18]

[29] Section 13 of the Act makes failure to comply (after a caution) with the direction of a constable exercising powers under ss 10 or 11 an offence.[19] It is also an offence under the section to provide knowingly false or misleading information.[20] In both cases conviction may result in imprisonment for a term not exceeding six months, a fine not exceeding $5,000, or both.

[30] Sections 14 and 15 relate to the obtaining of bodily samples from returning offenders. Section 14(1) authorises the issue of a databank compulsion notice requiring a returning offender to give a bodily sample if the offender's removal or deportation to New Zealand was because of conviction overseas of an offence for conduct that is an imprisonable offence in New Zealand and that conviction would, if

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16 Section 4(1) provides that the phrase "identifying particulars" has the same meaning as in s 32(5) of the Policing Act 2008. That section defines the phrase as meaning a person's biographical details, photographs or other visual images, and fingerprints, palm-prints or footprints.

17 Section 10(3).

18 Section 12(2) provides for the destruction of identifying particulars obtained in error, such as mistaken identity, or a mistake about whether the person meets the criteria for a returning offender.

19 Section 13(1).

20 Section 13(2).

entered in a New Zealand court, be a conviction to which pt 3 of the Bodily Samples Act applies. Part 3 of that Act applies to offences committed after its commencement, and in some cases before that date.[21]

[31] Section 14(2) of the ROMI Act applies pts 3 to 5 of the Bodily Samples Act to returning offenders with all necessary modifications. Section 15 of the ROMI Act then makes express modifications to the Bodily Samples Act to facilitate its application to returning offenders.

[32] In accordance with these various provisions, subpt 1 of pt 2 of the ROMI Act enables the gathering and retention of various kinds of personal information about returning offenders, who have been convicted in overseas jurisdictions and have, as a consequence, become liable for deportation or removal. Returning prisoners are included in the s 7(1) definition of "returning offender". These provisions collectively fulfil the part of the statement of purpose in s 3 about obtaining information from returning offenders. In broad terms the information gathered from the offenders is information that might have been obtained had their offending occurred and been the subject of convictions entered in New Zealand.

[33] Subpart 2 of pt 2 contains the ROMI Act's provisions about returning prisoners. Section 16 states that a returning prisoner is "a person who has been determined by the Commissioner to be a returning prisoner in accordance with the criteria set out in section 17".

[34] Section 17 provides as follows:

> **17 Criteria for determination that person is returning prisoner**
>
> (1) The Commissioner must determine that a person is a returning prisoner if the Commissioner is satisfied that the person—
>
> (a) has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand; and
>
> (b) has, in respect of that conviction, been sentenced to—
>
> (i) a term of imprisonment of more than 1 year; or

[21] Criminal Investigations (Bodily Samples) Act 1995, s 4(2).

(ii) 2 or more terms of imprisonment that are cumulative, the total term of which is more than 1 year; and

(c) is returning or has returned to New Zealand within 6 months after his or her release from custody during or at the end of the sentence.

(2) In subsection (1), **release from custody** means release from custody in a prison or, if a person is detained in an immigration or other facility following release from prison, release from that facility.

(3) To avoid doubt, a person who is released at the end of a prison sentence and has been in the community for more than 6 months is not a returning prisoner, even though he or she is later detained in an immigration or other facility.

[35] It can be seen that the language of s 17 is obligatory — that is, the Commissioner "must" make the determination if satisfied of the matters set out in paras (a)–(c) of s 17(1). The statute does not prescribe how the Commissioner goes about making the determination. But the Commissioner must make the determination within six months of the relevant person's return to New Zealand.[22]

[36] Section 19 provides for service of a written notice on the person who has been determined to be a returning prisoner. The section is in these terms:

19 Determination notice

(1) The Commissioner must serve a written notice on a person (**P**) who has been determined to be a returning prisoner.

(2) The notice must be served,—

(a) if practicable, on P's return to New Zealand; or

(b) if service on P's return to New Zealand is not practicable, as soon as is reasonably practicable after P's return to New Zealand; but

(c) in any event, not later than 6 months after P's return to New Zealand.

(3) The notice must state the information set out in section 20.

[37] A number of points may be made about s 19(1) and (2). First, the notice is served on a person who "has been determined to be a returning prisoner". Second, the notice must be served "if practicable" on the person's return to New Zealand.

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22 Section 18.

Together, these provisions imply that the decision is intended to be made while the person remains overseas or in transit to New Zealand. It is only where this is not practicable that s 19(2)(b) contemplates service "as soon as is reasonably practicable" after the person's return.

[38] We interpolate here that the evidence before the High Court in this case included a document described as an "Arrangement" executed in October 2018 between the Government of New Zealand (as represented by the Police and Immigration New Zealand) and the Commonwealth of Australia (represented by the Department of Home Affairs, incorporating the Australian Border Force). This had the purpose of providing for "advance notification in respect of proposed removals/deportations and the exchange of personal, criminal history and corrections information … for … use by Approved Agencies …". The police in New Zealand received information about the intention to deport G pursuant to this arrangement.[23]

[39] The idea of service taking place on return is consistent with the legislative policy that returning prisoners are made subject to release conditions that potentially restrict their place of residence and work: these conditions are subject to time limits that apply from the time that the determination notice is served.[24]

[40] Section 20 prescribes the content of the determination notice, stating that it must:

> (a) state that the person named in the notice (**P**) has been determined by the Commissioner to be a returning prisoner for the purposes of this Act; and
>
> (b) state that P is subject to release conditions under this Act; and
>
> (c) state the period for which P is subject to release conditions; and
>
> (d) set out the standard release conditions and any special condition or interim special condition; and

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23 We are not aware whether similar arrangements have been entered into with the governments of other countries, but it is safe to infer that most returning prisoners were anticipated to arrive from Australia, and statements made in Parliament during the legislative process confirm that to be so: see for example (17 November 2015) 740 NZPD at 8032–8033 and 8036–8037.

24 Section 24(1).

(e) state that P must report to a probation officer at a probation service centre within 72 hours of service of the notice; and

(f) provide information about how to contact a probation officer; and

(g) state that P may be required to provide identifying particulars; and

(h) explain P's right under section 22 to apply to the Commissioner for a review of the determination; and

(i) state the grounds on which P may apply for a Commissioner's review; and

(j) state the time limit for applying for a Commissioner's review; and

(k) state that P's release conditions are not suspended on account of a Commissioner's review; and

(l) state that, on the application of the chief executive, a court may impose 1 or more special conditions on P; and

(m) record the date on which the notice is served and the identity of the person who serves it.

[41] These provisions are self-explanatory. It is relevant to note para (d), which provides that the notice must include the standard conditions that apply by operation of the statute, and also any interim special conditions that apply, the latter again consistent with the possibility that arrangements to apply on the person's return will already have been considered. And paras (h) to (j) deal with an application to the Commissioner for a review of the determination. Again, these standard requirements for insertion in the determination notice are consistent with the determination being made in advance of the person's arrival back in New Zealand.

[42] Section 22 deals with review of the determination. It provides:

22 Review of Commissioner's determination

(1) A returning prisoner may apply to the Commissioner to review a determination under section 17 on the ground that—

(a) the returning prisoner does not meet 1 or more of the criteria set out in section 17(1); or

(b) the determination notice incorrectly states the period for which the returning prisoner is subject to release conditions; or

(c) the determination notice was served more than 6 months after a person's return to New Zealand.

(2) The application must be made within 15 working days after service on the returning prisoner of the determination notice.

(3) The review must be a factual inquiry only and must be completed within 20 working days after receipt of the application.

(4) The Commissioner must—

(a) give the applicant a reasonable opportunity to state his or her case before the Commissioner makes a decision; and

(b) confirm, modify, or revoke the determination notice; and

(c) notify the applicant of his or her decision in writing without unreasonable delay.

(5) Nothing in this section affects the right of a returning prisoner to apply for judicial review of the Commissioner's determination under section 17.

[43] It can be seen that there is a limited basis on which an application to the Commissioner to review the determination can be made. And of the three grounds stated only one relates to the substance of the determination: that is, that the returning prisoner does not meet one or more of the criteria in s 17(1). The other two go to the notice itself, and relate respectively to an incorrect statement in the notice of the period for which the release conditions apply, and the time limit for service of the notice. The fact that s 22(3) provides that "the review must be a factual inquiry only", and that the review must be completed in 20 working days, reflects the limited scope of the matters that may be raised on the review.

[44] The express obligation of the Commissioner, in s 22(4)(a), to give those applying for review a reasonable opportunity to be heard and state their case, before the Commissioner makes a decision on the review, is also significant. It may be contrasted with the absence of any such obligation prior to the making of the determination itself. Further, the right to apply for judicial review is expressly not affected by the section.[25] This preserves the ability to challenge the determination in the High Court including the ability to raise issues that might otherwise not able to be advanced because of the narrow scope of the review grounds in s 22(1).

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25 Section 22(5).

[45] We mention next s 23A of the Act. Section 23A(1) requires the Commissioner to revoke a determination that a person is a returning prisoner if, after considering information provided by or on behalf of that person, the Commissioner is satisfied that the overseas conviction which forms the basis of the Commissioner's determination has been overturned, or is the subject of a pardon. Section 23A(2) provides in addition that the "section does not limit any other duty or power of the Commissioner or of a court to amend or revoke the determination".

[46] The consequences of the determination that a person is a returning prisoner are dealt with in the balance of subpt 2 of pt 2. Importantly, s 24(1) provides that a returning prisoner is subject to standard release conditions from the time of service on that person of a determination notice. Section 25(b) enacts that the standard conditions with which the returning prisoner must comply are the standard release conditions set out in s 14(1)(b)–(i) of the Parole Act 2002, "with all necessary modifications". These standard release conditions apply for periods that are differentiated according to the length of the term of imprisonment to which the returning prisoner was subjected in the overseas jurisdiction. This is the result of s 24(2) of the ROMI Act which provides as follows:

> (2) The period for which a returning prisoner is subject to standard release conditions is,—
>
> (a) if the relevant sentence is imprisonment for a term that is more than 1 year but not more than 2 years, 6 months:
>
> (b) if the relevant sentence is imprisonment for a term that is more than 2 years but not more than 5 years, 1 year:
>
> (c) if the relevant sentence is imprisonment for a term that is more than 5 years but is not a sentence of life imprisonment, 2 years:
>
> (d) if the relevant sentence is a sentence of life imprisonment, 5 years.

[47] With respect to subs (2)(a), it will be recalled that if a person has been convicted and sentenced overseas to a term of imprisonment of one year or less, that person is not a returning prisoner because of s 17(1)(b)(i): the qualifying period of imprisonment is a term of more than one year. The six-month period stipulated in s 24(2)(a) has a rough equivalence with the period for which standard release

conditions would apply to a person sentenced in New Zealand for a period of more than 12 months but not more than 24 months, but without the flexibility available to the sentencing court in New Zealand.[26] Under s 24(2)(a) of the ROMI Act the standard release conditions apply automatically for a period of six months from the date of service of the determination notice. A person sentenced in New Zealand to two years imprisonment would be released after one year, and the standard parole conditions would apply until the sentence expiry date one year later.[27] But that period might be reduced in accordance with s 93(2A)(b) of the Sentencing Act, or increased by a period of up to six months after the sentence expiry date.[28]

[48] Similarly, s 24(2)(b) of the ROMI Act provides for application of standard release conditions for an automatic period of one year. Had the person been sentenced in New Zealand, the period for which standard release conditions would apply would depend to some extent on discretionary decisions made by the Parole Board under s 29(2) of the Parole Act. Under s 29(3), the period must be not less than six months, and can extend for no more than six months after the offender's statutory release date. Where the offender is released at the release date of a sentence over two years, the standard release conditions apply for a period of six months from the statutory release date under s 18(2) of the Parole Act. The same provisions under the Parole Act are applicable to persons sentenced in New Zealand to terms of imprisonment of more than five years. There is no equivalent to the two-year rule set out in s 24(2)(c) of the ROMI Act.

[49] In so far as sentences of life imprisonment are concerned, under s 29(4)(b) of the Parole Act, which applies to all indeterminate sentences, the standard release conditions apply for life, unless varied or discharged by the Parole Board under s 58. There is no equivalent to the five-year rule set out in s 24(2)(d) of the ROMI Act.

[50] Overall, it is clear that there was a legislative policy to provide set periods in s 24(2) during which standard release conditions would apply, differentiated according to the length of the sentence imposed by the overseas court. That is no doubt

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26 See Parole Act, ss 29 and 29AA; and Sentencing Act, s 93.
27 Sentencing Act, s 86(1).
28 Section 93(2A)(c).

explicable on the basis that the Parole Board would generally not have the information about returning prisoners (or the details of their offending) on which it could rely to assess the appropriate duration of release conditions that it would have in the case of persons convicted in New Zealand.

[51] The consequence of the rules stated in s 24(2) is that in some cases a returning prisoner might be subject to standard release conditions for a longer period than would apply if the relevant conviction had been entered in New Zealand.

[52] We have earlier set out the standard conditions to which G became subject pursuant to the determination notice. There is no issue that the conditions imposed reflected the standard release conditions contained in s 14(1)(b)–(i) of the Parole Act, with appropriate modifications as contemplated by s 25(b) of the ROMI Act.[29]

[53] In addition to standard release conditions, as has been seen the ROMI Act provided for both interim special conditions, and special conditions to apply for a longer period. The former expire 30 working days after the returning prisoner's return to New Zealand, although they are able to be extended for a "reasonable period" to enable the court to deal with any application by the Chief Executive for the imposition of special conditions to last for longer periods.[30]

[54] Section 26 of the Act deals with special conditions by co-opting s 15(3)(a)–(f) of the Parole Act with any necessary modifications.[31] Section 15(3)(a)–(f) of the Parole Act provides as follows:

> (3) The kinds of conditions that may be imposed as special conditions include, without limitation,—
>
> (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
>
> (ab) residential restrictions:
>
> (b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of

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29 See [17] above.
30 Section 27(6).
31 Section 26(4).

> further offending by the offender through the rehabilitation and reintegration of the offender:
>
> (ba) conditions prohibiting the offender from doing 1 or more of the following:
>
> (i) using (as defined in section 4(1)) a controlled drug:
>
> (ii) using a psychoactive substance:
>
> (iii) consuming alcohol:
>
> (c) conditions that the offender not associate with any person, persons, or class of persons:
>
> (d) conditions requiring the offender to take prescription medication:
>
> (e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:
>
> (f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions or conditions of an extended supervision order, imposed under paragraph (ab) or (e), that relate to the whereabouts of the offender:

[55] As can be seen, these conditions enable more extensive restrictions than in the case of the general conditions including residential restrictions, requirements to participate in programmes preventing the use of drugs and alcohol, non-association, taking prescription medicines and curtailing freedom of movement. There may also be a requirement for electronic monitoring.

[56] Section 31 of the Act makes it an offence to breach release conditions "without reasonable excuse". A person committing that offence is liable on conviction under s 31(2) to imprisonment for a term not exceeding one year or to a fine not exceeding $2,000.

[57] Subpart 3 of pt 2 of the Act contains provisions directed at returning offenders who meet the criteria in s 17(1) for a returning prisoner, except that they are returning to New Zealand more than six months after their release from custody. The provisions apply if a person in that category was, immediately before returning to New Zealand, subject to monitoring, supervision or other conditions of the sentence imposed overseas or "conditions imposed under an order in the nature of an extended

supervision order or public protection order".[32] Where a returning offender is subject to the provisions in subpt 3, the Court may on the application of the Chief Executive impose conditions that are necessary to facilitate the rehabilitation and reintegration of the returning offender; necessary to reduce the risk of reoffending by the returning offender or necessary for both purposes.[33] Section 34 then applies the same regime as is applicable to returning prisoners under ss 26–31.

[58] Subpart 4 of pt 2 of the ROMI Act contains provisions which made amendments to the Parole Act and the Public Safety (Public Protection Orders) Act 2014 which reflect the provisions of subpt 3.

[59] We note finally s 37 of the ROMI Act, which provides as follows:

> **37 Review by select committee**
>
> A select committee to be determined by the Clerk of the House of Representatives must, 18 months after the commencement of this Act, review the operation of this Act and prepare a report on that review.

High Court Judgment

[60] G pleaded five causes of action in the High Court all directed against the Commissioner and relating to the determination and the issue of the determination notice. In the first cause of action, G alleged that on the ROMI Act's proper construction, it should not have carried retrospective effect. G alleged that as his conviction and sentence preceded the Act coming into force, and because the Act was not retrospective, he was not a person to whom the Act applied. The Commissioner had therefore erred in law in making a determination that he was a returning prisoner.

[61] The second cause of action was based on the same reasoning, claiming that in making the determination and issuing the determination notice the Commissioner had taken into account "irrelevant considerations wrongly applicable" to him. Similarly, in the third cause of action, it was said the Commissioner had wrongly failed to take into account a mandatory relevant consideration, applicable to G, namely that he was a person to whom the ROMI Act did not apply. The fourth cause of action, again based

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[32] Extended supervision orders may be made in New Zealand under pt 1A of the Parole Act and Public Protection Orders are made under the Public Safety (Public Protection Orders) Act 2014.

[33] Section 33.

on the same reasoning alleged that the Commissioner had made jurisdictional errors of fact in the exercise of his statutory power to make the determination and issue the notice.

[62] The fifth cause of action alleged that the standard and special release conditions imposed on him breached his rights under the Bill of Rights Act, in particular ss 18 (freedom of movement), 21 (security against unreasonable search and seizure), 22 (liberty of the person), 26 (retroactive penalties and double jeopardy), 27 (right to justice) and 28 (other rights and freedoms not affected). It was said that the Commissioner's exercise of the power to make the determination had caused these consequences.

[63] The Judge considered that the principal issues raised by G's claim were:[34]

(a) Whether the determination resulted in G being subjected to a retrospective penalty.

(b) Whether the determination resulted in G being subjected to double jeopardy.

(c) Whether there is a right to be heard before the Commissioner makes a determination under s 17 that a person is a returning prisoner.

(d) Whether the Commissioner was entitled to accept the propriety of the qualifying overseas conviction, or whether the Commissioner was obliged to inquire into the basis of it.

(e) Whether the standard and special release conditions imposed on G amounted to a breach of the Bill of Rights Act.

[64] The Judge held that the Commissioner had applied the ROMI Act to G retrospectively. Her reasoning included the propositions that:

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[34] High Court Judgment, above n 2, at [42].

(a) The s 17 determination by the Commissioner was analogous to the imposition of a "sentence" for the purposes of s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act.[35] Both provisions affirm the right of an offender, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.[36]

(b) Section 26 of the Bill of Rights Act was also engaged.[37] Here the Judge specifically referred to the proscription in s 26(1) against conviction of an offence for an act or omission which did not constitute an offence under the law of New Zealand at the time it occurred.[38]

(c) The determination amounted to a penalty.[39] She noted that the triggering event for a determination is a criminal conviction; the person concerned is throughout the ROMI Act referred to as an "offender" and "prisoner"; eligibility for the determination depends on the person returning to New Zealand within six months after release from custody; the consequences of the s 17 determination are effectively "a subset of the sanctions" able to be imposed on offenders generally, extending (under s 31) to potential imprisonment for the breach of any of the conditions imposed.[40]

(d) The consequences of the determination, including the returning prisoner's identifying particulars being available to police for an indefinite period could also be described as "extra-curial punishment".[41]

[65] Noting this Court's judgment in *Belcher v Chief Executive of the Department of Corrections* that an extended supervision order (ESO) was a punishment for the

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35 At [58].
36 At [58].
37 At [57].
38 At [59].
39 At [73].
40 At [71].
41 At [72], citing *Bird v Police* [2017] NZHC 1296 at [28]–[29].

purposes of ss 25 and 26 of the Bill of Rights Act, and the Supreme Court's conclusion in *D (SC 31/2019) v New Zealand Police* that registration under the Child Protection (Child Sex Offending Government Agency Registration) Act 2016 (the Registration Act) involved a penalty, she concluded that the s 17 determination should also be so regarded.[42] This on the basis that:[43]

> The consequences of being determined to be a returning prisoner … amount to an ongoing intrusion into all aspects of a person's private life for the duration of the conditions and indefinitely in respect of identifying particulars and bodily samples.

[66] The Judge noted that where the issue of retrospectivity arises in the context of a penal enactment to which s 6 of the Sentencing Act applies, the presumption can be displaced where the legislation is sufficiently clear.[44] She considered the overarching test to be "whether in this case there is a clear [p]arliamentary intention, whether by express words or necessary implication, as to retrospectivity".[45]

[67] The Judge considered that the words used in the ROMI Act were insufficiently clear to give it retrospective effect.[46] She emphasised that the legislation did not expressly state that its provisions would apply in respect of qualifying offences committed, and for which sentence had been imposed, prior to the Act's enactment.[47] Nor was the way in which the qualifying criteria in s 17 of the Act were expressed in the past tense sufficient.[48] Further, the scheme of the Act was insufficiently clear to give it retrospective effect. This included the amendments made to the Parole Act which the Judge considered did not address who could be a returning prisoner for the purposes of the ROMI Act.[49]

[68] The Judge accepted that the legislative history showed that Parliament saw an urgent need to enact legislation to provide a framework for the management of

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42 At [67]–[69] and [71]–[73], citing *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213; and *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).
43 At [72].
44 At [74], citing *D (SC 31/2019) v New Zealand Police*, above n 42, at [75].
45 At [76].
46 At [92].
47 At [78].
48 At [80].
49 At [88]–[92].

returning prisoners, but the question of retrospective application of the legislation had not been directly addressed in the House.[50] Further, the report of the Attorney-General under s 7 of the Bill of Rights Act had apparently proceeded on the basis that the standard and special conditions authorised by the ROMI Act were not of a punitive character. This meant that there was no issue about the application of s 26 of the Bill of Rights Act.[51] The Judge felt able to "surmise" that the report did not consider the application of s 25(g) of the Bill of Rights Act and s 6 of the Sentencing Act because of its conclusion that the conditions were not punitive.[52]

[69] She concluded that the determination amounted to a punishment, with retrospective effect. There was "no clear parliamentary purpose that s 17 should have retrospective effect". In the circumstances, the common law presumption against retrospectivity and s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act, "to the extent they are applicable", meant that s 17 of the ROMI Act did not apply to G. Section 25(g) of the Bill of Rights Act and the principle of legality supported that view.[53]

[70] As a consequence, the Judge quashed the determination.[54]

[71] Although that was sufficient to resolve the first four causes of action in G's claim, the Judge went on to deal with other grounds of review on which G had relied, including those which were not pleaded.[55]

[72] In this part of the judgment the Judge concluded that the determination amounted to a breach of s 26(2) of the Bill of Rights Act, this because the determination was a second punishment, imposed in New Zealand, predicated on the Australian conviction.[56] She rejected arguments advanced by G that the Commissioner had improperly delegated the power to make the determination and

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50 At [96].
51 At [97].
52 At [98].
53 At [101].
54 At [102].
55 At [103].
56 At [107]–[111].

further held that the Commissioner had not been required to investigate the "propriety" of the Australian conviction.[57]

[73] However, she upheld G's argument that he had a right to be heard before the determination was made.[58] The Commissioner was a public authority, and the determination had potentially very important consequences for G.[59] G was not advised of the possibility of the determination being made or given a hearing before it was made. G's right to a hearing, under s 27(1) of the Bill of Rights Act, was therefore breached.[60]

[74] The Judge found that the determination, and consequent imposition of conditions, breached a number of G's other rights because:[61]

(a) it restricted his ability to travel and change residential address, the conditions breached his s 18 right to freedom of movement;

(b) it involved potential requirements that G provide identifying details, bodily samples and biometric information, the determination breached his right to privacy; and

(c) the potential collection of bodily samples and biometric information breached G's s 21 right to be secure against unreasonable search and seizure.

[75] The Judge noted she did not hear from G as to the extent and effect of the rights breaches. A further hearing would be necessary if he wished to pursue a claim for damages.[62]

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57 At [116] and [131]–[132].
58 At [139].
59 At [135] and [137]–[138].
60 At [140].
61 At [151]–[153].
62 At [155].

The appeal

[76] In advancing the appeal, counsel for the Commissioner submitted the principal issue is whether the High Court was correct to hold that s 17 of the ROMI Act did not apply to G. Counsel submitted the Judge erred in concluding that:

(a) the determination amounted to a penalty;

(b) there was a relevant increase in the penalty after G committed the relevant offences in Australia, for the purposes of s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act;

(c) there was no clear legislative intent for s 17 to have retrospective effect and it did not therefore apply to G;

(d) the conditions consequent on the determination breached G's right to be free from double jeopardy under s 26(2) of the Bill of Rights Act;

(e) G's right to a hearing under s 27(1) of the Bill of Rights Act was breached because he was not given an opportunity to be heard before the determination was made; and

(f) the conditions breached G's rights to freedom of movement, privacy and security against unreasonable search and seizure.

[77] Both Mr G and Mr Ewen, as counsel assisting the Court, submitted the Judge correctly determined these issues. We deal with each of the issues below.

Was the determination a penalty?

Submissions

[78] Mr Powell for the Commissioner argued that the High Court was wrong to conclude the determination amounted to a penalty. In developing that argument, he submitted:

(a) The standard and special conditions imposed under the ROMI Act are identical in scope and function to release conditions imposed on offenders convicted and sentenced in New Zealand. They have the function of enabling reintegration of the returning prisoner at the end of punishment in the unusual circumstance of deportation at the end of the sentence served overseas, rather than adding to the sentence.

(b) Unlike the case of ESOs under the Parole Act there could be no home detention as a consequence of the determination, nor detention in a residence for an indefinite period as might be the case with public protection orders (PPOs) made under the Public Safety (Public Protection Orders) Act.

(c) The standard and special release conditions imposed under the ROMI Act apply for a limited period, and may be contrasted with registration orders under the Registration Act addressed in *D (SC 31/2019)*,[63] which can apply for eight years in the case of the least serious qualifying offences (called class ordinary 1 offences), for 15 years in the case of class 2 offences and for life in the case of class 3 offences.[64]

(d) Release conditions including those imposed under the ROMI Act have as their purpose the "normalisation" of the relationship of the offender and the state. The aim is to facilitate rehabilitation and reintegration. Mr Powell submitted this was a further indication they are not penal in nature.

(e) By analogy with the legislative change to release dates discussed in *Morgan v Superintendent, Rimutaka Prison* where parole and release dates were not treated as part of the penalty for the type of offence for which Mr Morgan had been convicted, so here, it was wrong to regard

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63 *D (SC 31/2019) v New Zealand Police*, above n 42.

64 See Child Protection (Child Sex Offending Government Agency Registration) Act 2016, s 35.

the general and special conditions imposed under the ROMI Act as in the nature of a penalty.[65]

[79] Mr Ewen argued to the contrary. He submitted that the Judge correctly applied the indicia of a penalty discussed in this Court's decisions in *Belcher* and *Chisnall v Attorney-General*.[66] In accordance with the latter, what is required is a substance and consequence-based inquiry, rather than looking at matters of form or statutory purpose. The Commissioner's argument based on release conditions serving purposes of rehabilitation and reintegration is beside the point: what matters is whether the ROMI Act involves the imposition of restrictions that have the effect of penalties.[67]

[80] Mr Ewen argued that while ESOs and PPOs are more restrictive that did not mean that conditions imposed under the ROMI Act were not a penalty. In fact, the standard ROMI conditions are more restrictive than the standard conditions which apply when a sentence of supervision is imposed under s 49 of the Sentencing Act: under the former there can be both electronic monitoring and residential restrictions, neither of which apply by default upon a sentence of supervision. Further, the duration of ESOs and/or PPOs is immaterial. If the release conditions constitute a penalty, that is so regardless of duration. Mr Ewen also referred to both *Patterson v R* and *Woods v Police* in which this Court proceeded on the basis that there was a right of appeal under s 244 of the Criminal Procedure Act 2011 (which deals with a convicted person's "right of appeal against sentence"), against an order to vary release conditions under s 94 of the Sentencing Act.[68]

Analysis

[81] Although it appears Parliament's predominant intent was to protect the public, we consider it clear that the release conditions authorised by the ROMI Act are in the nature of penalties. We have earlier referred to the general conditions which the Act directly applies to returning prisoners and the special conditions which can be imposed

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65 *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.

66 *Belcher v Chief Executive of the Department of* Corrections, above n 42; and *Chisnall v Attorney-General* [2021] NZCA 616, [2021] 2 NZLR 484.

67 Citing *Chisnall v Attorney-General*, above n 66, at [155]–[156], [162] and [192].

68 *Patterson v R* [2017] NZCA 66 at [6]; and *Woods v Police* [2019] NZCA 446 at [22]–[27].

by a court under the Act.[69] Both kinds of conditions can result in significant restrictions on rights affirmed by the Bill of Rights Act. As we have noted, breach of the conditions can result in imprisonment under s 31(2). Similarly, the Act empowers the police to take identifying particulars and to detain returning offenders for that purpose.[70] And it is an offence against s 13(1) of the Act to fail to comply with a direction of a constable exercising these powers.

[82] As with ESOs and PPOs, the qualifying characteristic which applies the ROMI Act regime to a person is a conviction. It is not a New Zealand conviction, but a conviction entered in an overseas jurisdiction. It is nevertheless a conviction that triggers the determination from which the restrictions on the returning prisoner follow. In a real sense, those consequences flow from the overseas criminal conviction. As in the case of ESOs, the "triggering event" is a criminal conviction, imposed on an "offender".[71] And the consequences of the determination result in the imposition of release conditions equivalent to those that can be imposed on a person convicted in New Zealand. There can be no suggestion here that a determination notice under the ROMI Act is issued as part of a civil process: the context is criminal, relying on the overseas conviction albeit that the imposition of release conditions is not the result of a conviction entered in New Zealand. The consequential restrictions on rights afforded by the Bill of Rights Act make it difficult to escape the conclusion that the Act's regime involves the imposition of penalties.

[83] We note also that in *Chisnall* this Court rejected a submission advanced by the Crown that the concept of a penalty must invariably involve the goals of retribution and denunciation or punishment, as well as deterrence, and that in the absence of those features there could not be a penalty.[72] Although the Commissioner accepted that the absence of a punitive purpose was not decisive, the Commissioner's argument here is similar: it is said that the purpose of release conditions is rehabilitation and reintegration, and that they do not add to the punishment. However, those objectives

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69 At [46]–[55] above.

70 Sections 10 and 11.

71 Compare *Belcher v Chief Executive of the Department of Corrections*, above n 42, at [47]; and *Chisnall v Attorney-General*, above n 66, at [131] and [154].

72 *Chisnall v Attorney-General*, above n 66, at [132] and [136]–[137], citing *D (SC 31/2019) v New Zealand Police*, above n 42, at [58].

are to be achieved by the imposition of significant restrictions on the rights and freedoms that the returning prisoner would otherwise enjoy once returning to New Zealand from overseas.

[84] For these reasons we are satisfied that the legislative regime involves the imposition of restrictions in the nature of a penalty. The implications of that conclusion in the circumstances of this case however require careful assessment of the issues discussed in the balance of this judgment.

Was there a relevant increase in the penalty since G committed the relevant offences in Australia, for the purposes of s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act?

[85] Section 6 of the Sentencing Act provides as follows:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[86] That provision, relating to convicted offenders, has a parallel in s 25(g) of the Bill of Rights Act. Under s 25(g), everyone charged with an offence has, as one of the enumerated "minimum rights":

> (g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

[87] Both provisions have been said to provide for "benign retrospectivity".[73] In other words, where there has been a reduction in the penalty between the commission of the offence and sentencing, the person to be sentenced has the benefit of the lesser penalty. But that does not apply where there has been an increase in the relevant penalty.

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[73] *R v Pora* [2001] 2 NZLR 37 (CA) at [80] (referring, in the case of s 6, to its predecessor in s 4(1) of the Criminal Justice Act 1985).

[88] It can be seen that both provisions refer to "the commission of the offence" and "sentencing". Although there is no reference to dates, points in time are implicit.

[89] G's offending took place well before the enactment of the ROMI Act. He was sentenced in Australia on 11 September 2015, some two months prior to the ROMI Act coming into force. And, as noted above, G was sentenced in Australia and served five years and six months of that sentence before being deported. On the face of it, there could not be an increase in penalty "between the commission of the offence and sentencing" as a consequence of passage of the ROMI Act. It will be seen that this is an issue which arises quite apart from any issue concerning retrospectivity, because whatever effect the Act might have, it is still necessary to find a relevant increase in penalty between commission of the offence and sentencing.

[90] The Judge recognised this problem. She said that on a "literal approach" neither s 6 nor s 25(g) were directly applicable since the ROMI Act was not enacted between G's conviction and sentencing, but after the sentencing had occurred.[74] The Judge continued:[75]

> However, if the s 17 Determination is regarded as the "sentence" for the purposes of s 6 and s 25, those provisions would directly apply. In my view, the s 17 Determination must be regarded as the "sentence" for this purpose because the imposition of the penalty that the ROMI Act imposes (as I conclude below) occurred only when G returned to New Zealand, not during the sentencing process that took place in Australia. Furthermore, as the Court of Appeal noted in *McDonnell,* the ESO regime is analogous to a sentencing, with the consequence that the rights under ss 24 and 25 of the Bill of Rights that apply to a sentencing apply equally to the ESO process. So too, I consider the ROMI regime to be analogous to the sentencing process, with the consequent protection of ss 6 and 25 applying. In addition, as I conclude below, the Determination engages s 26 of the Bill of Rights.

[91] On this basis, a penalty would arise from the imposition of the release conditions in accordance with the ROMI Act. There would be in effect a second sentencing in respect of G's Australian offending. The question is whether the Judge was correct in that approach.

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74 High Court Judgment, above n 2, at [58], citing *Belcher v Chief Executive of the Department of Corrections*, above n 39, at [55].

75 At [58] (footnotes omitted).

Submissions

[92] Mr Powell submitted first that the Judge was wrong to characterise the "ROMI regime … [as] analogous to the sentencing process", so that s 6 and s 25(g) applied.[76] Relying on this Court's decision in *R v Oran*,[77] he argued in effect that "sentencing" refers to the date on which sentence is passed on a convicted defendant by a judge. As the determination, and consequent application of the ROMI Act regime to G, occurred well after his sentencing in Australia, there was no relevant penalty on which s 6 and s 25(g) could bite.

[93] Even if the determination were considered a relevant penalty for the purposes of s 6 and s 25(g), Mr Powell argued that the High Court was also wrong to consider that the penalty had increased since G offended in Australia. When he offended, he was liable to imprisonment in that country, and would have been subject to release conditions under relevant Australian legislation.[78] Mr Powell submitted that G's potential liability to removal of his residence status in Australia could not be construed as part of the penalty. Following the deportation, G became subject to release conditions under the ROMI Act as opposed to the release conditions which would have applied had he remained in Australia. This should not be seen as a relevant increase in penalty.

[94] We asked Mr Powell to provide material comparing the kinds of parole conditions to which G would have been subject had he remained in New South Wales with the conditions to which he became subject under the ROMI Act. We gave G an opportunity to respond, pointing out any errors that he discerned in the comparative table by the Commissioner. There does appear to be a broad congruence in the conditions that would be applicable in both jurisdictions. We reproduce the table, with minor correction, below as the appendix to this judgment.

[95] G submitted that the comparative table gave an incorrect impression of the maximum, minimum and otherwise mandatory penalties available in the respective

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76 At [58].

77 *R v Oran* (2003) 20 CRNZ 87 (CA).

78 Referring to Crimes (Administration of Sentences) Act 1999 (NSW), pt 6, divisions 1, 2 and 3; and Crimes (Administration of Sentences) Regulation 2014 (NSW), pt 14.

jurisdictions. He pointed out that the conditions in Australia would be controlled by the State Parole Authority and would not be mandatorily imposed. He claimed that in New Zealand under the ROMI Act the conditions "are a matter for the Commissioner of Police" (and not the Parole Board). He submitted that the mandatory imposition of minimum periods in itself made the conditions imposed under the ROMI Act more onerous, resulting in a retrospective increase in penalty.

[96] He also maintained that he had effectively been subjected to two different sets of parole-like conditions: first, in Australia for two years and six months, and then the additional two years of release conditions in New Zealand, together theoretically comprising a period of four years and six months. He said it was therefore not appropriate to compare the two regimes on a discrete basis.

[97] Mr Ewen supported the Judge's conclusion that the Commissioner's determination amounted to a sentence. He submitted that the Judge's approach accords with the generous interpretive approach to be given to the Bill of Rights Act.

[98] Although he did not specifically address whether the determination increased the effective penalty that G was subject to, Mr Ewen agreed that the ROMI Act could result in such an increase. That is because s 17(1)(c) of the Act contemplates that a returning prisoner may have served the entirety of their sentence. In such a case, a returning prisoner subject to release conditions in accordance with the formulae in s 24(2)(b) or (c) of the ROMI Act would be subject to those conditions for longer than the equivalent New Zealand offender, to whom standard release conditions cannot apply for more than six months after the offender's statutory release date.[79]

Analysis

[99] We first address the initial question of whether the making of the determination by the Commissioner may be properly characterised as "sentencing" for the purposes of s 25(g) of the Bill of Rights Act and s 6 of the Sentencing Act.

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[79] Parole Act, s 29(3).

[100] As we have noted, the Judge reasoned that the determination was to be regarded as a sentence with the result that that s 6 could be applied to the application of the ROMI Act. It may be that she took that approach because she was dealing with an application for review of the determination and pleadings that sought to impugn the determination rather than directly raising the compliance of the legislation with the Bill of Rights Act. The Attorney-General was not named as a respondent as would have been appropriate if the pleadings had directly raised that issue. In that case it might for example have been appropriate for the Court to consider making a declaration about the provisions of the Act itself, as was contemplated in *Belcher*, and occurred in *Chisnall*.[80] But the claim was advanced on the basis that the Commissioner had acted unlawfully by applying the provisions of the ROMI Act to G.

[101] Sentencing is a judicial act. As was observed by Winkelmann CJ in *Fitzgerald v R* "[s]entencing for criminal offences is the constitutional role of the third branch of government – the judicial branch".[81] So it is most unusual to characterise action by the executive as constituting a sentence. There may be circumstances in which legislation has the effect of placing members of the executive effectively in a position equivalent to that of a sentencer.[82] However, nothing in the language of the ROMI Act puts the Commissioner in such a position. And in particular it is not possible to describe the Commissioner's action in making a determination under s 17 of the ROMI Act as in any sense equivalent to the imposition of a sentence. Section 17 requires the Commissioner to determine that a person is a returning prisoner if satisfied that the person has a relevant overseas conviction, has in respect of that conviction been sentenced to a term of imprisonment of more than one year, and is returning or has returned to New Zealand. These are factual issues. In making the determination the Commissioner is simply complying with a statutory direction to inquire and make the determination if satisfied the facts exist. We do not consider this to be the imposition of a sentence, or analogous to that. We consider the Judge erred when she decided that it was.

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80 See *Belcher v Chief Executive of the Department of Corrections*, above n 42, at [57]–[59]; and *Chisnall v Attorney-General*, above n 66, at [230].

81 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [117].

82 See for example *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL) at 585 per Lord Steyn.

[102] The nature of the Commissioner's power therefore distinguishes this case from the statutory powers exercised in the cases on which the Judge relied including *D (SC 31/2019)*, *Belcher*, *Chisnall* and *McDonnell v Chief Executive of the Department of Corrections*.[83]

[103] Characterising the determination in this case as equivalent to a sentence was what enabled the Judge to decide that the determination was a penalty for the purposes of s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act. We think the Judge's reasoning was incorrect, even though we agree that the consequence of the scheme of the ROMI Act resulted in the imposition of a penalty. But for reasons we address later, that imposition is the consequence of application of the statutory scheme and not the result of the exercise by the Commissioner of the power to make the determination.

[104] Having concluded that the determination cannot properly be characterised as "sentencing" for the purposes of s 6 and s 25(g) (and nor can those provisions be given the meaning contended for by Mr Ewen), it is not strictly necessary to consider whether there has been an increase in penalty for the purposes of those sections. However, we do so because that question was the subject of argument before this Court.

[105] G's latter submission that he had been effectively subjected to two different sets of release conditions appears to be contrary to the finding made by Judge Toohey that Mr G was released to be returned to New Zealand at the expiry of the non-parole period of his Australian sentence.[84] Moreover even if G had been deported to New Zealand having served five years and six months in prison and then two years and six months on parole in Australia, he would not then have been automatically subject to the standard conditions set out in the ROMI Act. Rather, since his release from custody under that hypothetical would precede his return to New Zealand by more than six months, the provisions in subpt 3 of pt 2 of the Act would apply.[85]

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83 *D (SC 31/2019) v New Zealand Police*, above n 42; *Belcher v Chief Executive of the Department of Corrections*, above n 42; *Chisnall v Attorney-General*, above n 66; and *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770.

84 District Court special conditions judgment, above n 10, at [5].

85 We discuss subpt 3 at [57] above.

[106] We accept that in cases where the returning prisoner has served the full period of a determinate sentence and becomes subject to standard release conditions under s 24(2)(b) or (c) of the ROMI Act, the ROMI Act regime may result in an increase to the effective penalty to which that person is subject. But that is not the case here. As we have noted, G was released having served his non-parole period of five years and six months. He was then subject to release conditions under the ROMI Act which expired on 9 October 2021. That date predates the date on which he would have finished serving the totality of his effective term of eight years' imprisonment in Australia, being 10 April 2022.

[107] We conclude, on the basis of the table submitted by the Commissioner, that any increased penalty as a result of the application of the ROMI Act is likely to have been marginal at the most. It is unclear whether this aspect of the issue was addressed in the High Court; the absence of discussion of it in the judgment suggests it was not addressed by the parties.

[108] We conclude for these reasons that there was no relevant increase in penalty for the purposes of either s 6 of the Sentencing Act or s 25(g) of the Bill of Rights Act. The Commissioner did not sentence G to any penalty, or any increased penalty in respect of his Australian offending.

Has there been a breach of s 26(2) of the Bill of Rights Act?

[109] Our conclusion that the Commissioner did not sentence G to any increased penalty does not however bear on whether there has been a breach of G's s 26(2) right not to be punished again for an offence he has been finally convicted of. Unlike for s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act, the operation of s 26(2) is not confined to the time period between the commission of the offence and sentencing. Moreover, the Commissioner conceded in argument that a penalty for the purposes of s 26(2) need not be imposed by a court.

[110] Our conclusion that the application of the ROMI Act regime to G was in the nature of a penalty means that there has been a breach of s 26(2). But the penalty consists of the substitution of release conditions imposed by the ROMI Act in place of what would have applied had G remained in Australia. And in accordance with our

analysis below, that is the consequence of the clear parliamentary intent that the Act apply retrospectively.

Was there a clear legislative intent that the ROMI Act have retrospective effect and consequently apply to G?

Preliminary observation

[111] Mr Powell conceded in argument that s 17 of the ROMI Act would engage the presumption against retrospectivity if this Court were to conclude that the Act's provisions resulted in the imposition of a penalty. We proceed on that basis.

Submissions for the Commissioner

[112] Mr Powell submitted that even if the determination constituted a retrospective penalty, the High Court erred in holding that s 17 did not apply to G. He submitted that the text of the legislation, its context and the legislative purpose evinced a clear intention to apply the Act to persons who, immediately from its enactment, returned to New Zealand having been convicted and sentenced of a qualifying offence overseas. He argued that intention should displace the presumption articulated in s 6 of the Sentencing Act (against the retrospective application of penalties) and s 12 of the Legislation Act 2019 (providing that legislation does not have retrospective effect).

[113] Mr Powell noted that the Judge had relied on *D (SC 31/2019) v New Zealand Police* and the statement in the judgment of Winkelmann CJ and O'Regan J that where an issue of retrospectivity arises in the context of a penal enactment to which s 6 of the Sentencing Act applies:[86]

> … if it is intended the legislation will impose a greater penalty than that applicable at the time the offence was committed, the legislation needs to be clear to achieve that result.

And later, it was observed that the question which had to be answered was whether:[87]

> … Parliament has signalled, by express words or necessary implication, that the presumption that criminal penalties are not imposed retrospectively has been displaced.

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86 *D (SC 31/2019) v New Zealand Police*, above n 42, at [75].
87 At [81].

[114] Mr Powell contended that an intention to legislate retrospectively can be gathered from the context in which Parliament was legislating if that provides sufficient clarity of its intention. He submitted the degree of certainty required is related to the unfairness caused by retrospective application.[88]

[115] Mr Powell submitted that although there was no explicit statement in the Act providing that s 17 was to have retrospective effect, the text, context and legislative purpose together made it plain that was Parliament's intention.

[116] As to the text, he referred to the words "has been convicted in an overseas jurisdiction" in s 17(1)(a), followed by the words, "has, in respect of that conviction, been sentenced to" a qualifying term of imprisonment, used in s 17(1)(b). The use of the past tense implied the Act applies to persons who had in the past been convicted and sentenced. Mr Powell relied also on the circumstance that Parliament had considered the legislation under urgency because of the anticipated imminent arrival of a significant number of persons deported from Australia.

[117] Mr Powell also placed emphasis on s 37 of the ROMI Act which provided for review of the Act's operation by a committee "18 months after the commencement". Mr Powell noted that if the Act did not apply to people convicted and sentenced prior its coming into force, there would be little data about the Act's operation for the committee to review. Another strand of this argument was that if the Act were only to apply to persons convicted after its enactment, the most serious offenders, deported after being released from long-term sentences which commenced well before the Act came into effect, would be excluded from its operation notwithstanding they would be persons whose need for supervision might be the most pronounced.

[118] Mr Powell said that Parliament's intention was demonstrated by various speeches in the House when the Bill which became the ROMI Act (the ROMI Bill)[89] was being debated which clearly showed that it was contemplated the review would be able to take place on the basis of adequate operational data. More than that, the

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88 Citing *Houghton v Saunders* [2016] NZCA 493, [2017] 2 NZLR 189 at [293] per Randerson and Winkelmann JJ.

89 Returning Offenders (Management and Information) Bill 2015 (98-1).

speeches including that of the Minister introducing the legislation showed that it was intended to be an urgent measure designed to be in place to meet the apprehended imminent increase in the numbers of persons being deported from Australia.

Submissions of G and counsel assisting

[119] Mr Ewen, supported by G, argued that it is plain the text of the ROMI Act does not provide for retrospective effect. The presumption against retrospectivity should apply unless it can be shown that there is a necessary implication to the contrary. Mr Ewen relied on *B v Auckland District Law Society*, a case about legal professional privilege in which it was necessary to consider whether the District Law Society was entitled to require production of documents subject to legal professional privilege for the purpose of an inquiry into allegations of professional misconduct.[90] The relevant provision, s 101(3)(d) of the Law Practitioners Act 1982, did not expressly exclude legal professional privilege. This Court held that it did so by necessary implication. The Privy Council took a different view. In the course of the judgment, delivered by Lord Millett, he observed that:[91]

> Their Lordships are unable to agree. The meaning of the expression "by necessary implication" was authoritatively stated by Lord Hobhouse of Woodborough in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*, which is the most recent English decision on legal professional privilege. He said:
>
> > "A necessary implication is not the same as a reasonable implication … A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

[120] Mr Ewen also relied on Lord Millett's reference to what was said by this Court in *Commissioner of Inland Revenue v West-Walker*, in which a question arose as to whether legal professional privilege could be relied on to withhold information from the Commissioner of Inland Revenue exercising powers under the income tax

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90 *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326.
91 At [58] (citation omitted).

legislation.[92] Lord Millet referred to observations of Gresson J in that case that the relevant enactment was capable of being interpreted on the basis that the privilege had not been abrogated by it and it should therefore be so interpreted.[93] Lord Millet saw merit in asking whether an interpretation of the statute that preserved the privilege would produce a reasonable result, impede the statutory purpose for which production might be required, produce an inconsistency or stultify the statutory purpose.[94] Mr Ewen submitted the same test would be appropriate in any case where it was argued a statute should have retrospective effect. He also relied on the well-known statement of Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* to the effect that fundamental rights cannot be overridden by general or ambiguous words and that, in the absence of express language or necessary implication to the contrary, the courts will presume that even general words are intended to be subject to the basic rights of the individual.[95]

[121] Mr Ewen argued that while the ROMI Act would be "enhanced by retrospective effect", it could not be said that denying it retrospective effect would result in its fundamental frustration or stultification. While the purpose of the Act was to make provision for future returnees, that did not necessarily imply immediacy. The ROMI Act could fulfil its purpose without the implication of retrospective effect. Mr Ewen added that it was significant the ROMI Act had gone through all its stages in one day. He submitted that when Parliament "elects to elide" constitutional and conventional processes for the consideration of legislation, it was not for the courts to "seek to fill the gaps as a means of dealing with inadequate drafting".[96] As it had been put by Lord Nicholls in *B (A Minor) v Director of Public Prosecutions, "*clumsy parliamentary drafting is an insecure basis for finding a necessary implication elsewhere, even in the same statute".[97]

[122] Mr Ewen claimed that the same observation was apt with respect to inadvertence by failure to make express provision for legislation to have a

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92 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA).
93 *B v The Auckland District Law Society*, above n 90, at [59], citing *Commissioner of Inland Revenue v West-Walker*, above n 92, at 213.
94 At [59].
95 *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 115 (HL) at 131.
96 Citing *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449.
97 *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 (HL) at 466.

retrospective effect. He argued that the appeal should fail on the common law test relating to retrospective effect, without the need to consider the implications of the Bill of Rights Act, or s 6 of the Sentencing Act.

[123] Given the Commissioner's reliance on the parliamentary record to demonstrate legislative intent, Mr Ewen addressed argument about the extent to which it was legitimate for the Court to consider the parliamentary materials, especially for the purpose of drawing an inference about intended retrospective intent from the fact that the Act was passed under urgency in the space of one day. Mr Ewen contended that was not an argument that could properly be advanced, as it would amount to a direct contravention of the Parliamentary Privilege Act 2014.

[124] Referring to ss 11 and 13 of that Act and SO 57 of the Standing Orders of the House of Representatives (2000), which deals with urgency, Mr Ewen claimed that drawing any inference from the fact that the House took urgency would directly bring into question "the truth, motive, intention, or good faith" of the Minister's statement on introduction of the ROMI Bill. This he said would be contrary to s 11(a) and (c) of the Parliamentary Privilege Act, and probably subss (d) and (e) as well.[98] Mr Ewen pointed out that under s 10 of the Legislation Act 2019, the Court is directed to ascertain the meaning of legislation "from its text and in the light of its purpose and its context". He contrasted this with s 13 of the Parliamentary Privilege Act which acknowledges that the courts may admit in evidence documents relating to proceedings in Parliament communicated under the House's or a committee's authority, and allow statements, submissions or comments based on such documents. Mr Ewen accepted this allows limited resort to Hansard and parliamentary proceedings, but only for the purpose of ascertaining the meaning of terms and not for their intended purpose. It was wrong, he claimed, to consider these materials for the purpose of ascertaining whether or not Parliament intended the legislation to have retrospective effect.

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[98] Section 11 of the Parliamentary Privilege Act is set out below at [130].

Analysis

[125] If accepted, Mr Ewen's argument about the Parliamentary Privilege Act would restrict the range of materials to which we might have regard to ascertain Parliament's purpose in enacting the ROMI Act. It is therefore appropriate to deal with it before embarking on the interpretative exercise.

Parliamentary Privilege

[126] We start with the Legislation Act. Under s 10(1) of that Act, "[t]he meaning of legislation is to be ascertained from its text and in the light of its purpose and its context." Section 10(2) provides that subs (1) applies whether or not the legislation's purpose is stated in the legislation. These two subsections are a very broad direction by the legislature, acknowledging the role of purpose and context in interpreting the text of legislation, and clearly contemplating that purpose may be ascertained, in an appropriate case, by reference to matters outside the legislative text. It would be odd if those provisions were to be read down so as to limit the extent to which a court might have regard to anything said or done in the parliamentary process which the court considered would help it to arrive at the meaning of legislation.

[127] The jurisprudence of legislative interpretation has developed over recent decades in a way that may be said to have been characterised by a retreat from adherence to the literal meaning of the text considered in isolation, and an increasing readiness to take into account relevant matters of context to ascertain purpose and meaning.[99] This approach is reflected in the observation of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* that:[100]

> In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[128] That statement was endorsed by the Supreme Court in *Shark Enterprises v PauaMAC5*.[101] It shows that the Court's approach to interpretation was already in

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99 See for example Ross Carter *Burrows and Carter Statute Law in New in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 283.

100 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

101 *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [28].

conformity with the approach in s 10 of the soon-to-be-enacted Legislation Act. It may also be noted that the Interpretation Act 1999 provided (less broadly than s 10 was to do) that the meaning of an enactment was to be ascertained "from its text and in the light of its purpose."[102] The Legislation Act's explicit reference to "context" was new, but this change was intended only to reflect the existing approach of the courts.[103]

[129] Section 10 is one of the "general principles of interpretation" stated in pt 2 of the Legislation Act—in fact, it can be seen as the core principle. We think it is inherently unlikely that anything in the Parliamentary Privilege Act was intended to limit the court's ability to refer to matters in the parliamentary record that might assist it to ascertain the proper meaning of the legislation. An examination of the relevant provisions of the Parliamentary Privilege Act on which Mr Ewen relied satisfies us they do not have the effect for which he contended.

[130] Section 11 provides:

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:

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102 Interpretation Act 1999, s 5(1).

103 The explanatory note for the Legislation Bill 2017 (275-1) records that this change was in line with the Law Commission's recommendation in its report which preceded the enactment of the Interpretation Act 1999. The change was omitted from that Act owing to concerns that its inclusion would justify legislative interpretation that departed from Parliament's intended meaning. The explanatory note observes, however, that courts have continued to be informed by internal and extrinsic context; "[i]nterpretation informed by context is thus now, and has perhaps always been, both orthodox and routine": Legislation Bill 2017 (275-1) (explanatory note) at 7; and see Law Commission *A New Interpretation Act: To Avoid "Proxility and Tautology"* (NZLC R17, 1990) at [67]–[73] and [100]–[105].

(d) proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:

(e) resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[131] Section 11 is a restriction about what evidence may be given concerning proceedings in Parliament. It is not a blanket restriction, but one which focuses on the purpose for which the evidence is given. We do not regard reference by a court to matters of parliamentary record for the purpose of ascertaining the meaning of legislation as within the proscribed purposes.

[132] Mr Ewen's argument was founded on the idea that it would be wrong to draw any inference from the fact that the ROMI Act was passed under urgency.

[133] Standing Order 57(1) provides that a minister may move, without notice, a motion to accord urgency to certain business. Standing Order 57(3) requires the minister, on moving the motion, to inform the House with some particularity of the circumstances that warrant the claim for urgency. Mr Ewen contends that seeking to draw any inference from the House taking urgency would directly bring into question "the truth, motive, intention, or good faith" of the Minister's statement, contrary to s 11(a) and (c) (as well, probably, as (d) and (e)).

[134] We do not accept that is so. The fact that the House accorded urgency to business is plain on the record. The provisions of SO 57 mean that there must have been an appropriate motion and explanation. The relevant inference that can be drawn is that the Minister considered there was a problem that needed to be dealt with urgently. Drawing that inference does not breach any of the provisions of s 11(a). Nor do we see room for the application of subs (c). Referring to the urgency issue would not be drawing an inference; it would be recognising a fact. As to subs (d) there is no relevant fact "necessary for, or incidental to, establishing any liability" involved. Nor would the reference to urgency be for any of the purposes set out in subs (e). The fact that Parliament acted under urgency is a relevant part of the context of this case, and can be referred to as part of ascertaining the meaning of the ROMI Act. We do not see this as infringing any of the prohibited purposes in s 11.

[135] That this is a legitimate step for the Court to take is in any event put beyond doubt by s 13 of the Parliamentary Privilege Act. This provides:

> **13 Use of certain documents in interpretation of legislation**
>
> (1) This section applies to proceedings in a court or tribunal so far as those proceedings are for the purpose of ascertaining the meaning of, or the meaning that can be given to, an enactment.
>
> (2) Neither this subpart nor the Bill of Rights 1688 prevents or restricts the court or tribunal only for that purpose—
>
> (a) admitting in evidence (or taking judicial notice of) a document relating to proceedings in Parliament communicated under the House's or a committee's authority; or
>
> (b) allowing the making of statements, submissions, or comments based on that document.

[136] Section 11 is in the same subpt as s 13. So s 13(2) means that s 11 does not prevent or restrict a court admitting in evidence or taking judicial notice of documents relating to proceedings in Parliament, if that is done for the purpose of ascertaining the meaning of an enactment. Mr Ewen sought to argue that s 13 relates only to steps to ascertain the meaning of legislation, as opposed to the purpose of Parliament in passing it. We cannot accept that. It rests on an artificial distinction between the various steps that may be taken to ascertain meaning. Section 10(1) of the Legislation Act requires the Court to look at text, purpose and context. It would be directly contrary to that direction to hold that the Parliamentary Privilege Act prevents reference to Parliament's purpose in enacting legislation while requiring it to consider meaning. It would also be illogical and unworkable. We reject the argument.

[137] We adhere to the position adopted in *Attorney-General v Taylor* in which a similar argument was rejected by this Court.[104] That judgment identified uses to which parliamentary materials have frequently been put in court proceedings, without breaching privilege.[105] These include, pre-eminently, for the purpose of ascertaining what Parliament intended by the words it has used in legislation.[106] This has become a common approach where issues arise about the implications of legislation for rights

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104 See *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [110]–[146].
105 At [113].
106 At [120].

protected under the Bill of Rights Act, and it is necessary to consider the application of ss 4 to 6 of that Act. That is not to question parliamentary proceedings, but rather to better discern what Parliament's intention is.[107] This is squarely in accordance with s 13(1) of the Parliamentary Privilege Act.

[138] The range of parliamentary materials to which resort may be had in ascertaining the meaning of legislation affecting rights protected under the European Convention on Human Rights and the Human Rights Act 1998 (UK) was addressed by Lord Nicholls in *Wilson v First County Trust Ltd (No 2)* who acknowledged that there may be a need to consider in this context "background material" which can inform the court of the nature and extent of a problem the legislature has sought to address in legislation.[108] He explained that the background material might be found in published documents, such as a government white paper, and continued:[109]

> If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

[139] This approach was accepted by this Court in *Taylor* and we endorse it here.[110] We also agree with Lord Nicholls' further statement that it is difficult to see any objection to the court taking into account something said in Parliament when there is no suggestion what was said was the result of improper motives, untrue or misleading and in the absence of any issue about potential legal liability.[111] That seems to us an approach comfortably within the contemplation of ss 12 and 13 of the Parliamentary Privilege Act.

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107 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL) at 638 per Lord Browne-Wilkinson.
108 *Wilson v First County Trust Ltd (No 2)* [2004] UKHL 40, [2004] 1 AC 816 at [64].
109 At [64].
110 *Attorney-General v Taylor*, above n 104, at [126].
111 *Wilson v First County Trust Ltd (No 2)*, at [65].

Parliament's intent

[140] Against the background of that discussion, we turn to the ROMI Act starting with the text. We have already referred to the principal provisions on which the Commissioner relied to argue that Parliament intended the Act to apply to persons returning to New Zealand having been convicted overseas, regardless of the date of their conviction. The purpose of the legislation stated in s 3, the definition of who is a returning offender in s 7 and the suite of measures in the legislation providing for the obtaining and retention of identifying particulars are all provisions which suggest that the Act was intended to apply to all persons returning to New Zealand after enactment of the legislation, regardless of when they were convicted. As do the provisions of the Act which contemplate those persons being subject to standard and special release conditions in accordance respectively with ss 24 and 26 of the Act.

[141] A key pointer to the intention of Parliament is found in the provisions of s 17 of the Act. That section establishes the basis upon which the Act's provisions are applied to returning prisoners. The legislature asks the Commissioner to determine three straightforward factual matters.

[142] There is absolutely no suggestion in the statutory language that it is the Commissioner's role to determine whether the relevant conviction had been entered before enactment of the Act. On the contrary, the language used in s 17, "has been convicted", "has, in respect of that conviction, been sentenced" and "is returning or has returned to New Zealand", strongly suggests that the Commissioner is required to make the factual findings in respect of a person arriving or who has arrived back in New Zealand, regardless of conviction date.

[143] The alternative approach, and the one which found favour with the Judge, would be to read these provisions as if the Commissioner was not required to make the inquiries contemplated by s 17 unless dealing with a person convicted overseas after 18 November 2015 when the Act commenced, having received Royal assent. The consequence of that approach would be to defer the operation of the Act until returning offenders convicted after that date began to arrive back in New Zealand. A most unusual situation would then arise where the point in time at which the ROMI Act

regime would apply to an individual would be determined by the Commissioner. If it was intended that the Commissioner should make the determination only in respect of those convicted after enactment of the legislation, the absence of any direction in s 17 to that effect would be truly remarkable.

[144] We think that is a state of affairs most unlikely to have been what Parliament intended. That is especially so, when those sentenced to lengthy terms of imprisonment overseas, having committed the most serious crimes, would not be subject to the Act: they would constitute a class of serious offenders to whom the Act would never be applied notwithstanding legitimate concerns about the inability to supervise them on their return. And in the case of less serious offending, there would be a substantial number of persons sentenced to terms of imprisonment of a year or more as a result of convictions entered before enactment of the Act who would also not be covered. Achievement of the purpose of the Act, stated in s 3, would be deferred for a potentially significant number of persons returning to New Zealand and meeting the criteria set out in s 17(1).

[145] There was no suggestion this was what was intended in the explanatory note of the ROMI Bill, when it was introduced on 17 November 2015. It would be surprising if Parliament intended the effective operation of the Act to be deferred in this way and there was no suggestion either in the text of the Bill or its explanatory note to that effect.

[146] These considerations are underlined when regard is had to the context in which the legislation was passed. As has been noted, the Act was dealt with under urgency, being introduced on 17 November 2015, and receiving the Royal assent on 18 November 2015, at which point it commenced. The reasons Parliament acted with urgency may be inferred from the fact that the numbers of persons arriving in New Zealand having been deported from Australia were anticipated to increase. The regulatory impact statement (the RIS) prepared on the ROMI Bill by the Ministry of Justice in October 2015 noted that more New Zealanders were returning to New Zealand after committing criminal offences overseas.[112]

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[112] Ministry of Justice *Regulatory Impact Statement: Management of offenders returning to New Zealand* (12 October 2015) at 2–3.

[147] This statement included the following, in a section headed "Status quo and problem definition":[113]

> *More New Zealanders are returning to New Zealand after committing criminal offences overseas*
>
> 5. In recent years, approximately 60 – 100 offenders per year were deported to New Zealand after committing a criminal offence in another jurisdiction. The vast majority (more than 80 percent) of these returning offenders were removed from Australia.
>
> 6. This number is increasing following changes to the Australian Migration Act 1958 which came into force on 12 December 2014. The amendments lowered the threshold for visa cancellation. All non-citizens are now liable for mandatory visa cancellation in Australia if they have been sentenced to 12 months imprisonment or more. The average number of offenders deported from Australia per month has increased from about five per month in previous years to 25 deportations per month since June 2015.
>
> 7. As at 6 August 2015 visa cancellation decisions were pending for 568 New Zealanders and 293 New Zealanders whose visas have been cancelled were still in Australia awaiting removal. Between 5 January 2015 and 29 September 2015 – a period of just under 9 months – 157 offenders had been deported to New Zealand.
>
> 8. These numbers appear to represent an *initial surge in deportations* following the changes to Australia's Migration Act. While volumes will likely remain higher than before the legislative changes, they are expected to decrease from this current peak over time.

[148] Subsequent parts of the RIS outlined the risk posed by retuning offenders to public safety in New Zealand, highlighting that some 70 per cent of those returning had been convicted of serious offending including convictions for assault (30 per cent); armed robbery and burglary (20 per cent); rape or sexual assault (including child sex offences) (15 per cent) and murder and manslaughter (five per cent). The RIS also noted that there was no formal system for supervising or monitoring returning offenders.[114] This shows clearly the problem that the ROMI Bill was intending to address, and why it was apprehended that the issues needed to be taken up urgently. The reference in the RIS to an "initial surge in deportations" is plainly inconsistent with the idea that Parliament would have been intending the legislation to apply only to persons convicted after its enactment. And the fact that the increase in the numbers of those arriving had already begun when the legislation was

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113 At 2–3 (footnote omitted and emphasis added).
114 At 3.

introduced might explain why s 17(1)(c) applied not only to those who were "returning" but also extended to persons who *had* "returned" to New Zealand within six months after release. The fact the legislative net, at the time of commencement, on a plain reading extended to persons already back in New Zealand is a very plain indication that Parliament intended the legislation to have immediate effect. It could only do so if it applied to persons who had been convicted prior to commencement.

[149] In this context it is important to note the Minister's speech on the introduction of the ROMI Bill. She observed that although Australia and other countries had previously deported New Zealanders who had committed crimes abroad, with the recent policy changes in Australia the numbers would increase from between 80 to 100 persons a year to between 250 to 300 a year, with an increased risk to New Zealanders.[115] She noted that in contrast to the normally anticipated period required to draft a Bill of 80 working days, the ROMI Bill had been drafted, "consulted on" and approved by Cabinet in just 12 working days. The "quick turn-round demonstrates the Government's urgency and commitment to protecting New Zealanders". People could be assured that the "Government has done all it could and moved as quickly as possible to get an appropriate oversight regime in place".[116] And she said:[117]

> It is critical that we have in place a regime that can manage and supervise the offenders who do return, many of whom have been convicted of serious offences. The proposed supervision regime as set out in this bill will mean that offenders who arrive in New Zealand shortly after being released from prison will be subject to the same sort of oversight as offenders who have served a similar sentence here. The proposed regime in the bill will apply automatically to returning offenders who are sentenced to more than 1 year in prison in another country, who return to New Zealand within 6 months of their release from custody overseas, and who were imprisoned for behaviour that would be an imprisonable offence under New Zealand law.

[150] She ended by thanking the House for accepting the need to pass the Bill under urgency, noting there was a strong public interest in putting in place appropriate systems to manage the risks posed by returning offenders.[118] The clear tenor of the

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115 (17 November 2015) 710 NZPD 8032.
116 At 8033.
117 At 8032.
118 At 8033.

Minister's remarks is contrary to any suggestion the Act would not have immediate effect including by applying to offenders convicted before its commencement.

[151] Reference should also be made here to s 37 of the ROMI Act, which required that a select committee review the operation of the Act and prepare a report 18 months after its commencement. We accept Mr Powell's submission that it is unlikely Parliament would have provided for a review 18 months after the Act's commencement if its effective operation had been deferred to the extent necessary to confine its application only to those persons convicted after enactment. It is worth noting that when the ROMI Bill was introduced the provision contemplated a review after two years. The proposal on introduction was that the Bill be referred to the Justice and Electoral Committee for the review, which would then present its report to Parliament.[119] In her speech on introduction, the Minister referred to the review, noting that the issues to be canvassed would likely include operational, practical and social matters, as well as legal matters.[120] It seems clear that it was intended that the review take place after there had been experience in the operation of the Act. The review clause was the subject of debate as the measure passed through Parliament, with the opposition suggesting a parallel process, involving introduction of another Bill to be referred to a select committee for the purposes of hearing submissions in accordance with a normal legislative process.[121] Issues could be resolved in that process, and at the end of it the ROMI Act could be repealed and replaced. What was described as this "dual process" was put forward as an alternative to the select committee review proposed in the Bill.[122] In the end, the Government rejected that proposal, the Minister observing:[123]

> My view was that rather than having two parallel processes happening at the same time, the review should occur once we have a period of operation of the legislation. … I am of the view that that review will be a far more useful mechanism.

[152] This emphasises that it was thought that a review after 18 months would take place when there had been meaningful experience about the effect of the Act in

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119 Returning Offenders (Management and Information) Bill 2015 (98-1), cl 37.
120 (17 November 2015) 710 NZPD 8033.
121 See for example at 8035, 8043 and 8068.
122 At 8043.
123 At 8100.

practice. We see this as another indication that it was intended that the Act should apply from its commencement date, including to offenders convicted before that date.

[153] In summary the context in which the ROMI Act was passed, as demonstrated by the parliamentary materials, confirms the conclusion to be reached from the text of the Act, and its purpose, that it was intended to effectively apply from the commencement date.

[154] As we have seen, the Judge concluded that the determination amounted to a punishment, with retrospective effect.[124] Having accepted that Parliament clearly saw an urgent need to legislate, she went on to hold that there was "no clear parliamentary purpose that s 17 should have retrospective effect".[125] Accordingly, she held that s 17 of the ROMI Act did not apply to G. She derived support for that view from the Supreme Court's judgment in *D (SC 31/2019)*, s 25(g) of the Bill of Rights Act and principle of legality.[126]

[155] We do not consider it necessary to deal in detail with the Attorney-General's s 7 report. Apart from any other consideration, the law on what constitutes a penalty has subsequently developed in accordance with the Supreme Court's decision in *D (SC 31/2019*, and this Court's judgment in *Chisnall*.[127] However, it should be noted that the report specifically recorded that the application of standard and special release conditions to returning prisoners would limit their rights to freedom of movement and association, but concluded those limitations to be "demonstrably justified in a free and democratic society".[128] It took a similar approach in respect of the power to obtain identifying particulars: this was "justified by the need to ascertain whether an offender is a returning prisoner", and was "consistent with the right to be secure against unreasonable search and seizure".[129]

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124 High Court judgment, above n 2, at [101].
125 At [96] and [101].
126 At [101].
127 *D (SC 31/2019) v New Zealand Police*, above n 22; *Chisnall v Attorney-General*, above n 37.
128 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* (2015) at [5]. The Attorney-General considered there was no issue under s 26 of the Bill of Rights Act because he did not consider the measures to be punitive: at [20].
129 At [6].

[156] As we have noted above, this is not a case where a declaration of inconsistency with the Bill of Rights Act has been sought. Rather, this case concerns whether the Commissioner may be said to have acted unlawfully by applying the provisions of the ROMI Act to G, specifically by making the determination that G was a returning prisoner. Unless he did act unlawfully, the Judge should not have quashed the determination.

[157] That question turns on the retrospectivity issue. For the reasons we have set out above, we are satisfied that all s 17 required was a factual determination by the Commissioner that G satisfied the criteria set out in s 17(1). We consider that Parliament intended those criteria to apply from the date when the Act came into effect. From then on, there was a statutory direction obliging the Commissioner to determine that a person was a returning prisoner if the statutory criteria were met. That means that the Commissioner's application of s 17 to G (with the consequences that followed under the ROMI Act) cannot be impeached. In these circumstances, we have not found it necessary to embark on a consideration of justification.

[158] These conclusions make it strictly unnecessary to consider in this context the Judge's reliance on *D (SC 31/2019)*, s 6 of the Sentencing Act and s 25(g) of the Bill of Rights Act, and the principle of legality, but we do so in case this matter goes further.

[159] We have already discussed *D (SC 31/2019)* in the course of reaching our conclusion that the ROMI Act regime involves the imposition of restrictions in the nature of a penalty. The Judge placed particular emphasis on the discussion of retrospectivity in the joint judgment of Winkelmann CJ and O'Regan J. The Judges made the point that where the issue of retrospectivity arises in a penal statute to which s 6 of the Sentencing Act applies, there was no need to resort to a *Hansen* analysis.[130] They continued:[131]

> In those cases, even without considering the Bill of Rights, if it is intended the legislation will impose a greater penalty than that applicable at the time the offence was committed, the legislation needs to be clear to achieve that result.

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130 *D (SC 31/2019) v New Zealand Police,* above n 42, at [75], referring to *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

131 At [75].

[160] This was an approach that was said to reflect the common law principle of legality, encapsulated in the well-known statement of Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms*, referenced above.[132] Lord Hoffmann spoke of the need for Parliament to "squarely confront" and "accept the political cost" of legislating contrary to fundamental human rights. He said:[133]

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[161] In *D (SC 31/2019)* the majority of the Supreme Court took the view that the Registration Act was not sufficiently clear to displace the presumption in s 6 of the Sentencing Act that those whose offending pre-dated the coming into force of the Registration Act, and who were convicted after that date, could not be the subject of a registration order.[134] In the present case we have reached a different conclusion about the clarity of Parliament's intention. The absence of words indicating that the legislature was consciously acting in breach of the Bill of Rights Act is not significant for reasons already addressed.

[162] There is an additional point that can be made. The consequence of the statutory regime in the ROMI Act is to subject returning offenders to a regime very similar to that to which they would have been subject if released on parole in Australia, and similar to the regime to which they would have been subject had they been convicted and sentenced in New Zealand. We have addressed above the similarity of the parole regimes in New Zealand and New South Wales. There was no general evidence in this case about the regimes in other countries from which persons have been deported, and there is no basis on which to assume that the result of imposition of the ROMI Act regime would be more onerous for such persons than that to which they might have been subject overseas.

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132 See above at [120].

133 *R v Secretary of State for the Home Department, ex parte Simms*, above n 95, at 131.

134 *D (SC 31/2019) v New Zealand Police,* above n 42, at [77] per Winkelmann CJ and O'Regan J and [159] per Ellen France J.

[163] This must affect the perception of whether the ROMI Act could properly be described as overriding "fundamental rights". Notwithstanding our conclusion that the Act provides for the imposition of restrictions in the nature of a penalty, it must be acknowledged that the restrictions are in substitution for release conditions that would have been in effect overseas. And the collection and retention of identifying particulars and bodily samples are also designed to place the returning offenders in the position they would have been in if processed through the New Zealand criminal justice system. The controls have been imposed in New Zealand in respect of offending and convictions overseas, and have no authority other than that in the ROMI Act, but the context here shows broad, although not exact, equivalence with what would have occurred if persons deported from New South Wales had been subject to the criminal justice system there.

[164] It is in this context that the issue of retrospectivity must be addressed. As a general proposition it has been said that the strength of the presumption against retrospectivity can vary from case to case, depending on the degree of unfairness that would result from giving the particular enactment retrospective effect. The greater the unfairness, the clearer the language required to rebut the presumption.[135]

[165] The proper approach was discussed by Lord Mustill, giving the judgment of the House of Lords in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd*.[136] He referred to the grounding of the presumption in considerations of fairness, and the unfairness which would arise if past conduct, lawful when it occurred was subsequently characterised as criminal, or when there were changes to the national, civil or familial status of individuals. But he expressed reservations about the "reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words".[137] The danger with that approach would be to "confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they

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135 Diggery Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at 268.

136 *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 (HL) at 524.

137 At 524–525.

were the same".[138] This would be misleading; the inquiry in each case should be about fairness. Changing the legal character of a person's actions after the event would often be unfair, and since it can rightly be assumed that Parliament will rarely wish to act in a way that seems unfair, "it is sensible to look very hard at a statute which appears to have this effect, to make sure that … is what Parliament really intended."[139] He continued:[140]

> This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself.

[166] Later, Lord Mustill said:[141]

> Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.

[167] Here the context includes the fact that various provisions of the Bill of Rights Act are engaged. But this is not a case where Parliament has purported to criminalise conduct retrospectively. And although we have accepted that the ROMI Act involves the imposition of restrictions in the nature of a penalty is it hard to characterise its effect as amounting to the imposition of a second penalty or an increased penalty, except, as we have noted above, in cases where the returning prisoner has served the full period of a determinate sentence and becomes subject to standard release conditions under s 24(2)(b) or (c). But that is not the case here. And generally, it is more accurate to describe the effect of the ROMI Act as the replacement of the

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138 At 525.
139 At 525.
140 At 525.
141 At 525.

applicable overseas release conditions with conditions based on the New Zealand parole regime.

[168] The other relevant elements of the context, as discussed, include the clear intention of Parliament that emerges from the statutory scheme, its text and purpose and the context and circumstances of the legislation's enactment. That clarity runs counter to application of the presumption against retrospectivity, whether derived from statute or the common law. In the circumstances, the absence of express reference in the statute to the Bill of Rights Act does not alter that view.[142] We do not consider there is unfairness in applying the statute to persons whose convictions overseas predated its enactment.

[169] For these reasons we have concluded that the appeal against the setting aside of the Commissioner's determination must be allowed.

Breach of natural justice

[170] We summarised the Judge's reasoning on this part of the case above.[143] In essence, the Judge held that the seriousness of the determination's consequences for G meant that he should have been heard before it was made. In the absence of a hearing, his right to natural justice affirmed by s 27(1) of the Bill of Rights Act had been breached.

[171] Ms McGlone for the Commissioner submitted that the contents of the right to natural justice are not rigid or prescribed but vary with context. Here, that included a legal and factual context as well as procedural protections contained in the ROMI Act, together with the nature of the decision and power being exercised.

[172] She accepted that s 27 of the Bill of Rights Act applied to s 17 determinations, as the High Court found. The question was how natural justice was to be given effect to in the light of the statutory scheme. Essentially, Ms McGlone argued that the Commissioner was obliged by s 17 to make a determination, if the statutory criteria were met. Following the determination, s 19(2) provided that the Commissioner must

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142 Compare *R v Pora*, above n 73, at [116].
143 Above at [73].

serve written notice on a person determined to be a returning prisoner "if practicable, on [their] return to New Zealand". If service on return is not practicable, the section directs that it must take place as soon as is reasonably practicable after return, and in no case later than six months after return.

[173] Another important feature of the statutory scheme emphasised by Ms McGlone is the right to review the s 17 determination. As noted earlier, a returning prisoner may apply to the Commissioner to review the determination that has been made under s 17 on grounds that: the returning prisoner does not meet one or more of the criteria set out in s 17(1); the determination notice incorrectly states the period for which returning prisoners are subject to release conditions; or the determination notice was served more than six months after a person's return to New Zealand.[144] The right to seek a review by the Commissioner is in addition to the right to make an application for judicial review of the Commissioner's determination, which is specifically preserved by s 22(5).

[174] Ms McGlone argued that the statutory scheme excludes the right to be heard prior to the determination. Instead, the opportunity is given to challenge the determination after it is made but it is to be a limited factual inquiry as to satisfaction of the s 17(1) criteria. The inquiry does not reach examining the correctness of the overseas conviction or the consequences of the determination on the returning person. Ms McGlone also pointed out that delaying the s 17 determination to the point where the returning prisoner had been given an opportunity to be heard would risk undermining the statutory purposes of public safety and rehabilitation by delaying the imposition of conditions on arrival. There would be an inconsistency between such a requirement and the provisions of s 19 requiring the Commissioner to serve notice on the returning prisoner on their return, or as soon as practicable afterwards.

[175] Ms McGlone submitted that given the overall statutory scheme, reading in an additional requirement to hear the returning prisoner before making the s 17 determination would be inappropriate, and not required to achieve fairness and vindicate the right protected by s 27(1) of the Bill of Rights Act.

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144 Section 22(1).

[176] G endeavoured to uphold the Judge's reasoning, but Mr Ewen accepted that the determination turns on a purely factual assessment by the Commissioner. His argument on this issue was confined to the proposition that there was an issue as to whether the Commissioner was empowered to embark on the exercise of the statutory power or function without asking whether the statute authorises the determination to be made at all: proceeding without making that inquiry was an error of law. But he conceded that argument added little to the argument about retrospectivity.

[177] We are satisfied that the scheme of the ROMI Act is inconsistent with the suggestion that the Commissioner was obliged to give returning prisoners an opportunity to be heard before making the s 17 determination. We say that given the following features of the regime:

(a) the narrow nature of the inquiry to which the Commissioner is put by s 17(1);

(b) the Commissioner's obligation to serve a determination notice "if practicable" on the person's return to New Zealand, or as soon thereafter as is reasonably practicable and in any event no later than six months after their return;[145] and

(c) the contents of the determination notice, which are extensive and are required to include the fact of the determination having been made, and state that as a consequence the returning person is subject to release conditions under the Act.[146]

We consider it clear that the legislation envisages the determination being made in sufficient time to serve the notice (wherever practicable) on the person's return to New Zealand. This is inconsistent with any process other than the limited factual inquiry which the Commissioner is directed to make.

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145 Section 19(2).
146 Section 20.

[178] The determination notice is required, amongst other things, to explain the right under s 22(1) to apply to the Commissioner for a review of the determination. In effect, this confers a right of hearing in relation to the determination, albeit after the determination has been made. The grounds on which an application for review of the determination may be made to the Commissioner are limited by s 22(1), but they relate to precisely the same matters that would have been relevant to a right to be heard under s 17(1).

[179] Section 22(4)(a) specifically requires the Commissioner, in dealing with the review, to give applicants a reasonable opportunity to state their case before a decision is made. In this way, the right to justice set out in s 27(1) of the Bill of Rights Act is effectively provided. And there is the potentially broader right to apply to the High Court for judicial review, preserved in accordance with s 22(5) of the ROMI Act, and s 27(2) of the Bill of Rights Act.

[180] It is also worth emphasising that the ROMI Act contemplates that the standard release conditions will apply to returning prisoners as soon as they return to New Zealand.[147] It does so, because of Parliament's perception of what is necessary to provide appropriately for public safety.

[181] For these reasons, we would allow the Commissioner's appeal on this aspect of the case as well.

Other rights said to be infringed by the ROMI Act

[182] As we noted earlier the Judge found that the determination and consequent imposition of conditions on G had affected a number of G's rights beyond those concerning retrospectivity and natural justice.[148] The rights affected were G's rights to freedom of movement, privacy and security against unreasonable search and seizure. This was in the context of G's fifth cause of action. Because she had not received evidence about the extent and effect of the infringements, or submissions on

147 Sections 24(1) and 19(2).
148 Above at [74].

damages, the Judge said that if G wished to pursue a claim for damages that would require a further hearing.[149]

[183] The Commissioner appeals against the Judge's findings that the conditions imposed breached G's rights to freedom of movement and security against unreasonable search and seizure. The Commissioner's submission appears to be that this section of the High Court judgment should be read as simply reflecting its conclusion that the rights infringements caused by the application of the ROMI Act to G were not "prescribed by law" for the purposes of s 5 of the Bill of Rights Act (because the Act did not, properly construed, apply to offenders who were convicted prior to the Act's commencement).

[184] We agree that the findings that G's rights to freedom of movement and security against unreasonable search and seizure were breached must be read in light of the earlier conclusion that the ROMI Act should not have been applied to G. The Judge does not appear to be suggesting that a person's rights would be breached in an unjustified manner even in circumstances where their offending occurred after the Act's commencement. That is understandable given, as we have noted, in his pleadings, G did not directly raise the compliance of the legislation with the Bill of Rights Act, but sought to impugn the determination to which he was subject. And the question of justification was not addressed before the High Court (just as it was not before this Court).

[185] We have already determined that the ROMI Act regime was properly applied to G. We do not consider the determination was made unlawfully. The breaches of rights of which G complains are inevitable consequences of the statute, properly construed. Given our finding, the argument about the consequential rights breaches falls away.

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[149] High Court judgment, above n 2, at [155]. It is unclear to why the Judge thought it was appropriate to allow G the right to call evidence at a later date. The claim as pleaded sought compensation in the sum of $500,000.

Other matters

[186] If the Commissioner seeks costs a memorandum may be filed within 10 working days. G may have a further 10 working days to respond. Memoranda should not exceed five pages. In the meantime, we reserve questions of costs.

[187] Finally, we record our gratitude for the assistance we received from Mr Ewen as counsel assisting the Court.

Result

[188] The appeal is allowed.

[189] The decision of the High Court quashing the determination of the Commissioner that G was a returning prisoner under s 17(1) of the ROMI Act is set aside.

[190] The order made by the High Court that the Commissioner pay reasonable disbursements to G is set aside.

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Appendix

COMPARISON TABLE: PAROLE CONDITIONS (NEW SOUTH WALES) AND ROMI ACT CONDITIONS

Parole conditions in New South Wales: Crimes (Administration of Sentences) Act 1999, pt 6 and Crimes (Administration of Sentences) Regulation 2014), pt 14	**Conditions under the Returning Offender (Information and Management) Act 2015**
<u>Key</u>: Plain text: standard conditions, provided in s 214 of the Act Italics: supervision conditions, provided in reg 214A of the Regulation, which apply as a condition of a parole order (s 128C of the Act unless there are exceptional circumstances, in s 128D)	**<u>Key</u>:** Plain text: standard conditions, provided in s 25 ROMI Act 2015 Italics: special conditions, imposed by court per s 26 ROMI Act and by reference to s 15 Parole Act 2002, and interim special conditions per s 27 ROMI Act
Must be of good behaviour on parole: s 214(1)(a)	
Must not commit any offence on parole: s 214(1)(b)	
Must adapt to "normal lawful community life" on parole: s 214(1)(c)	
On release, report to a community corrections officer: reg 214A(1)(a)	Report to probation officer (**PO**) as soon as possible in 72 hours following service of determination notice on them: ROMI Act, s 25(a)
Must report to a community corrections officer at times and places they direct: reg 214A(1)(b)	Must report to PO as/when required: Parole Act, s 14(1)(b)
Must comply with community corrections' directions as to	
Place of residence: reg 214A(1)(c)(i)	Must notify PO of residential address when asked: Parole Act, s 14(1)(b)
	Must notify PO of change of residential address with reasonable notice: s 14(1)(e)
	Must not reside at any address a PO has directed them not to reside at: s 14(1)(f)
	Further residential restrictions including conditions to reside at a certain place: Parole Act, s 15(3)(a)-(ab) and conditions to remain there if residential conditions are imposed by the Board: s 15(3A)
Participate in programmes, treatment, interventions etc: reg 214A(1)(c)(ii)	*Conditions requiring offender to participate in a programme reg 214A(l)(c)(ii) to reduce further offending: s 15(1)(3)(b)*

Participate in employment, education, training etc: reg 214A(1)(c)(iii)	Must notify a PO of nature and place of employment when asked: Parole Act, s 14(1)(b)
	Must not engage in any employment or occupation the PO has directed they discontinue or not take up: s 14(1)(g)
Non-association conditions—as to people and attending certain places: reg 214A(1)(c)(v) and (vi)	Must not associate with certain persons or classes of persons prohibited by a PO: s 14(1)(h)
Ceasing drug and/or alcohol use: reg 214A(1)(c)(vii)–(ix)	*Must not use controlled drugs, psychoactive substances, or consume alcohol: s 15(3)(ba)*
Requirements for the purposes of monitoring compliance with the parole order: reg 214A(1)(c)(x)	
To give consent to third parties providing information to a community corrections officer about compliance with order: reg 214A(1)(c)(xi)	
Comply with other reasonable directions of community corrections officer; allow them to attend at place of residence: reg 214A(1)(c)–(d)	
Notify community corrections of any change to his or her place of residence, contact details or employment: reg 214A(1)(f)	
Not to leave New South Wales without permission of a community corrections manager: reg 214A(1)(g)	
Not to leave Australia without the Parole Authority's permission: reg 214A(1)(h)	Must not attempt to leave New Zealand without written consent: s 14(1)(fa)
	Electronic monitoring conditions may be imposed to monitor compliance with other conditions as to restrictions on residence and visiting places relating to offender's whereabouts: s 15(3)(f)
	Interim special conditions may be imposed on returning offenders with certain qualifying sexual or violent offenders (for purpose of pt 1A Parole Act): ROMI Act, s 27
	Must, if PO directs, allow collection of biometric information: s 14(1)(fb)
	Conditions on finances or earnings: s 15(3)(a)
	Conditions requiring taking certain prescribed medications: ss 15(3)(d); 15(4), 15(5)

Offenders subject to a supervision condition and serving a sentence for a serious sex offence, in addition must: *Reg 214A(1A)(a): submit a schedule of proposed activities for approval.* *(b): submit to electronic monitoring.* *(c): comply with all reasonable directions of a community corrections officer or EM officer in relation to electronic monitoring;* *(d): not remove or tamper with, damage or disable the EM monitoring equipment* *Reg 214A(2)–(4): periods of supervision under a supervision condition imposed on a parole order (applicable to all offenders who are subject to supervision conditions):* *(2): unless the Act applies to the offender because of s 40(4) of the Children (Detention Centres) Act 1987, the lesser of three years or the period the parole order is in force; or* *(3) in the case of serious offenders, the Parole Authority may extend by, or impose a further period of supervision of, up to three years at a time*	