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ARTICLE

A Get-Out-of-Jail-Free Card: Discharge Without Conviction in New Zealand

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A discharge without conviction is a sentencing option that is available to an offender who has pleaded or been found guilty. The offender is not convicted, and so can present himself or herself as never having committed the offence. Discharges are available because people make mistakes. Sometimes the potentially severe and far-reaching consequences of a conviction would be disproportionate to the mistake. A discharge is a second chance—a judicial concession to an offender who both needs and deserves it. A major problem with the discharge procedure is the apparent inequality that arises from the focus on individual consequences. Discharges appear to create a class of special persons who are more likely to receive the sentence: those who come to court with opportunity.

This article argues that Parliament should amend the Sentencing Act 2002 to empower judges to grant conditional as well as absolute discharges. A conditional discharge requires a specified period of good behaviour during which no further offences can be committed. If the offender reoffends within that period, he or she is re-sentenced for the original offence. This article argues that a conditional discharge better reflects the second chance rationale of a discharge without conviction. It better provides for young first-time offenders, addresses the issue of inequality by shifting the fundamental focus of the discharge power, and satisfies many of the purposes and principles of sentencing.

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I Introduction

To err is human, to forgive, divine.

—Alexander Pope[1]

People make mistakes; it is part of being human. Most mistakes do not have serious consequences. However, some mistakes lead to criminal charges being laid, which can lead to a criminal conviction. A conviction can have severe and far-reaching consequences. Where these consequences are sufficiently disproportionate to the offence committed, Parliament has made available a sentence that allows the offender to leave the criminal justice system without a conviction: a discharge without conviction.[2]

A discharge allows the court to forgive the offender and let him or her continue life unencumbered by a conviction. It is the least restrictive sentence that may be imposed.[3] A discharge is, in a sense, a *get-out-of-jail-free card*,[4] as the offender avoids punishment for conduct which was accepted to be against the law and has no continuing obligation to disclose the fact of the offending. On average, over the last decade, 9,500 cases per year (around 9 per cent) resulted in discharge or diversion.[5] Discharges are common across the country for a wide range of offences.

The sentencing court's power to grant a discharge is currently manifested in s 106 of the Sentencing Act 2002. This section confers a discretion on the court to discharge an offender who has pleaded or been found guilty.[6] Section 107 provides guidance as to how the discretion should be exercised.

A major problem with the current discharge power is that it appears to operate unequally in practice. It seems to benefit those who come before the court with opportunity and to discriminate against those who do not. This article argues that this apparent inequality is real and, in fact, inherent in the way the discharge power is currently formulated.

A discharge in New Zealand is absolute. Once it has been granted, that is the end of the matter. This article proposes an alternative model—namely, conditional discharge—as a way of addressing the inequality that appears to be inherent in the discharge power. This article argues that the Sentencing Act should be amended to empower the courts to grant conditional discharges.

An offender who is conditionally discharged would be required to refrain from committing any further criminal offences for a specified time. It is, in essence, a good behaviour period. If the offender successfully completes this period without further offending, the discharge becomes absolute. However, if the offender reoffends, he or

1 Alexander Pope *An Essay on Criticism* (R Urie, Glasgow, 1754) at line 525.

2 Sentencing Act 2002, s 106. "Discharge" could also refer to conviction and discharge under s 108 of the Sentencing Act, which is commonly used where the offender has a criminal record, but the offence is not considered serious enough to deserve punishment. Throughout this article, "discharge" will refer only to a discharge without conviction.

3 Section 10A(2).

4 But not literally, as it will almost always be an alternative to a non-custodial sentence.

5 "Adults prosecuted in court—most serious offence calendar year" (October 2016) NZ.Stat <www.nzdotstat.stats.govt.nz>. Diversion is a police initiative similar to discharge whereby the prosecution offers no proof and the case is withdrawn subject to the offender meeting certain conditions. See New Zealand Police "Adult diversion scheme policy" (January 2016) <www.police.govt.nz>.

6 Sentencing Act, s 106(1).

she becomes liable to be resentenced for the original offence. The discharge is thus conditional on the offender showing that he or she made a one-off mistake and is not likely to repeat it.

This article is structured as follows. Part II sets out the relevant legislation, discusses the theory behind discharges and considers several sentencing options similar to discharge. Part III examines how the current discharge power operates by reference to relevant case law. Part IV addresses the apparent inequality in the discharge power and argues that this inequality is inherent in the current formulation of the power. Part V sets out the conditional discharge model, discusses the rationale behind the conditional discharge model and considers how the model could operate in practice. The article concludes that the Sentencing Act should be amended to include a conditional discharge power.

II Legislation, Theory and Sentencing Options

A *Legislation*

Section 106 of the Sentencing Act sets out the sentencing court's discretion to discharge an offender who has pleaded or been found guilty:[7]

> **106 Discharge without conviction**
>
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
>
> (2) A discharge under this section is deemed to be an acquittal.
>
> (3) A court discharging an offender under this section may—
>
> (a) make an order for payment of costs or the restitution of any property; or
>
> (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
>
> (i) loss of, or damage to, property; or
>
> (ii) emotional harm; or
>
> (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:
>
> (c) make any order that the court is required to make on conviction.
>
> (3A) Sections 32 to 38A apply, with any necessary modifications, to an order under subsection (3)(b) as they apply to a sentence of reparation.
>
> …
>
> (5) Despite subsection (3)(b), the court must not order the payment of compensation in respect of any consequential loss or damage described in subsection (3)(b)(iii) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001

7 This test was largely based on s 19 of the Criminal Justice Act 1985, which was in turn based on s 42 of the Criminal Justice Act 1954. Note that s 106(4) was repealed by s 12(2) of the Sentencing Amendment Act 2011.

The term "minimum sentence" in s 106(1) replaced "minimum penalty" in the previous legislation,[8] as "penalty" includes an order (such as disqualification from holding a driver licence[9] or forfeiture of a motor vehicle[10]) whereas "sentence" does not.[11]

Section 107 provides guidance as to how the discharge power is to be exercised:

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

This imposes a mandatory balancing exercise—a proportionality test—which must be met before considering the s 106 discretion. This test is a matter of judicial assessment rather than discretion.[12] The court must weigh the "direct and indirect consequences of a conviction" against the "gravity of the offence". It is only once the court is satisfied that the consequences are "out of all proportion" to the offence that it may consider whether to grant a discharge or not. The meaning and operation of each of these phrases will be examined throughout this article.

B *Theoretical basis*

The primary reason for discharges is that people make mistakes. A discharge forgives the offender for the mistake and gives him or her a second chance. It is a judicial concession to deserving individuals. It ensures that a conviction does not ruin the offender's prospects, by allowing him or her to continue life unencumbered by a criminal record. It acknowledges that the offence has been committed, but declines to make this a matter of public record.

This rationale is in direct conflict with the public interest in sanctioning those who commit crimes. The criminal law is a powerful tool for societal regulation: it governs how citizens may act and interact with each other. Thus, where citizens fail to abide by those rules, there is public interest in punishing those offending citizens. However, a discharge effectively allows an offender to avoid punishment.[13] When an offender is convicted, the conviction is punishment in and of itself. A discharge allows the offender to avoid a conviction altogether.

It is clear that the decision to grant a discharge requires a balancing exercise. Regarding an analogous discharge power in the United Kingdom, Lord Hoffman commented: "In deciding whether or not to impose punishment, the most important consideration would be whether it would do more harm than good."[14] The court must

8 Criminal Justice Act 1985, s 19.

9 *Police v Wise* [1987] 1 NZLR 290 (CA).

10 *R v Eteveneaux* (1999) 16 CRNZ 601 (CA).

11 (18 April 2002) 599 NZPD 15656–15657; and Sentencing and Parole Reform Bill 2002 (148-2) at 21. See also *Police v Stewart* (2004) 22 CRNZ 35 (HC) at [30]–[34]; *Waight v Police* HC Auckland CRI-2006-404-465, 24 May 2007; *Neason v Police* HC Dunedin CRI-2004-412-49, 17 March 2005; and Robert Lithgow "Discharge Without Conviction and Drink/Drive" [2004] NZLJ 27. In *Neason*, the Judge decided that the consequence of conviction (not being able to obtain a limited licence—a penalty, but not a sentence) could be taken into account.

12 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [25]–[41].

13 However, this may be qualified by any order imposed under s 106(3) of the Sentencing Act.

14 *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856 at [34].

look at how serious the offending was (the gravity of the offence), what harms would result from a conviction being entered (the consequences of a conviction) and whether entering a conviction would do more harm than good (the proportionality of the consequences of a conviction to the gravity of the offence). In short, the court must decide whether the offender both *requires* and *deserves* a second chance.

This individualised assessment results in an inherent tension between the need to consider each case individually on its merits, and the desire for consistency and parity in sentencing. As Tipping J notes in *Mathias v Police*:[15]

> Such a tension and the difficulties inherent in it are a familiar part of the judicial process. No preconceived policy should preclude a careful appraisal of the individual circumstances, yet on the other hand the discretion must be exercised in a manner which is as consistent as possible with its exercise in like cases. A reconciliation of these two factors can often be difficult.

Judges are well aware of this tension, and difficulty should never be an excuse. Two factors assist them here. First, a clear framework for considering and discussing discharge applications improves consistency and ensures a level of parity in sentencing. Secondly, there must be avenues of appeal available to rectify incorrect decisions. The courts have determined that the proportionality test is a judicial assessment rather than a proper exercise of discretion.[16] This means that the normal appellate principles apply.[17] The importance of this should not be understated—it means that an appellant does not need to meet the more onerous test of appealing the exercise of a discretion.[18]

It is crucial that sentencing judges are transparent in their reasoning and articulate the reasons for their decisions as clearly as possible, both for the clear operation of the framework and for appeal purposes. This expectation should be borne in mind throughout the rest of this article.

C *Other outcomes*

Before looking more closely at the discharge power, this article will briefly outline the other ways with which an offender may be dealt. Some of these processes bear similarities with either the current discharge power or the proposed conditional discharge model. These similarities can provide some assistance in understanding the principles that underpin both models. The processes that will be examined are: pre-charge warnings; diversions; indications of discharge; conviction and discharge; and orders to come up for sentence if called upon.

(1) Pre-charge warning

A pre-charge warning is a formal warning given after arrest for a relatively minor offence.[19] It particularly targets intoxicated or first-time offenders. It is not a conviction and will not show up in police vetting procedures, but it remains on police records.

15 *Mathias v Police* HC Dunedin AP38/89, 19 May 1989 at 4–5.
16 *Hughes*, above n 12.
17 See *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
18 *May v May* (1982) 1 NZFLR 165 (CA) at 170.
19 See New Zealand Police "Policing Fact Sheet: Pre-Charge Warnings" (July 2013) <www.police.govt.nz>.

Common offences that are dealt with by way of pre-charge warnings include breaches of liquor bans, disorderly conduct and possession of cannabis. In practice, only the most minor cases will be halted at the pre-charge warning stage.

(2) Diversion

If the offending is sufficiently serious for a charge to be laid, the offender may be considered for the Police Adult Diversion Scheme. Diversion was introduced in 1987 as an initiative aimed at resolving appropriate cases through means other than the formal criminal justice system.[20] It was initially designed to give first-time offenders a chance to avoid conviction but has since expanded to encompass any offender who meets the prescribed diversion criteria. Diversion is appropriate in cases where there is sufficient public interest in a charge being laid, but not in the offender being convicted.

The primary objectives of diversion are reparation and rehabilitation.[21] It is a way of holding the offender accountable and satisfying the interests of the victim, without subjecting the offender to the full court process. An offender who is accepted into the diversion programme will be expected to comply with certain conditions. Once the diversion officer is satisfied that these conditions are completed, the police will offer no evidence for the prosecution and the charge will be either withdrawn or dismissed.

The conditions with which the offender will be required to comply are at the discretion of the diversion officer. Common conditions imposed include requiring the offender to write an apology letter, pay reparation, meet with the victim, engage in counselling or complete some voluntary community service.

One of the problems with diversion is that all decisions are entirely at the discretion of the police prosecuting agency. The courts have no power over the diversion scheme. While the police have a nationwide policy governing diversion, the discretionary nature of the power inevitably means there is significant variation in its application. For example, regional policy sometimes dictates that diversion is not to be offered for particular types of offending.[22] This means that an offender who would be eligible for diversion in one region may not be in another.

The use of diversion has expanded to encompass many cases where the offender would otherwise have sought a discharge.[23] In any case where the offender is hoping to receive a discharge without conviction, diversion should be canvassed as a first option. If diversion is not offered, the offender can then resort to the formal discharge without conviction mechanism.

(3) Indication of discharge

In some cases, the court will indicate to the offender that if he or she complies with certain expectations—such as a donation to charity[24] or voluntary community work[25]—

20 See generally New Zealand Police, above n 5.

21 At 4.

22 I can attest to this from personal experience in legal practice. For example, the Police Prosecution Service in Waitakere does not currently offer diversion for offending involving domestic violence or for the possession of methamphetamine. Also, if a particular type of crime has seen a significant increase in a certain area, the police have been known to to stop offering diversion for that crime for a period of time in an attempt to deter offenders.

23 Lithgow, above n 11, at 27.

24 See, for example, Bailey v Police [2015] NZHC 3051 at [49].

then a discharge will be granted. This is not a formal process; it has emerged as judicial practice. If this occurs, the matter will usually be adjourned for sufficient time to enable the defendant to comply with the requests.

In appropriate cases, this approach allows the court to ensure that the defendant is taking steps to address the underlying issues that led to the offending. This may include drug and alcohol counselling or a stopping violence programme. Whether this approach is adopted is a matter of judicial preference: some judges utilise it regularly; others do not.

(4) Conviction and discharge

Before imposing a sentence, the court must consider whether the offender would be more appropriately dealt with by way of conviction and discharge.[26] This means that the offender receives a conviction, which remains on their record, but is not punished any further.

A conviction and discharge is generally used for minor offending, often where the offender already has a criminal history. A common example is a charge of failing to answer bail.[27] In such cases, simply recording the offence on the offender's record is considered sufficient punishment.

(5) Order to come up for sentence if called upon

Before imposing a sentence, the court must also consider whether it would be more appropriate to deal with the offender by an order to come up for sentence if called upon under s 110 of the Sentencing Act.[28] Such an order means that if the offender is convicted of a subsequent offence during the relevant period, the subsequent sentencing court may resentence the offender for the original offence.[29] This order remains effective for a maximum of one year.[30]

An order to come up for sentence means that the offender receives no punishment beyond a conviction, but is placed on a good behaviour period. *Hall's Sentencing* comments:[31]

> The use of the section appears to be particularly appropriate where the offence committed, although of a relatively minor nature, warrants the entering of a conviction and the monitoring of the offender's future behaviour, but no immediate further contact with the criminal justice system appears to be necessary and the circumstances of the offender are such that a fine or other non-custodial sentence is inappropriate …

This approach clearly bears a strong similarity to the proposed conditional discharge model. The promise of no further punishment is contingent on the offender's ability to show, by committing no further offences, that no punishment is required. In the

25 See, for example, Parkinson v New Zealand Police [2015] NZHC 3272 at [41].
26 Sentencing Act, s 11(1)(b).
27 Bail Act 2000, s 38.
28 Sentencing Act, s 11(1)(c).
29 Section 110(1).
30 Section 110(2).
31 Geoffrey G Hall *Hall's Sentencing* (online looseleaf ed, LexisNexis) at [SA110.4].

sentencing hierarchy, it is on the same level as a discharge without conviction,[32] with the key difference being whether a conviction goes on the offender's record or not.

III Operation of Discharge Without Conviction

A *The test*

The legislative framework in ss 106 and 107 of the Sentencing Act provides the courts with the following five-step test:[33]

1. Identify the gravity of the offence by reference to the facts of the case;
2. Identify the direct and indirect consequences of a conviction;
3. Determine whether the consequences of a conviction would be out of all proportion to the gravity of the offending;
4. If so, determine whether the discretion should be exercised; and
5. If so, determine whether any orders should accompany the discharge.

The first three steps are required by s 107, the fourth by s 106(1), and the fifth by s 106(3). The third step is a necessary precondition—a "gateway"—to the exercise of the discretion under s 106.[34]

B *Relevant factors*

Following the passage of the Sentencing Act, there was a period of judicial disagreement as to whether certain factors should be taken into account when considering the proportionality test under s 107, or when exercising the discretion under s 106(1).[35] The focus was primarily on the purposes[36] and principles[37] of sentencing, aggravating and mitigating factors relating to the offence and the offender,[38] and any offers or agreements to make amends.[39] The question was settled in *Z(CA447/2012) v R,* in which the Court of Appeal preferred to consider these factors while undertaking the proportionality test.[40]

Next, the court had to consider the point in the proportionality test at which the factors should be considered. There are two options: to consider them when determining the gravity of the offence; or to consider them when undertaking the balancing exercise. Miller J in *Delaney v New Zealand Police* preferred the former approach:[41]

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32 Sentencing Act, s 10A(2).

33 *Hughes*, above n 12, at [2]. The leading authorities for the analogous tests under former legislation are *Police v Roberts* [1991] 1 NZLR 205 (CA) for s 19 of the Criminal Justice Act 1985; and *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) for s 42 of the Criminal Justice Act 1954.

34 *Hughes*, above n 12, at [8] and [23].

35 See *Hughes*, above n 12, at [36]–[37]; and *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620 at [9]–[14].

36 Sentencing Act, s 7.

37 Section 8.

38 Section 9.

39 Section 10.

40 *Z(CA447/2012) v R* [2012] NZCA 599 at [27]. This case was affirmed in *DC(CA47/2013) v R* [2013] NZCA 255 at [35].

41 *Delaney v New Zealand Police* HC Wellington CRI-2005-485-22, 22 April 2005 at [29].

> … I consider that "the gravity of the offence" should be read as including not only the offence itself but also anything that may affect the Court's subsequent assessment of overall culpability. That includes guilty pleas, expressions of remorse and the Court's assessment of how likely it is that the offender will reoffend, the victim's perspective, and any consequence already suffered by way of reparation, community work, or publicity.

His Honour confirmed this approach in *Montgomery v New Zealand Police*:[42]

> In *Delaney,* I held that considerations such as attendance at a restorative justice conference, community work undertaken, and willingness to make reparation are relevant considerations under [ss 106 and 107]. The phrase "the gravity of the offence" in [s 107] includes not only the offence but anything that may affect the Court's subsequent assessment of overall culpability.

Miller J's approach interprets the phrase "gravity of the offence" widely. It does not restrict the phrase to factors directly relevant to the offence; rather, it assesses the offender's overall culpability for the offending. This approach has been received favourably by the courts and should be regarded as good law.[43]

C *Step one: gravity of the offence*

Assessing the gravity of the offence is crucial: the weight that is apportioned to the offence will dictate how severe the consequences must be to regard them as disproportionate. This becomes even more important if the law adopts this article's recommendation for conditional discharge as the assessment will shift emphasis from the readily identifiable consequences of a conviction to the offender's overall culpability. This section will examine how the courts have approached some of factors relevant to the gravity of the offence.

(1) Seriousness of the offending

The primary factor affecting overall capability is the seriousness of the offending. The starting point is the offence charged. The courts may look at the nature of the charge as well as the offence's maximum penalty.[44] However, there is a broad scope of conduct

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42 *Montgomery v New Zealand Police* HC Palmerston North CRI-2005-454-70, 11 April 2006 at [10].

43 See, for example, *DC(CA47/2013)*, above n 40, at [35], where the Court said: "[A]ll relevant aggravating and mitigating factors relating to the offending and the offender come into play when considering the gravity of the offence"; *Devey v New Zealand Police* [2016] NZHC 70 at [52], where Faire J said: "In determining the gravity of the offending, the court is required to consider not only the facts of Ms Devey's offending, but also any factors which might affect the assessment of her culpability"; *Backhouse v New Zealand Police* [2015] NZHC 1178 at [21], where Lang J held: "The Court is also entitled at this stage of the enquiry to have regard to factors that are wider than the commission of the offence itself."; and *Weng v New Zealand Police* [2014] NZHC 2586 at [46], where Duffy J said: "[T]he remorse of Mr Weng, his guilty plea, his clean record, and his attempts to address the cause of his anger issues should be taken into account as well. These factors help to reduce the seriousness of the offending".

44 Focussing on the maximum penalty was how Tipping J in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [238]–[245] interpreted "seriousness of the offence" under s 30(3)(d) of the Evidence Act 2006, which governs exclusion of improperly obtained evidence. The Court of Appeal in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [46]–[48] rejected this approach, finding that the appropriate measure was the starting point of the likely sentence.

that fits within many offences; as such, it is imperative that a court is able to examine what the offender did in order to accurately assess the overall culpability of his or her conduct. As Asher J said in *Alshamsi v New Zealand Police*:[45]

> Section 107 refers to the gravity of the "offence", and not the offending. However, offences should not be considered in a vacuum. It is necessary to look at the offending itself.

The focus on overall culpability means the court must look beyond the generic seriousness of the offence charged and consider other factors such as where the conduct sits among offences of the same type and what the offender's role in the offending was. This approach has received significant judicial approval and should now be regarded as settled law.[46]

There is a caveat. The fact that the offending was at the lower end of the spectrum for a particular offence does not necessarily mean it was not serious offending. For example, in drink-driving cases, defence counsel often argue that the offending was not serious because the offender was only slightly above the legal limit. While this is not as serious as being significantly over the limit, it is imperative that the court does not lose sight of the offence that has been committed.

However, in appropriate circumstances, offenders faced with very serious charges can still receive a discharge if their culpability is at the lowest end of the spectrum. This is illustrated in cases such as *R v Illston,*[47] *R v Nagle*[48] and *R v X (No 1)*.[49] These cases all involved discharges being granted on charges of manslaughter where negligent conduct by mothers resulted in the death of a child.[50] They show that, despite the inherent seriousness of an offence, a discharge may be appropriate where culpability is at the lowest end of the spectrum for that offence and, particularly, where the offender has already suffered a serious consequence.

While not directly on point, these cases—and others like them—illustrate the difficulties inherent in assessing the seriousness of offending and show that courts can take a myriad of different approaches.

45 *Alshamsi v New Zealand Police* HC Auckland CRI-2007-404-000062, 15 June 2007 at [19].

46 *Hamed*, above n 44, at [238]–[239]. See, for example, *A(CA747/2010) v R* [2011] NZCA 328 at [24], where the Court said the offending was "serious and at the high end of the scale for offending of this kind"; *Bailey*, above n 24, at [29], where Gendall J argued that "[t]he charge itself … is perhaps of lesser import here than the actual facts of the offending"; *Tupu v New Zealand Police* [2014] NZHC 743 at [18], where Dunningham J said that the trial judge "noted that it was a serious charge carrying a maximum of five years imprisonment, although correctly recorded that that, in itself, did not necessarily establish the seriousness of the offending or the appellant's level of culpability"; and *Stewart v New Zealand Police* [2015] NZHC 165 at [22] and [27], where Thomas J said that it was "easy to envision a more serious assault, but the fact remain[ed] that this was a violent attack" and that, taken together with a number of other factors, led him to "classify the offending as moderately serious".

47 *R v Illston* HC Whanganui CRI-2011-034-273, 26 October 2011.

48 *R v Nagle* [2013] NZHC 2532.

49 *R v X (No 1)* [2015] NZHC 1244.

50 In *Illston*, above n 47, the defendant briefly left her 22-month-old daughter near a pool and she drowned; in *Nagle*, above n 48, the defendant had not realised that her newborn—a home birth—had a condition that caused him to die 10 days after birth; and in *R v X*, above n 49, the defendant accidentally left her 16-month-old son in a hot car, where he died from heatstroke and dehydration.

(2) Other factors

Several other factors can increase or decrease the offender's overall culpability for the offence. Most of these factors can be found in ss 7–10 of the Sentencing Act.[51]

An important, and often crucial, factor is whether the offender has accepted responsibility for the offending.[52] A failure to accept responsibility will weigh strongly against a discharge being granted; "it would be extraordinary … for a judicial concession to human fallibility to be accorded in a case where fault has not been accepted by the offender".[53]

Accordingly, the timing of a guilty plea (or lack thereof) is clearly relevant to this factor.[54] In *R v Hughes,* the Court of Appeal suggested that a late guilty plea, or the absence of one, is not an aggravating factor, but is "simply the absence of a mitigating factor".[55] However, a failure to enter a timely guilty plea indicates a lack of remorse and accountability, and so will often weigh against a discharge being granted.[56]

This factor would also be particularly important to the proposed conditional discharge power. An unwillingness to accept responsibility for the offending is often treated as an indicator of a high likelihood of reoffending. An offender who has not accepted responsibility, or who minimises his or her offending, may struggle to convince a court that he or she can refrain from committing further offences.

The interests of the victims may be taken into account in assessing the gravity.[57] This is usually done through a victim impact statement.[58] The court will consider whether the victim opposes the discharge being granted, but this will not be the sole determining factor. In the unusual case where the victim supports a discharge, the court will consider this persuasive.[59]

The court may also take into account the outcomes of any restorative justice processes when assessing overall culpability.[60] Restorative justice is:[61]

> … a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.

Restorative justice usually occurs by way of a conference, overseen by restorative justice facilitators, whereby the offender and the victim are both given an opportunity to discuss the offending and share their views. Restorative justice conferences are primarily an opportunity for the offender to apologise. However, in many cases the benefits go

51 *Hughes*, above n 12, at [40]–[41].
52 Sentencing Act, s 7(1)(b).
53 *Amarasekera v Police* HC Hamilton AP116/90, 17 December 1990 at 6. See also Geoffrey G Hall *Sentencing: 2007 Reforms in Context* (LexisNexis, Wellington, 2007) at [106.2.1].
54 Sentencing Act, s 9(2)(b).
55 *Hughes*, above n 12, at [71].
56 *Amarasekera*, above n 53, at 6.
57 Sentencing Act, s 7(1)(c). See *Edwards v R* [2015] NZCA 583 at [12].
58 Victims' Rights Act 2002, s 17AB.
59 See, for example, *Bailey*, above n 24, where the victim took some responsibility for the offence and supported the discharge application. Gendall J took this into account in granting a discharge but properly noted at [42] that "at the end of the day it is Mr Bailey who is responsible for his own actions".
60 Sentencing Act, s 8(j).
61 *Restorative Justice: Best Practice in New Zealand* (Ministry of Justice, Wellington, 2011) at 6.

beyond this as they provide an opportunity for all parties to work through underlying issues in a professional and formal setting. While restorative justice is not possible in every case, where successful it should be treated as a strong mitigating factor. Their success means that the offender has accepted responsibility for the offending and has been held accountable, and the process can serve both to deter the offender and to satisfy the interests of the victim.[62] In short, successful restorative justice processes render the offender a more deserving recipient of the judicial concession because they have, to some degree, made amends.[63]

Any reparation paid or promised may also mitigate the offender's overall culpability.[64] However, the courts should be cautious about this factor. If undue weight is placed on reparations paid, this may create an ability—whether real or apparent—for offenders to buy their way out of a conviction. While it is important that, where possible, the victim's interests are provided for, and while it is appropriate for reparations paid to mitigate the offender's culpability, the sentence should not overly depend on the offender's financial means.

Other factors that may also be relevant to overall culpability are the need to deter the offender (specific deterrence) and others (general deterrence) from committing the same or a similar offence, as well as the need to denounce the conduct.[65] The *get-out-of-jail-free card* basis of a discharge allows the offender to leave without a conviction, which may dilute the deterrent effect of a criminal record. However, several factors suggest that this arguably undesirable consequence is not as concerning as it may appear.

First, courts have made it clear that a second discharge is very unlikely and the offender should not expect any further judicial concessions.[66] Secondly, as Hall argues, "the shock of detection, trauma of the criminal proceedings, surrounding publicity, and possible loss of employment can be considered adequate to deter the offender and protect society", even without a conviction.[67] Indeed, court proceedings can be time-consuming, intimidating and unpleasant, and they can drive home the severity of the offender's conduct. Thirdly, the fact that a discharge is not granted until sentencing means that it is not simply a *handout* and will require considerable investment in time, effort and (possibly) cost before it is granted. It is likely that this involvement in the court process will go some way to deterring the offender from re-offending even if it is not marked on the offender's criminal record. Finally, the highly individual focus of the assessment means that no two cases will be alike, and a discharge being granted in one case is unlikely to create the expectation that it will be available in another.

However, the concerns about deterrence and denunciation could be eased by adopting the conditional discharge model. Conditional discharges provide a strong deterrent, as the threat of being resentenced incentivises the offender to refrain from

62 Sentencing Act, ss 7(1)(a)– 7(1)(f).

63 See *Cook v New Zealand Police* [2014] NZHC 282.

64 Sentencing Act, ss 7(1)(d) and 10.

65 Sections 7(1)(f) and (e).

66 See, for example, *Bigy v New Zealand Police* [2012] NZHC 2852 at [14], where Courtney J said: "I am sure it is clear to Mr Bigy how fortunate he is to have avoided a conviction in this case. He could not expect the same outcome in the event of any further offending". See also *Fraser v Police* [2014] NZHC 2437 at [15], where Gendall J said: "This is Mr Fraser's chance … He may not get another one like it and he would be well advised needless to say to make the most of it".

67 Hall, above n 31, at [SA106.1].

reoffending. The good behaviour period will serve as a constant reminder of the consequences of breaking the law again.

D *Step two: consequences of a conviction*

Once the gravity of the offence has been established, the court must determine the "direct and indirect consequences of a conviction".[68] This section begins by examining three issues of general application: the requisite standard of proof, the relevance of the Criminal Records (Clean Slate) Act 2004 (Clean Slate Act), and the interests of regulatory authorities in knowing about the offending. This raises issues with regard to consequences on which applicants regularly rely.

(1) Standard of proof

Section 107 of the Sentencing Act is silent as to the required likelihood of the consequences of a conviction. A strict reading suggests that these consequences must be guaranteed—a high threshold.[69] However, in *Iosefa v New Zealand Police*, Randerson J noted:[70]

> … it is not necessary for the Court to be satisfied that the identified direct and indirect consequences would inevitably or probably occur. It is sufficient if the Court is satisfied there is a real and appreciable risk that such consequences would occur.
>
> However, the nature and seriousness of the consequences and the degree of likelihood of their occurring will be material to the Court's assessment of whether those consequences would be out of all proportion to the gravity of the offence. In other words, the higher the likelihood and the more serious the consequences, the more likely it is that the statutory test can be satisfied.

A "real and appreciable risk" that the alleged consequences will occur "connote[s] something of substance and not simply something fanciful or something which may never happen".[71] This threshold has been widely accepted by the courts.[72]

There is no formal onus on the offender to establish the likely consequences. However, the offender is often the only one able to provide the relevant information. To establish a real and appreciable risk of the alleged consequences, the offender should submit some evidence before the court, such as an affidavit or other supporting documentation, beyond the mere assertion of counsel.[73] The court is not confined to

68 Sentencing Act, s 107.

69 This was the interpretation taken in Heath J's dicta in *Police v Devereux* HC Auckland A03/02, 27 June 2002 at [6], as the section says "would be". However, this has been heavily criticised due to the difficulties in proving a future contingent, and should not be regarded as the law. See Robert Lithgow "Discharge Without Conviction: Shutting the stable door before the horse is in" [2002] NZLJ 405.

70 *Iosefa v New Zealand Police* HC Christchurch CIV-2005-409-64, 21 April 2005 at [34]–[35].

71 *Barker v R* [2014] NZHC 435 at [41].

72 See *Alshamsi*, above n 45, at [20]; *Currie v New Zealand Police* HC Auckland CRI-2008-404-307, 27 May 2009 at [49]; *DC(CA47/2013)*, above n 40, at [43]; and *Edwards*, above n 57, at [23]–[25].

73 Such as a letter from a current or prospective employer, or a foreign travel official. See, for example, *Police v M* [2013] NZHC 1101 at [55]–[62]; *Simmonds v New Zealand Police* [2014] NZHC 2488 at [34]; *KCW v New Zealand Police* [2015] NZHC 459 at [32] and [50]; *Adamson v New Zealand Police* [2015] NZHC 2031 at [28]; and *Brunton v New Zealand Police* [2012] NZHC 1197 at [15].

"evidence" in a strict sense, "but may take into account all relevant information and material".[74] The court may also take judicial notice of widely known and accepted facts.[75]

However, this creates a roadblock for certain applications. Where the basis of the application is that the offender will lose his or her job if his or her employer discovers the offending, the offender cannot prove such without providing some supporting material from the employer. Yet the offender cannot obtain this material without informing the employer of the court proceedings, which may undermine the purpose of seeking the discharge in the first place. This is a choice the offender must make.

(2) Criminal Records (Clean Slate) Act 2004

The Clean Slate Act provides that a conviction may not burden an offender for the rest of his or her life. Under the Clean Slate Act, an eligible individual is deemed to have no criminal record for the purposes of any questions asked about his or her criminal record,[76] and is entitled to answer any such question by stating that he or she has no criminal record.[77] An individual is eligible if, among other conditions, he or she has completed a "rehabilitation period" of seven years following the sentencing date.[78] This means a conviction need only be disclosed during that seven year period. This is relevant to discharge proceedings in two ways.

First, it may be a number of years before the envisaged problematic consequences arise. For example, in *Morgan v Police*, Allan J noted that any detriment was "likely to be limited" since, at worst, as a result of the Clean Slate Act, "it appear[ed] that [Ms Morgan] may be delayed in applying for admission to the Institute by a year or two".[79] In such cases, the Clean Slate Act weighs against a discharge being granted as it mitigates the consequences of a conviction.

Secondly, if the offender has any previous convictions, they may soon or already be eligible under the Clean Slate Act in relation to those previous convictions. If a conviction is entered on the active charge, the offender will no longer be entitled to withhold the previous convictions.[80] This may aggravate the consequences of a conviction as it will require disclosure of the offending history.[81] In *Williams v New Zealand Police*, Brewer J commented:[82]

74 *Currie*, above n 72, at [43] per Potter J.

75 Evidence Act, s 128. See *R v Hemard* HC Christchurch T30/03, 11 April 2003 at [14]; *Harvey v Police* HC Christchurch CRI-2007-409-235, 13 February 2008; and *M*, above n 73, at [53].

76 Criminal Records (Clean Slate) Act 2004 [Clean Slate Act], s 14(1).

77 Section 14(2).

78 See s 4 on the definition of "rehabilitation period"; and s 7.

79 *Morgan v Police* HC Auckland CRI-2009-404-212, 8 October 2009 at [31].

80 Clean Slate Act, s 7(1)(a).

81 See, for example, *Miller v New Zealand Police* [2015] NZHC 2747 at [28(c)], where, in response to the concern that a conviction would reactivate the defendant's three historic driving convictions, Clifford J said: "I accept that is a consequence. However, when reactivated those offences will be, by any assessment, themselves historic and, except perhaps in the context of employment involving driving, of little relevance now. The adverse effect of that reactivation is, similarly, limited." See also *Deeming v The Police* HC Whangarei CRI-2008-488-61, 24 July 2009 at [33]–[36]; *Nash v New Zealand Police* HC Wellington CRI-2009-485-7, 22 May 2009 at [19]; and *Harvey*, above n 75, at [11]–[12].

82 *Williams v New Zealand Police* [2013] NZHC 394 at [29]–[30].

> The Criminal Records (Clean Slate) Act deals with the consequences of reoffending. One is that the previous record is revived. The appellant would have to spend a rehabilitation period of seven years before statutory concealment would apply again. That is what Parliament intended. Although loss of concealment of the earlier convictions can be seen as an indirect consequence, I think there is some merit in the respondent's submission that to give it weight could undermine Parliament's intention that there be consequences for further offending.
>
> That is not to say that it could not be a factor in an offender's favour in a case of particular sensitivity. There could be cases where the entry of a conviction would reveal the existence of previous convictions with serious consequences for the offender. But that is not the case here.

An example of a case "of particular sensitivity" is *Lechner v Police*, where the defendant would have been able to claim a clean slate in two years if they were not re-convicted.[83] When coupled with the extremely minor nature of the offence, this justified a discharge being granted.[84] Indeed, the impact on the offender will be more severe if they are required to disclose the present conviction as well as all previous convictions. However, in most cases, the courts will treat this as legitimate prejudice resulting from the previous offending.[85]

(3) Interests of regulatory bodies

A discharge is deemed to be an acquittal.[86] Therefore, a discharged offender can present himself or herself to others as never having committed the offence. This may include authorities such as current or prospective employers, immigration officials or regulatory licencing bodies.

One of the roles of these authorities is to assess the character of the applicant and his or her suitability for the position or privilege sought. Therefore, it is in the public interest for the offending to be disclosed. If a discharge prevents authorities from knowing about the offending, their ability to accurately assess the offender's character and suitability is limited—their judgment will not be based on the full information. In light of this, the courts often allow "the consequences of conviction to be resolved by the appropriate authorities, rather than … attempting to pre-empt that decision-making process by a decision to discharge without conviction".[87] In an oft-cited passage from *Roberts v Police*, Wylie J squarely addresses the tension:[88]

> I can well accept that if a conviction is going to result in an absolute bar to the offender gaining entry to some profession or career then it may well be appropriate to ameliorate that consequence in an appropriate case by declining to enter a conviction. Where,

83 *Lechner v New Zealand Police* [2013] NZHC 1166 at [11]; and Clean Slate Act, s 7.

84 *Lechner*, above n 83, at [11].

85 In *Stewart*, above n 46, at [32], Thomas J took into account the fact that a conviction would reactivate Ms Stewart's two previous convictions, but said: "Those convictions are, in any event, a relevant consideration in an application such as this. In other words, Ms Stewart is not someone who comes to the Court with no prior involvement in the criminal justice system."

86 Sentencing Act, s 106(2).

87 *Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 17 March 2011 at [14].

88 *Roberts v Police* (1989) 5 CRNZ 34 (HC) at 36–37.

> however, Parliament has seen fit to establish a statutory authority with the task of selecting or screening applicants for admission to whatever trade or profession may be involved, then clearly Parliament has contemplated that those bodies should exercise a discretion as to admission in the light of the expertise that those bodies will build up over a period of time and with the knowledge of the kind of qualities that are appropriate for the particular trade or profession and those which render admission to that trade or profession inappropriate. It seems to me … that it would be inappropriate, at any rate in all but the most exceptional case, for this Court to substitute its discretion as to what may or may not be relevant on the seeking of admission to a particular profession for the discretion which Parliament has seen fit to vest in a statutory body. Indeed it is not perhaps going too far to say that to do so the Court would be actively concealing from the statutory body information which ought properly to come before that body.

The same reasoning can be extended to non-statutory authorities such as private employers. However, on appeal from this decision, the Court of Appeal stressed that the above statement is not an absolute rule and may be overridden in appropriate circumstances.[89] The question, then, is what constitutes appropriate circumstances.

A highly relevant factor is whether the offender will have the opportunity to explain the circumstances surrounding his or her conviction. In *Currie v New Zealand Police*, Potter J noted:[90]

> It is no doubt highly likely that [the defendant] will need to explain the convictions in any such future application, and they will be a factor the relevant authorities or institutions weigh in the overall assessment of the merit of his application, along with his qualifications and his abilities for the position for which he has applied.

However, this factor can only be appropriately weighed by the relevant authorities if the offender is actually given the opportunity to explain. In cases where the authority only knows the fact that there has been a conviction, such as at the first stage of a job application where applications are considered purely on the papers, the offender will probably not have any opportunity to explain.

Even where there is an opportunity to explain the conviction, it is not guaranteed that the authority will actually take the surrounding circumstances into account. In *Brown v R*, the Court of Appeal thought it was unlikely that most prospective employers would do so.[91] In *Edwards v R*, a different bench disagreed:[92]

> We do accept that some employers may not be prepared to look beyond the bare fact of a conviction to read what the courts had to say about its circumstances and mitigating factors, but we are not prepared to assume that all or even most will behave in that way, especially where the offender is generally a person of good character …

This may assume too much: in most cases, the incentive for employers to put time and effort into discovering more about the conviction is low. Further, details of the offending may not be readily accessible, or employers may not know how to interpret and understand them. It is likely that where two equally qualified candidates are competing

89 *Roberts* (CA), above n 33, at 202.
90 *Currie*, above n 72, at [50]. See also *Stevenson v Police* HC Auckland A108/01, 2 November 2001.
91 *Brown v R* [2012] NZCA 197 at [32].
92 *Edwards*, above n 57, at [18].

for the same position, the fact of a conviction will provide the employer with an easy way of differentiating between the candidates.

However, that does not necessarily make this practice wrong. One of the candidates has committed a criminal offence; the other has not. If they are otherwise equally qualified, this would seem an appropriate and justifiable ground for choosing one over the other. Further, it would go against public interest for the character assessment to favour the person with a discharge over the person with no history of offending if the fact of the offending is hidden. This would not paint a fair picture of the competing candidates.

If the authority would know of the offending regardless of whether a discharge was granted, a discharge may be unnecessary.[93] However, it may assist the authority by indicating the court's assessment of the offender's overall culpability. Considering the court has access to much more material information, it may be in the best position to make such assessments.

One further issue is the conviction's relevance to the offender's suitability for the position or privilege sought. Where the conviction bears directly on his or her suitability, such as a dishonesty conviction for someone applying for a job involving access to company accounts, having to disclose it means the consequences will be more severe. However, the courts will and should regard this as legitimate prejudice. The law should not permit the offender to hide such a directly relevant offending history solely because it would hamper the offender's chances of obtaining the position or privilege.

Examples abound where discharges have been denied because they would usurp the assessment of the regulatory body.[94] These cases show that the courts take seriously the desire not to hide the fact of offending. This is an important factor in balancing the interests of the individual with those of the public. It goes against public interest to allow an offender to disguise his or her character in these situations as the regulatory body would not be able to make fully informed decisions. It would be inappropriate for the courts, as agents of the public, to assist an offender in doing so.

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93 *Zhang*, above n 87, at [14]. This was determinative in *Blythe,* above n 35, at [28]–[29], where the fact that the Police Commissioner would look at all the circumstances of the offending in determining an appropriate internal sanction meant that a conviction did not make a significant difference. See also *New Zealand Police v Paki* [2014] NZHC 3112 at [47] for slightly different but analogous considerations regarding the consequences of a conviction on the son of the Māori King, specifically his suitability for, and potential accession to, the throne.

94 See, for example, *Chammaa v New Zealand Police* [2015] NZHC 1893 at [74]–[77], where Woolford J considered it inappropriate to usurp a decision about whether the defendant would be a good adoptive parent; *Vermeulen v New Zealand Police* HC Wellington CRI-2010-485-141, 11 March 2011 at [25]–[32], where the Court denied a discharge to both a lawyer, who was concerned about the effect of a conviction on her practicing certificate, and a law student, who was concerned a conviction would prevent admission to the bar; *Andrews v New Zealand Police* [2015] NZHC 3212 at [21]–[22], where the Court denied a discharge to a teacher who was concerned that a conviction would prevent renewal of her teaching registration; *Graves v New Zealand Police* HC Rotorua CRI-2010-463-57, 28 February 2011 at [25]–[26], where the Court denied a discharge to a holder of a manager's licence because it was for the Liquor Licencing Authority to determine his fitness to hold the licence; *Backhouse*, above n 43, at [26]–[30], where the Court denied a discharge to an offender seeking a controlled substance licence from WorkSafe in order to become a self-employed commercial possum hunter, because it was for WorkSafe to determine the offender's fitness to hold a licence; and *Daleszak v New Zealand Police* [2015] NZHC 1853 at [26], where Keane J considered that it was for the Nursing Council to determine whether the defendants were fit to be registered nurses.

These concerns would also apply to conditional discharges, as they allow the offender to hide the fact of the offending. However, there is an important difference: an offender who is conditionally discharged is required to show, by refraining from further offending, that he or she is generally of good character and that the offence was a one-off mistake. This can give the public some assurance that the offender is not hiding his or her real character, but merely this one-off, out-of-character mistake. This makes it less concerning that the regulatory body is not aware of the offence when assessing the applicant's character.

(4) Consequences of conviction

Much could be said about the consequences of conviction that have been relied on for both successful and unsuccessful applications. The assessment of these consequences is necessarily a highly fact-specific and individualised exercise. The consequences most commonly relied upon relate to employment, travel, immigration and the general consequences associated with a first conviction. This article will now focus on employment and general consequences, as both of these illustrate the inequality inherent in the discharge power, and support the conditional discharge model.

In some lines of work, a conviction will be an absolute bar to employment; in others, a hindrance. Where employment is relied on, offenders should provide evidence that establishes both an intention to enter into or continue their chosen career, and the potential effect of a conviction on entering into or continuing that career.[95] However, this can prove difficult for those who are yet to form any specific career intentions, such as young people. This is troubling. Young first-time offenders who, due to developmental immaturity, have made an uncharacteristic mistake are among the most suitable recipients of a judicial concession. In *Amstad v Police*, Whata J noted:[96]

> The brand of a conviction for young people who do not have a foothold in a career can be permanently damaging. This feeds inextricably into an assessment of the proportionality as between the seriousness of the offence and the consequences.

Youth has played a role in many decisions to grant a discharge without conviction.[97] As these cases illustrate, the courts are alert to the importance of discharges for first-time young offenders. This is an entirely appropriate use of discharges, as:[98]

> … little will bring home to a young offender the gravity of their actions like the formality and solemnity of the formal court processes, and the consequences of being an unwilling participant in its machinery. It is at this stage that there exists an opportunity to punish, condemn and tersely warn, without adding an increased layer of difficulty to their lives, which will follow them forever.

95 *Police v M*, above n 73, at [49]–[61].

96 *Amstad v Police* HC Auckland CRI-2011-404-161, 6 September 2011 at [22]. This case was cited with approval in *Glenn v Police* [2016] NZHC 928 at [23].

97 See, for example, *Cook*, above n 63, at [20]; *Latimer v R* [2013] NZCA 562 at [12]; *Milton v New Zealand Police* [2013] NZHC 2537 at [36]; and *Dickins v R* [2012] NZCA 265 at [19].

98 Shane Campbell "Discharge without conviction for first time young offenders" [2014] NZLJ 430 at 432.

However, the current discharge power still requires the offender to satisfy the court that there is a real and appreciable risk that a conviction would have consequences on his or her employment prospects. A young person who has not obtained any qualifications or real work experience may struggle to identify any consequences beyond mere speculation. For these people, a conviction would be doubly disadvantageous as the offender will be left with no job and a criminal record, further decreasing his or her prospects of finding employment.

The conditional discharge power would address this concern. It would allow the young people who do not reoffend to show, through these important developmental years of their life, that they have learnt their lesson and are deserving recipients of a second chance. It could permit many of them to go on and find a career where a conviction may have prevented them from doing so.

The courts have also been mindful of the fact that a conviction may have general consequences:[99]

> I accept … that there are general consequences that follow from a conviction. In a variety of ways (eg. employment, insurance, immigration) people are asked to disclose whether they have criminal convictions. For those that are remorseful there can be a loss of pride and self-esteem or at least embarrassment in having to answer that question honestly.

Embarrassment or loss of pride and self-esteem are consequences that follow from a conviction. They are central to whether the effect on the individual of being tarnished with a criminal conviction outweighs the public interest in seeing offenders properly sanctioned for their conduct. However, it is debatable how much weight should be placed on such consequences where a discharge is not otherwise justified. As Dunningham J noted in *Edward v New Zealand Police*:[100]

> While inevitably there have been, and will continue to be, adverse consequences for Mr Edward stemming from this offending, they do not strike me as being significantly different from the consequences that any young person might experience with such a conviction.

These general consequences are a natural result of committing a criminal offence. To an extent, they may be regarded as legitimate prejudice that flows from criminal offending. Offending is not something to be proud of—indeed, one purpose of sentencing is "to denounce the conduct in which the offender was involved".[101] Sentencing is intended to shame the offender and mark his or her conduct as wrongful. Placing undue weight on these general consequences would undermine this and other purposes of sentencing, such as holding the offender accountable, promoting a sense of responsibility and deterring misbehaviour.[102]

E *Step three: proportionality test*

Once the court has determined the gravity of the offence and identified the direct and indirect consequences, it must then undertake the proportionality test. All factors that

99 *Nash*, above n 81, at [19].
100 *Edward v New Zealand Police* [2016] NZHC 878 at [28].
101 Sentencing Act, s 7(1)(e).
102 Sections 7(1)(a), 7(1)(b) and 7(1)(f).

impact on the offender's overall culpability will have been taken into account at step one, when determining the gravity of the offence. Step two would have considered every relevant consequence of a conviction. The court must then weigh these factors on the scales and determine where the merits of the case lie.

The court must be satisfied that the consequences would be "out of all proportion to the gravity of the offence".[103] In *Police v Roberts*, the Court of Appeal suggested that these words "point to an extreme situation which speaks for itself",[104] and they have been described as a "stiff test".[105] However, the Court of Appeal in *Hughes* was cautious about employing such terminology:[106]

> We do not consider descriptions of the disproportionality test such as "very stiff", "exceptional", or extreme to be helpful. While stating that the words "out of all proportion" point to an "extreme situation", Bisson J in *Roberts* also said … that expressions suggesting the discretion should be "exercised sparingly" and "only in exceptional circumstances" tended to fetter the wide discretion under s 19 [of the Criminal Justice Act 1985], and are "hardly of any assistance": at 210. We agree with the latter statement. We note that Richardson J in *Turner* did not apply any such descriptors or qualifiers. The test is the test. Simply, under s 107 the Court must be satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence, before it may consider the exercise of the discretion conferred by s 106 to discharge without conviction.

The word "all" does appear to impart a higher threshold than mere imbalance. There must be significant or substantial disproportionality before the test will be met—the consequences must grossly outweigh the gravity of the offence. Where this threshold is not met, the consequences are regarded as legitimate prejudice resulting from the offending.

There is no formulaic or mathematical way of undertaking the proportionality test. It is very difficult to articulate how to achieve this balancing. This difficulty means it is crucial that sentencing judges make explicit the reasons for their decisions to the greatest extent possible. This should include all factors that the judge relied on and the weight apportioned to each. In particular, if one factor is determinative, this should be identified and explained. Under this framework, the sentencing court at least provides the offender with a logical chain of reasoning behind the decision that has been made. In the absence of this logical chain, the decision can appear subjective and arbitrary, which is highly undesirable in a criminal justice system.

F *Step four: residual discretion*

The court may discharge the offender only if satisfied that the consequences would be "out of all proportion to the gravity of the offence".[107] The use of the modal "may" rather than the imperative "must" indicates that there remains a residual discretion to refuse a discharge. However, it would be rare to reach this stage of the analysis only to deny a

103 Sentencing Act, s 107.
104 *Roberts* (CA), above n 33, at 210.
105 *Hughes v New Zealand Police* HC Wellington CRI-2007-485-155, 18 March 2008 at [25].
106 *Hughes*, above n 12, at [23].
107 Sentencing Act, s 107.

discharge.[108] In fact, the residual discretion appears to be essentially redundant. It is very difficult to envisage a case where the proportionality test is met but the sentencing court nevertheless refuses to discharge the offender.[109]

G *Accompanying orders*

If the court discharges an offender, it may still impose accompanying orders.[110] These include orders for payment of costs or the restitution of any property,[111] and orders for payment of compensation.[112] These are important. While this step occurs after the decision to grant a discharge, the availability of such orders may support—and even determine—the application for a discharge. They allow the court to meet many sentencing objectives despite entering no convictions. For example, the orders can vest a sense of responsibility and accountability in the offender, provide general and specific deterrence, serve the interests of the community and, perhaps most importantly, provide for the interests of the victims.[113]

However, a concern with these orders is that they may favour those with the means to effectively buy their way out of a conviction. A system that more readily grants a discharge to someone with the means to immediately pay compensation to the victim naturally favours those who can afford to make such recompense. It discriminates against those who do not have the means to pay compensation. This may be justified by the desire to satisfy the interests of the victim, but the courts ought to be cautious about apportioning too much weight to the ability to pay compensation in considering whether to grant a discharge or not.

Section 106(3)(c) of the Sentencing Act enables the court to make any other order it would have been required to make had a conviction been entered. Some examples include mandatory orders for disqualification from driving,[114] forfeiture orders[115] or confiscation orders.[116] These orders mean that the offender can be discharged, and thus avoid the consequences of a conviction, yet be prevented from engaging in the conduct that led to the offence. For example, as is common in drink-driving cases, the offender can be discharged, but disqualified from driving. This serves the public interest where the reason for sanctioning the offender is the high risk he or she poses to public safety.

IV Inherent Inequality

The most contentious and, arguably, problematic aspect of the current law on discharge is the apparent inequality. Equality is a cornerstone of the rule of law: "[t]he laws of the

108 *Blythe*, above n 35, at [13]; and *Z(CA447/2012)*, above n 40, at [27].
109 This did not occur in any of the cases examined in the preparation of this article.
110 Sentencing Act, s 106(3).
111 Section 106(3)(a).
112 Section 106(3)(b). This is qualified by s 106(5): the court is unable to order compensation of sums paid or payable under the Accident Compensation Act 2001. Section 106(3A) of the Sentencing Act provides that the term "compensation" is analogous to "reparation", and the mechanical provisions of ss 32–38A concerning reparation payments apply.
113 Section 7.
114 See, for example, ss 32(3)(b) and 56 of the Land Transport Act 1998; *Wakefield v Police* (1994) 12 CRNZ 624 (HC); and *Devey,* above n 43.
115 See, for example, ss 255A–255D of the Fisheries Act 1996.
116 See, for example, s 129 of the Sentencing Act.

land should apply equally to all, save to the extent that objective differences justify differentiation."[117] This recognises that, sometimes, equal application is not the same as equal treatment. *Formal* equality calls for the same opportunities to be given to all, regardless of background. *Substantive* equality recognises that some people may labour under a disadvantage, and provides those people with further opportunity in order to level the playing field where doing so is objectively justified.

Theoretically, a discharge is available as a sentencing option to all facing conviction. However, its focus on individual consequences means that, while discharges *formally* provides equal opportunity to all, it is not *substantively* equal. Considerations of the socio-economic background of offenders, the public status of offenders, and the budding sporting careers of offenders account for why two offenders who have committed the same offence under the same circumstances will not necessarily receive the same treatment under the law.

The socio-economic background of offenders plays a notable role in the likelihood of receiving a discharge, for the simple reason that those from higher socio-economic backgrounds tend to have more opportunity, which makes it easier to point to specific consequences of a conviction. Those from more privileged backgrounds tend to receive higher education and, in turn, tend to pursue careers for which a conviction will have more severe consequences. With privilege comes opportunity, and those with more opportunity tend to have more to lose from a conviction. Thus, the court is more likely to find that they, rather than their counterparts from lower socio-economic backgrounds, may suffer consequences that are "out of all proportion to the gravity of the offence".[118]

The progress of the Sentencing and Parole Reform Bill informs this issue in an interesting way. At its first reading, what is now s 107 of the Sentencing Act contained several factors that the court could take into account:[119]

> **96 Guidance for discharge without conviction**
>
> (1) The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.
>
> (2) When considering whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence, the court may take into account—
>
> (a) the nature of the offence; and
>
> (b) the gravity of the offence as indicated by the maximum penalty prescribed for it; and
>
> (c) the seriousness of the offending in the particular case; and
>
> (d) the age, occupation, and previous character of the offender; and
>
> (e) *the effect of a conviction on that offender's family, career, economic circumstances and reputation*; and
>
> (f) any offer, agreement, response, or measure of a kind described in section 10, or any other restorative justice process or meeting in relation to the offence; and
>
> (g) any other relevant circumstances.

117 Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 55.

118 Sentencing Act, s 107.

119 Sentencing and Parole Reform Bill 2001 (148-1), cl 96 (emphasis added).

Sub-clause 2 was deleted before the second reading of the Bill at the recommendation of the Justice and Electoral Committee.[120] The select committee report reads:[121]

> The majority of submissions we received on these clauses concern clause 96(2). This relates to the court's ability to take into account the effect a conviction might have over a range of factors. Factors such as 'occupation and career', 'previous character' and 'reputation' are considered by most submitters on this issue to be highly subjective and outdated concepts and *only serve to discriminate against those who are from lower socio-economic groups.*
>
> Most of us agree with these arguments. We recommend clause 96(2) is deleted. Most of us agree the guidance in subclause (1) is sufficiently broad to allow a sentencing judge to determine if a conviction will have a disproportionate effect on the offender. We do not think it is necessary for this to be explicit and *deletion will remove any suggestion of class bias.*

The deletion of these considerations may have removed the "suggestion of class bias", but it does not address the underlying concern that class bias may be inherently within the discharge power. The explanatory note to the first reading of the Bill states that the original cl 96 was "intended largely to reflect existing case law".[122] Deleting sub-cl (2) to "remove any suggestion of class bias" appears to confirm that class bias was, and is, inherent in the existing case law.

Similarly, well-known public figures seem more likely to receive a discharge. This may be due to the public and media interest that makes the consequences of a conviction more severe than for someone who is not a public figure. While this is a legitimate consequence that should be taken into account, placing undue weight on this factor is troubling because it appears to create a class of persons (that is, public figures) who receive different treatment under the law.

An analogous issue has arisen around name suppression. One ground for name suppression is that publication would be likely to "cause extreme hardship" to the applicant.[123] This is qualified: "The fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship".[124] This qualifier reflects the court's desire to "avoid creating a special echelon of privileged persons in the community who will enjoy suppression where their less unfortunate compatriots would not".[125] Similar concerns apply to discharge proceedings.

The third area where apparent inequality has caused a divide of opinion is discharges granted to budding sportspeople. In New Zealand, such discharges, particularly those granted to rugby players, have received substantial media attention and comment. A recent example is the discharge granted to Wellington Lions player Losi Filipo,[126] which

120 Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 21.

121 At 21 (emphasis added).

122 Sentencing and Parole Reform Bill 2001 (148-1) (explanatory note) at 23.

123 Criminal Procedure Act 2011, s 200(2)(a).

124 Section 200(3).

125 *Proctor v R* HC Auckland T167/96, 16 July 1996 as cited in *Proctor v R* [1997] 1 NZLR 295 (CA) at 299–300.

126 *New Zealand Police v Filipo* [2016] NZDC 18820. In *Police v Filipo* [2016] NZHC 2620 the decision was overturned following an appeal by the Solicitor-General as the gravity of the offending, which involved a serious violent assault, was regarded as too severe to warrant a discharge.

led to widespread public backlash.[127] Associate Professor Bill Hodge argued that the current discharge power "sets up a two-standard, two-tier system—one for athletes and one for everybody else".[128] Hodge made similar warnings following a discharge given to rugby player Riley McDowall:[129]

> If this was an apprentice welder or potential builder, I would hope the judge would've gone about it in the same way … There should not be a get-out-of-jail-free card because you're a present or future potential sportsman.

This warning is valid. Having the potential to succeed in sport should not on its own justify the grant of a discharge. However, this may be an unjustifiably narrow focus. A potential sporting career is a very legitimate consideration in determining whether the consequences of a conviction would be out of all proportion to the gravity of the offence. It should not be treated differently from an offender's prospects in any other career. As Judge Davidson noted in *New Zealand Police v Filipo*:[130]

> I think it needs to be said that many people in our community do not seem to regard professional sport as a career, but rather as some form of entertainment. While it has entertainment value for the viewers … professional sport is a career path available to young people who have the requisite skills and ability. It should not be seen as anything less than, say for example, a career in law or medicine or the police force or anything else. It is purely and simply a professional career.

This article agrees with Hodge's suggestion that the discharge power creates a two-tier system. However, the two tiers are not comprised of athletes on one, and everyone else on the other: they are those for whom the consequences of a conviction (on their career, whatever it may be) would be "out of all proportion to the gravity of the offence", and those for whom they are not. This is precisely what the law sets out to address, by providing a second chance to those who can show that they need it. Those who cannot show that the consequences would be disproportionate are *not* discharged. If a conviction will not cause the builder or the welder in Hodge's example to lose their job, then perhaps they do not need a discharge.

In each of the examples discussed above, the law does differentiate. It is more likely to provide a discharge to those who can show opportunity than those who cannot. This is exactly what the law permits: it objectively differentiates between those who will face severe consequences and those who will not. This objective differentiation is said to justify different outcomes, despite both offenders having committed the exact same offence.

However, it is certainly arguable that this objective differentiation is unjustified. Everyone has something to lose from a conviction. It is unfair that those who can show

127 See, for example, Colin Peacock "Public anger over a controversial court ruling mirrored by the media" (2 October 2016) Radio New Zealand <www.radionz.co.nz>.

128 Interview with Bill Hodge, former Associate Professor of Law at the University of Auckland (Morning Report, Radio New Zealand, 28 September 2016) at 02:52. The interview is available at "Should your career influence a judge?" (28 September 2016) Radio New Zealand <www.radionz.co.nz>.

129 Kurt Bayer "Otago jawbreaker rugby rep avoids conviction" *New Zealand Herald* (online ed, Christchurch, 11 December 2014). See *Police v McDowell* DC Dunedin CRI-2014-012-1355, 9 December 2014.

130 *Filipo* (DC), above n 127, at [11].

what they stand to lose receive a discharge while those who presently cannot, do not. In order to avoid "creating a special echelon of privileged persons",[131] perhaps those who have more to lose should simply have to bear the consequences of their criminal offending. Alternatively, perhaps the second chance should be more readily available to all.

There is a third option: conditional discharge. This would shift the fundamental focus of the discharge power. Currently, the power favours those who come to court with opportunity. In contrast, a conditional discharge power would favour those who show that they will make the most of the second chance. It would reward those who can show, through their actions rather than their background, that a discharge is a just outcome.

V Conditional Discharge

Section 106 of the Sentencing Act is an absolute discharge power. Once the discharge is entered, that is the end of the matter, and the offender cannot be resentenced for the offence. This article proposes that a discharge could also be conditional: the offender is discharged on the condition that he or she will not reoffend within a specified period. It is a *good behaviour* period—a chance for the offender to show that the offence was a one-off mistake and the behaviour will not be repeated. If the offender does not reoffend during this period, he or she is discharged absolutely. If the offender does reoffend, then he or she may be resentenced for the original offence alongside the new offence. This reflects the "essence of the conditional discharge": that "the court is prepared to impose no sanction for the present offence, on condition that there is no reoffending within the specified period".[132]

Many common law jurisdictions utilise conditional discharges. They are available in both the United Kingdom and Canada.[133] In Australia, discharges can be made conditional upon entering a recognisance, with or without sureties, which includes remaining on "good behaviour" for a specified period for federal offences[134] and for offences in every state or territory.[135] The maximum periods for the good behaviour bonds in all Australian jurisdictions range from one to five years.

A *Conditional discharge: the argument*

It is not clear why the New Zealand Parliament chose not to adopt the power to grant a conditional discharge in the Sentencing Act. In fact, it appears that the courts did previously envisage the discharge power as encompassing conditional discharges. In an oft-cited passage from *Fisheries Inspector v Turner*, Richardson J stated: "Section 42 confers an unfettered discretion on the Court to give an absolute

131 *Proctor* (HC), above n 125.

132 Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, Cambridge, 2015) at 339.

133 Powers of Criminal Courts (Sentencing) Act 2000 (UK), s 12; and Criminal Code RSC 1985 c C-46, s 730.

134 Crimes Act 1914 (Cth), s 19B(1)(d).

135 The relevant statutes are the Crimes (Sentencing Procedure) Act 1999 (NSW), s 10; Penalties and Sentences Act 1992 (Qld), s 19; Sentencing Act 1991 (Vic), s 75; Sentencing Act 1997 (Tas), s 59; Criminal Law (Sentencing) Act 1988 (SA), s 39; Sentencing Act 2005 (NT), s 11; Crimes (Sentencing) Act 2005 (ACT), s 13; and Sentencing Act 1995 (WA), ss 48 and 49.

or conditional discharge without conviction in any case where a minimum penalty is not provided for."[136]

However, "conditional discharge" here means conditional upon payment, reparation or completion of any accompanying orders such as those presently available under s 106(3).[137]This is not the same as a discharge that is conditional on a good behaviour period, such as is available in the jurisdictions discussed above. There are several factors that support legislative amendment to confer such a power on sentencing courts in New Zealand.

First, a conditional discharge better reflects the principles underlying the discharge power. The purpose is to give offenders a second chance. It is a judicial concession that allows offenders to continue their life unhindered by a criminal record. It follows that this second chance should only be available to those who will not waste it by reoffending. The court cannot possibly predict with absolute certainty who will and will not reoffend, but a conditional discharge removes the need to predict. It shifts the burden onto the offender to show, by refraining from criminal activity, that he or she is a suitable recipient of the judicial concession.

Secondly, the majority of discharge applications concern young or first-time offenders.[138] These persons are the primary targets of the second chance purpose of the regime. However, as discussed above, it is often difficult for such persons to establish specific consequences of a conviction, as young people often do not yet have a foothold in a career. It may be appropriate that discharges are nevertheless available, but it is also in the public interest to implement measures to ensure that there is no further offending. Conditional discharges serve this purpose without adding any additional layers of difficulty to the offender's life. The only additional burden is to refrain from further criminal activity.

Thirdly, conditional discharges provide an appropriate way of addressing the issues discussed above regarding the apparent inequality of the discharge power. Rather than rewarding those who come to court with opportunity, they reward offenders who can show that they will not repeat their offending conduct. Conditional discharges benefit those who can demonstrate that they are appropriate and worthy recipients of the judicial concession. There may still be a requirement to show that the consequences of conviction would be out of proportion to the gravity of the offence. However, the threshold could be lowered. This would likely render the concession more readily available to those who cannot show any specific consequences but for whom a conviction may cause serious and unpredictable hardship.

Fourthly, a conditional discharge would better reflect the purposes of sentencing.[139] It would promote a greater sense of responsibility in the offender as the offending would not be out of mind as soon as the discharge is granted. It would also serve to denounce the conduct. It would provide greater specific deterrence as offenders would be aware

136 *Turner*, above n 33, at 241.

137 At 241.

138 Having previous convictions or discharges is not an absolute bar to receiving a discharge. Although rare, some cases do concern offenders who have previous convictions or discharges. See, for example, *Collins v Police* HC Auckland CRI-2009-404-409, 4 March 2010 at [6], a very unusual case in which the defendant had previously received five discharges without conviction. See also *Police v McCabe* [1985] 1 NZLR 361 (HC); *Morgan*, above n 79, at [15]; and *Swami v Police* [2012] NZHC 2725, [2012] NZFLR 962 at [25]. In any case, having previous convictions or discharges will weigh heavily against a discharge being granted.

139 See Sentencing Act, s 7.

that further offending would result in their being sentenced for both offences. It would also provide greater general deterrence as the sentence is more burdensome than an absolute discharge. Further, it would protect the community from the offender, as being placed on a good behaviour period with the threat of being resentenced is likely to reduce the chances of reoffending.

Fifthly, it would punish repeat offending more harshly than the current discharge power. Presently, under s 106 of the Sentencing Act, if an offender receives a discharge and then goes on to commit a further offence, he or she is not punished for the original offence. A conditional discharge would ensure that those who do not show that they are worthy recipients are duly punished for the initial offence by being resentenced for that offence.

Finally, the fact that many other common law jurisdictions have a conditional discharge power suggests that each regards it as justifiable. It also suggests that conditional discharges can be made to work in practice and are, to some extent, effective. While this cannot be determinative, it provides significant support for adopting an analogous power in New Zealand.

In the jurisdictions mentioned above, conditional discharges tend to be much more common than absolute discharges.[140] If New Zealand were to adopt a conditional discharge power, the same trend will likely emerge. Absolute discharges should be reserved for the most minor offending or where the consequences would be so severe that a conviction could never be justified. In all other cases, where the consequences would be out of proportion to the gravity of the offence, the offender should be discharged conditionally—that is, on the condition that he or she does not commit any further offences for a specified period.

A conditional discharge would still differentiate between two classes of people, but it would do so on a more principled basis than the current discharge power. Under a conditional discharge framework, the two classes would be those who can refrain from criminal offending and those who cannot. This is a much more appropriate distinction to make than between those with and without opportunity, and one that is often made in the sentencing process.[141]

B Conditional discharge: the amendment

Legislation for a conditional discharge power could be modelled on legislation from any one of the common law jurisdictions discussed above. For example, s 106 of the Sentencing Act could be amended as follows:

106 Discharge without conviction

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

140 For example, in the United Kingdom, an average of 1 per cent of offenders receive an absolute discharge whereas around 6 per cent are conditionally discharged. See "Table 2" and "Table 3" in Andrew Ashworth *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, Cambridge, 2010) at 10.

141 For example, by any uplift to sentence imposed due to the defendant's previous relevant convictions. See Sentencing Act, s 9(1)(j).

(2) A discharge under this section may be—
  (a) absolute; or
  (b) subject to the condition that the offender commits no offence during such period specified by the sentencing court not exceeding three years from the date on which the offender is sentenced.

(3) A discharge which is absolute is deemed to be an acquittal.

(4) If the offender commits an offence punishable by a term of imprisonment during the period specified in subsection (2)(b), then the court—
  (a) must inquire into the circumstances of the original offence and the conduct of the offender since the conditional discharge was granted; and
  (b) may sentence or otherwise deal with the offender for the original offence.

(5) If the offender reaches the expiry of the period specified in subsection (2)(b) then the offender is deemed to have been absolutely discharged.

...

Two points emerge from this proposed legislation. First, a framework would need to be established for determining the appropriate length of the good behaviour period in each case. A balance would need to be struck between the need to enact a sufficiently long period for the offender to prove him- or herself, and the need to impose the least restrictive outcome appropriate in the circumstances. This framework could be expected to develop in the courts over time.

Secondly, if the offender commits a further offence during the good behaviour period, there should remain a residual discretion for a sentencing judge to extend the good behaviour period, rather than enter a conviction on the new charge. This may be appropriate where the new offending is very minor or where the consequences of a conviction would still be out of all proportion to the gravity of the offending.

VI Conclusion

The power to discharge an offender without conviction is an important sentencing option. It recognises that a conviction is not always the best outcome. Where it is not in the public interest for a conviction to be entered, a discharge should be available. The offender should be given a second chance—a chance to continue life unhindered by a criminal conviction.

Conditional discharges provide a better option than the current discharge power. Conditional discharges would go some way in ensuring that only deserving recipients avoid conviction. Parliament should amend the Sentencing Act to confer upon sentencing courts the power to grant a conditional discharge. Such an amendment would satisfy the principles that underpin the discharge power, mitigate the inequality inherent in the discharge power and bring New Zealand law in line with other common law jurisdictions.

A discharge would still be a *get-out-of-jail card*, but it would not be free. Instead, it would require the offender to show, through his or her actions rather than background, that a discharge is a justified outcome. It would provide a high incentive to refrain from further offending, and it would reward those offenders who are capable of doing so. The law would become more substantively equal.