NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011 AND PURSUANT TO SS 107RA AND 107G OF THE PAROLE ACT 2022. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360347.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: HIGH COURT ORDER IN [2018] NZHC 3455 PROHIBITING PUBLICATION OF NAME AND ANY IDENTIFYING DETAILS OF APPELLANT REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 64/2022
[2024] NZSC 47

BETWEEN	R (SC 64/2022) Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	8 August 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ
Counsel:	A J Ellis and G K Edgeler for Appellant U R Jagose KC, R K Thomson and L C Hay for Respondent
Judgment:	7 May 2024

JUDGMENT OF THE COURT

A The application by the respondent to adduce further evidence is granted.

B The appeal is allowed.

C The proceeding is remitted to the High Court for reconsideration in light of this judgment and any further evidence adduced in that Court. Pending the High Court's decision on review under s 107RA(5) of the Parole Act, the appellant remains subject to the extended supervision order.

REASONS
(Given by Kós J)

[1] This appeal concerns the relationship between extended supervision orders (ESOs) and compulsory care orders (CCOs) under the relevant legislation.[1] Three questions arise for consideration by this Court. First, does the statutory scheme permit concurrent ESOs and CCOs? Secondly, could GPS monitoring be required under a CCO? Thirdly, how might the New Zealand Bill of Rights Act 1990 (NZBORA) affect the exercise of the courts' powers of review of the continuation of an ESO? While procedural issues arising in the appeal limit full examination of the issues, these questions arise in the following way.

[2] The appellant, R, is now 69 years old, and has spent most of his life in institutional care. He has an intellectual disability and been found unfit to stand trial. He is prone to sexually offend against women and girls. The first such allegation was made when he was 14 years old. For the most part, he has been dealt with as a special patient in mental health facilities, rather than as a sentenced offender in prisons. A problem associated with that disposition is his tendency to escape from secure care.

[3] R is presently subject to both an ESO, made in 2017 under the Parole Act 2002,[2] and a CCO, made in 2019 under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) and administered under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act).[3] The respondent applied to the High Court for review of the ESO in 2021, as the

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1 We explain what these orders do below at [29]. A glossary of acronyms appears at the conclusion of this judgment.

2 Parole Act 2002, s 107I(2).

3 Criminal Procedure (Mentally Impaired Persons) Act 2003 [CPMIP Act], s 25(1)(b); and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCR Act], s 6(3)(b).

Parole Act required.[4] The High Court confirmed the making of the ESO.[5] The Court of Appeal dismissed R's appeal of that decision.[6]

[4] Leave to appeal to this Court was then granted, the approved question being "how does the [NZBORA] affect the exercise of the court's discretion to renew an [ESO] when the individual concerned is also subject to a [CCO]?"[7]

[5] The respondent had contended below that the ESO was required to address the situation arising if the CCO was not renewed. But before us that argument was abandoned.[8] Rather, the respondent argued the ESO was liberty-enhancing for R because a CCO does not enable imposition of a GPS monitoring bracelet to track his location, whereas an ESO with that feature would manage risk of absconding and reoffending, giving R greater personal freedom and autonomy, and "broader reintegrative options". While this bears some similarity to a secondary argument advanced orally by the respondent in the Court of Appeal, the principal justification advanced for the ESO has evolved from a combination of public safety and the fulfilment of R's therapeutic needs (which prevailed in the Court of Appeal)[9] to one based on the enhancement of his liberty while he is subject to a CCO.[10] In support of this revised argument, the respondent sought to adduce further evidence before us.[11]

[6] We have concluded that the appeal must be allowed, and the ESO review remitted to the High Court for reconsideration. That is because, as just noted, a key argument underpinning the decisions of the High Court and the Court of Appeal was abandoned by the respondent. Further, the respondent's new argument depends on evidence which has not yet been the subject of informed instructions by R, and his

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4 Parole Act, s 107RA.

5 *Chief Executive of the Department of Corrections v R (CRI-2021-409-11)* [2021] NZHC 2276 (Osborne J) [HC judgment].

6 *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 (Dobson, Simon France and Hinton JJ) [CA judgment].

7 *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2023] NZSC 31 (Glazebrook, O'Regan and Williams JJ) [SC leave judgment].

8 This followed the Court of Appeal's finding that the public safety argument alone did not provide a sufficiently strong justification for the extended supervision order [ESO], because an interim detention order [IDO] might instead be made under s 107 of the Public Safety (Public Protection Orders) Act 2014 [PSPPO Act] if the compulsory care order [CCO] ended and was not further extended: CA judgment, above n 6, at [57]. As to these orders, see below at [25].

9 CA judgment, above n 6, at [52] and [58]–[62].

10 See below at [49].

11 See below at [7]–[11].

position on the argument itself is presently neither adequately informed nor articulated. Nor has the new evidence been tested before us by cross-examination. A further consequence of the above is that it is now unnecessary for this Court to address in any detail the approved question on which leave was given.

Application to adduce further evidence

[7] Shortly before the hearing, the respondent sought leave to adduce updating evidence on R's current CCO conditions. This was done on the basis that in the 15 months since the Court of Appeal hearing, the Family Court had (in July 2022) extended the duration of the CCO but reduced it to an order for supervised (rather than secure) care.[12] Leave was sought to adduce two affidavits.

[8] The first affidavit is from Mr Sean Berrill, R's care coordinator appointed under the IDCCR Act. His affidavit explains the practical machinery of the CCO. He notes that under R's care and rehabilitation plan, he may:

> … only attend outings to locations on a list pre-approved by his care manager, after a risk assessment has been carried out on the day, and must be supervised by at least one staff member within line of sight whenever he leaves on an approved outing.

Mr Berrill concludes that "it would be too unsafe to leave him with no legal mandate, even if he agreed to remain where he is". Mr Berrill further explains that the "safety net" of GPS monitoring was material to R's transitioning from secure hospital to secure community care in 2020, and "crucial" to his then transitioning to supervised community care.[13]

[9] The second affidavit is from Ms Christina Wilson, the supervisor of R's probation officer. Her affidavit explains the security systems at R's residence. She notes that:

> Early in 2023, when [R] had just moved to supervised care he did go for a walk up the road out of the property a few times. The Emerge Aotearoa staff

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12 *Re [R]* FC Christchurch FAM-2019-9-1614, 8 July 2022 (Minute of Judge Hambleton) [FC order].

13 A care recipient may be required to receive either supervised care or secure care: IDCCR Act, ss 86(3)–(4) and 47(2); and see s 5 definitions of "secure care" and "supervised care". Within these classifications, a care recipient may be subject to more or less liberal care regimes: ss 9, 26 and 63–64.

> followed him and he returned voluntarily. We are reluctant to take breach action unless we really have to, which so far has not been necessary.

[10] R's counsel opposed submission of this further evidence, including on the basis that as R is unfit to stand trial, he cannot give adequate instructions on the matter or otherwise waive his interests. Objection was also made on the basis that the evidence was not fresh, and that parts of it were irrelevant and prejudicial.

[11] We accept that to the extent the evidence is updating, including as to the arrangements made after the July 2022 Family Court order, it can be received on this appeal. As we are going to remit review of the ESO back to the High Court, we will receive the evidence tendered by the respondent without qualification.

Background

[12] We first outline R's offending, and then set out the relevant orders made. We turn, after that, to the legislative framework and the substance of the appeal.

Offending

[13] In about 1969, when R was 14 years old, he was reported to have sexually assaulted a younger girl. He was admitted to Cherry Farm Psychiatric Hospital. He was discharged but readmitted a year later after another alleged sexual assault. At 18, he was charged with raping a fellow psychiatric care patient. As a result, he was made a special patient at the Lake Alice Hospital National Secure Unit (Lake Alice).

[14] He was discharged from Lake Alice in 1985. In June 1986, he reoffended and was convicted of two charges of indecent assault. Committal orders were made by the District Court, and he was returned to Lake Alice.[14] From there he absconded and committed further offences, including attempted sexual violation and two charges of permitting indecent acts with a child. Further committal orders were made, and he was transferred to Porirua Hospital.

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[14] See below at [21].

[15] In 1994, he absconded twice from Porirua Hospital, and reoffended. He was convicted of three indecent assaults and sentenced to nine months' imprisonment. He was released from prison in June 1995. On the day of his release he indecently assaulted three women. He was then sentenced to a further 15 months' imprisonment.

[16] At this point historic offending against two young female family members was identified. The offending had occurred back in 1985–1986, after his discharge from Lake Alice. He was convicted of the rape of one child, and the attempted rape of the other. In June 1996, he was sentenced to a total of nine years' imprisonment.[15] He was released from prison on parole in October 2003 to accommodation administered by the Regional Intellectual Disability Care Agency. Following his release, the first ESO was made in 2005.[16]

[17] In January 2005, he offended while on an approved unsupervised outing, resulting in convictions for burglary and breach of parole. Following that offending, the first CCO was made.[17]

[18] R has committed several other offences, including performing indecent acts (upon himself) and behaving threateningly. As Whata J recorded in 2018, his alleged victims included a prison officer (2001); school children (2003); two women in a park (2008); four female staff at his care facility (2009); a meter reader who visited his home (2009); and other care facility staff (2011, 2012, and 2015).[18] He was convicted of breaching his ESO in 2015 by absconding, and by behaving threateningly in 2016.

[19] In 2019 he was charged with possessing an offensive weapon and two counts of threatening to kill. That offending resulted in a finding that R was unfit to stand trial. He was remanded to Hillmorton Hospital under s 23(2)(b) of the CPMIP Act.[19]

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15 *R v [R]* HC Wellington T 137/95, 21 June 1996.
16 *The Chief Executive of the Department of Corrections v [R]* HC Auckland CRI-2005-404-125, 24 November 2005 [First ESO].
17 *New Zealand Police v [R]* DC Manukau CRN 5092005358, 29 November 2005 [First CCO].
18 *The Chief Executive of the Department of Corrections v R* [2018] NZHC 3106 at [9].
19 *New Zealand Police v [R]* [2019] NZDC 5397.

Orders made

[20] Several Acts of Parliament have been brought to bear on R's circumstances. In order, they are the Criminal Justice Act 1985 (committal orders in 1986); the Parole Act (ESOs in 2005 and 2017); the CPMIP Act and IDCCR Act (CCOs in 2005 and 2019); and the Public Safety (Public Protection Orders) Act 2014 (PSPPO Act) (interim detention orders (IDOs)) in 2018 and 2019).[20]

[21] R's 1986 offending resulted in committal orders under s 118 of the Criminal Justice Act, enabling committal (rather than the passing of a sentence) where two doctors gave a diagnosis of mental disorder such that R required detention in a hospital in his own interest or that of public safety.

[22] Following R's release from prison in October 2003, and before the end of his parole period, the Department of Corrections (Corrections) applied for an ESO on the basis that he was likely to reoffend on ceasing to be subject to his continuing release conditions. On 24 November 2005, his first ESO was imposed by Rodney Hansen J.[21] The Judge found R lacked or had low self-control. He lacked insight into his offending and motivation to change. He had proved unsuitable for sexual offender treatment programmes. The Judge was satisfied that R was likely to commit further sexual offences.[22] The term of the order was ten years.

[23] Five days later, a further order for supervised care was made, arising from R's January 2005 offending.[23] This was the first CCO, made under s 34(1)(b)(ii) of the CPMIP Act. It appears it was not opposed. It was extended twice, ending in August 2011.

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20 The primary function of the PSPPO Act, unsurprisingly, is to enable the making of public protection orders [PPOs]. No PPO has been made in relation to R, although one was sought in 2018. Whata J directed the Department of Corrections instead consider making an assessment application under s 29 of the IDCCR Act: *The Chief Executive of the Department of Corrections v R* [2018] NZHC 3455. This direction became redundant a short while later when R was placed under a CCO, having been found unfit to plead in respect of fresh offending: see below at [26].

21 First ESO, above n 16.

22 At [26]; and see Parole Act, s 107I(2).

23 First CCO, above n 17.

[24] In March 2017, a second 10-year ESO was imposed by Edwards J.[24] The Judge was satisfied R displayed a pervasive pattern of serious sexual or other violent offending, with "an intense drive to commit a relevant sexual offence" against very young children and complete strangers, a limited self-regulatory capacity and limited acceptance of responsibility.[25] The Judge was satisfied that there was a high risk that R would commit a relevant sexual offence in the future.[26] An appeal to the Court of Appeal was unsuccessful.[27] As noted earlier, that second ESO was reviewed and confirmed by the High Court in 2021, and by the Court of Appeal in 2022. It is from those decisions the present appeal lies.[28]

[25] In 2018, Corrections applied for a public protection order (PPO) under the PSPPO Act. An IDO, requiring detention until a PPO application is finally determined, made under s 107 of that Act, was imposed in July 2018, but set aside on appeal in March 2019.[29] Thereafter, the further charges referred to above at [19] arose and Corrections initiated steps under the IDCCR Act. A further IDO was then made, apparently by consent, and this time under s 12(3) of the PSPPO Act, in March 2019.[30]

[26] Finally in this sequence of events, in April 2019, a three-year secure care order—a form of CCO—was made pursuant to s 25(1)(b) of the CPMIP Act.[31] That order followed the finding R was unfit to stand trial on the threatening and offensive weapon charges he then faced.[32] That order was then extended (but on a supervised rather than secure care basis) by Judge Hambleton in July 2022, and is due to expire in July 2024.[33] We note that the High Court's review and confirmation of the ESO occurred after this CCO was made, but before it was altered and extended by Judge Hambleton.

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24 *Chief Executive, New Zealand Department of Corrections v [R]* [2017] NZHC 559 at [79].
25 At [34] and [49]–[53].
26 At [54].
27 *[R] v Chief Executive of the Department of Corrections* [2020] NZCA 126.
28 See above at [3]–[4].
29 *Chief Executive, New Zealand Department of Corrections v [R]* [2018] NZHC 1733; and *R (CA464/2018) v Chief Executive of the Department of Corrections* [2019] NZCA 60.
30 *The Chief Executive of the Department of Corrections v R* [2019] NZHC 536.
31 *New Zealand Police v [R]* DC Christchurch CRI-2019-009-000014, 15 April 2019 (formal order). We were told that written reasons for the order cannot be found. While that fact is unusual, the order is not directly challenged before us in this appeal, which is concerned with the 2021 review of the ESO.
32 See above at [19].
33 FC order, above n 12; and see above at [7].

R's current care arrangements

[27] In June 2020, R was transferred to a secure facility in the community, managed by a private healthcare provider. His probation officer reactivated some ESO conditions, including those providing for GPS monitoring of his whereabouts. In late 2022, R moved into a supervised care facility. He presently remains subject to both the ESO made in 2017 (and confirmed on the review the subject of this appeal) and the CCO made in 2019 (and extended in 2022). His current arrangements are the subject of the updating evidence, discussed at [7]–[11] above.

Legislative framework

[28] We will deal at more length with specific provisions of the relevant legislation in the analysis that follows. However, we can summarise the essence of them here.

Features of PPOs, ESOs and CCOs

[29] First, we describe the basic features of PPOs, ESOs and CCOs (noting again that no PPO has been made in relation to R):

(a) A PPO is made in the case of very high-risk offenders, who are then detained separately from the main prison but behind a secure perimeter fence. PPO recipients may not leave the secure residence except under escort and supervision for medical and other approved purposes. PPOs have no fixed duration but are reviewed annually.

(b) An ESO may be made in the case of high-risk sex or serious violence offenders who have been released into the community. Parole-like conditions apply, and special conditions may restrict location or activity, and impose an electronic monitoring requirement. ESOs may not exceed 10 years' duration, but the Chief Executive of Corrections can apply for a new ESO of up to 10 years' duration before the old order expires.

(c) A CCO may be made under the IDCCR Act in the case of a prisoner (or former special patient) with an intellectual disability, or under the CPMIP Act where a defendant is unfit to stand trial (as in this case) or found not guilty by reason of insanity.[34] CCO recipients enjoy a range of statutory rights (including to treatment and company) but may be required to accept care properly given under an order or relevant care and rehabilitation plan and, if required to receive secure or supervised care, to stay in a designated residence. CCOs may not exceed three years but may be extended.

[30] The primary purpose of the PPO and ESO regimes is to protect the safety of the public.[35] By contrast, while a governing principle of the CCO regime is treating care recipients so that the health and safety of the recipient and others are protected, its primary objective is to provide appropriate care and rehabilitation for defendants with intellectual disabilities.[36]

[31] The test for a PPO and ESO involves an assessment of the risk of the offender committing further serious sexual or violent offending.[37] This includes an assessment of the offender's drive to reoffend, their self-regulatory capacity and their understanding of the impact of their offending.[38] The test for a CCO generally involves (among other things) an assessment of whether the person has an intellectual disability and an inquiry into the best method of dealing with that person.[39] In some cases, it involves an assessment as to whether a CCO is necessary for the safety of the public.[40]

[32] Those subject to a PPO have a right to rehabilitative treatment but only where "the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident".[41] The standard conditions of an ESO require the offender to take part in

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34 Where a CCO is made under the CPMIP Act in respect of a person with an intellectual disability, the CCO is administered under the IDCCR Act: CPMIP Act, ss 25(1)(b) and 26(2).
35 PSPPO Act, s 4(1); and Parole Act, s 107I(1).
36 IDCCR Act, ss 3 and 11(a).
37 PSPPO Act, s 13(1)(b); and Parole Act, s 107I(2)(b).
38 PSPPO Act, s 13(2); and Parole Act, ss 107I(AA)(1)–(2).
39 IDCCR Act, ss 44(1) and 45(1)(a); and CPMIP Act ss (3)(a), 23(1), 25(1) and 34(4)(a).
40 CPMIP Act, s 34(2).
41 PSPPO Act, s 36.

a rehabilitative needs assessment if directed to do so but do not require or offer any rehabilitative programme.[42] Rather, taking part in a rehabilitative programme is a special condition that the Parole Board may impose.[43] In contrast, rehabilitation and care is the core function of a CCO.

[33] PPOs continue indefinitely until a court finds, on review, that there is no longer a very high risk of imminent serious sexual or violent offending by the respondent.[44] ESOs last for a nominal maximum of 10 years but Corrections can apply for a new ESO, also for a duration of up to 10 years, provided they do so before the previous ESO has expired.[45] CCOs can be imposed for a maximum of three years but can be extended.[46]

[34] ESOs may be made subject to intensive monitoring conditions (including electronic monitoring).[47] There is no equivalent provision for CCOs in the IDCCR Act, and the respondent here does not suggest electronic monitoring can be required as part of a CCO.[48]

The interrelationship between PPOs, ESOs and CCOs

[35] The PSPPO and Parole Acts offer some guidance as to the interrelationship between PPOs, ESOs and CCOs:

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42 Parole Act, s 107JA(h).
43 Section 15(3)(b).
44 PSPPO Act, ss 18(4) and 93(1)(a).
45 Parole Act, ss 107F(1)(b) and 107I(4).
46 IDCCR Act, ss 46(2)–(3) and 85(1).
47 Parole Act, ss 15(3)(f) and 107K. Equivalent provisions are not found in the PSPPO Act.
48 The appellant contends that such a condition is available under a CCO: see below at [53] and [58].

(a) *ESOs and PPOs:* An ESO application is suspended if a PPO has also been sought (and is deemed withdrawn if the PPO is made).[49] Being subject to an ESO with an intensive monitoring condition however meets one eligibility criterion for a PPO.[50]

(b) *PPOs and CCOs:* A PPO should not be imposed on someone eligible to be detained by a CCO made under the IDCCR Act.[51] Relatedly, a PPO (and any application for a PPO) is suspended while the person is detained in a facility under the IDCCR Act.[52]

(c) *ESOs and CCOs:* Section 107P(3) of the Parole Act provides that where a person is subject to both an ESO and a CCO, the ESO conditions are suspended while the person is detained in a hospital or secure facility under the IDCCR Act (although the ESO conditions can be reactivated if necessary to mitigate risks to others' safety). Time on the ESO continues to run during that period of suspension.[53]

The 2021 ESO review

[36] The application for review of R's ESO was filed by Corrections in February 2021. Specifically, it sought a review to ascertain whether, under s 107RA(1)(a) of the Parole Act, there was a high risk that R would commit a relevant sexual offence within the remaining term of the order. In support, a report from a registered clinical psychologist, Paul Carlyon, was filed by Corrections in June 2021.

Evidence

[37] After recording R's history of offending and other anti-social behaviour prior to the making of the order in March 2017, Mr Carlyon turned to more recent information. He noted that:

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49 Parole Act, ss 107GAA(1)–(2).
50 PSPPO Act, s 7(1)(b).
51 PSPPO Act, ss 5(c) and 12.
52 PSPPO Act, ss 111(1)(b), 111(2), 139(1)(b) and 139(2).
53 The appellant argues that these orders cannot be imposed concurrently in R's case: see below at [55]–[57].

> A 2020 assessment … referred to a range of voyeuristic and exhibitionistic acts perpetrated by [R] while he was in prison or in care; victims included female staff and, less typically, women in public places.

[38] A further 2020 report referred to R performing an indecent act in front of a female residential support worker, resulting in a direction that women were not to be left alone with R thereafter. That report also noted that, with highly impulsive presentation that can vary with fluctuating mood, R could rapidly become "aggressive and confronting".

[39] R declined, as was his right, to engage with Mr Carlyon in the preparation of his report. However, the report noted that R had also not engaged in any offence-focused rehabilitation, and indicated an unwillingness to do so in the future. He had not, therefore, completed or appeared to take any long-term benefit from any treatment provided with the intent of reducing his risk of sexual reoffending. Mr Carlyon noted:

> It is important to observe that [R]'s profile – characterised by intellectual impairment, challenging and complex personality traits (e.g., high emotional sensitivity and reactivity, lack of concern for others, poor behavioural controls) and long-term reliance on external controls and support – poses significant and enduring barriers to the provision of offence-focused treatment.

R, having come to rely on others heavily in managing his behaviour, was likely to have reduced his "sense of self responsibility and increased his belief (reasonably held) that professional supports will make critical decisions and manage complex or risky situations".

[40] Using a number of standard predictive tools (and noting, fairly, their many deficiencies), Mr Carlyon concluded that R posed a high risk of engaging in further relevant sexual offending. Most likely, in his opinion, the risk would manifest in R perpetrating an indecent assault, most likely against a pubescent or post-pubescent female victim. However, he noted a wide band of potential victims, and a broad array of severity possible in any future sexual assaults.

[41] Mr Carlyon was cross-examined by counsel for R. He accepted supervision substantially lowered R's risk of sexual reoffending. The ESO substantially reduced

risk, in contrast to R simply living in the community unmonitored, but would not be enough on its own. Viewed overall, the CCO secure care environment was more effective in reducing risk than the ESO.[54]

High Court decision

[42] In terms of the mandatory considerations prescribed by s 107IAA(1) of the Parole Act, Osborne J concluded that:

(a) on the available evidence, R had demonstrated an intense drive, desire and urge to commit a relevant sexual offence;[55]

(b) R had a predilection and proclivity for serious sexual offending;[56]

(c) R had limited self-regulatory capacity (including in relation to sexual offending);[57] and

(d) R displayed both a lack of acceptance of responsibility or remorse for past offending and an absence of understanding or concern about the impact of his sexual offending on actual or potential victims.[58]

[43] Turning then to s 107RA of the Parole Act, and relying on the conclusions of Mr Carlyon, the Judge concluded that there was a high risk that R would commit a relevant sexual offence within the remaining term of the current ESO unless the order continued.[59] Next, and referencing the discretion provided in s 107RA(5), the Judge considered the significance of the potential for R no longer to be subject to a CCO, given that the order then in place was due to expire in April 2022. Osborne J observed:[60]

> [88] It is important to acknowledge in relation to R's care that the standard of care and supervision currently available to R through the [CCO] is excellent. It is appropriate that I note that R, who asked to speak to me directly

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54 HC judgment, above n 5, at [82]–[83]. At the time this evidence was given, R's CCO care level was secure. In July 2022, it was reduced to supervised care: see above at [7] and [26].
55 HC judgment, above n 5, at [59].
56 At [62].
57 At [65].
58 At [68].
59 At [74].
60 Footnotes omitted.

> at the hearing, also acknowledged his appreciation of the quality of that care. That said, there is no assurance that R will remain under that care regime beyond April 2022. The Court's review of the ESO has to take into account the risks that R might pose (both for himself and for the community) should there not be an ESO in place in the event his compulsory care regime has come to an end.
>
> [89] The only appropriate answer is that the ESO must continue for the time being. There would otherwise be clearly identified risks which need to be addressed but are no longer the subject of an appropriate regime. It would not be possible for the Department of Corrections to lodge a further application for an ESO at a later date to meet a future change in R's status under the [IDCCR] Act.
>
> [90] In these circumstances, I am satisfied it is appropriate to confirm the ESO.

[44] It will be readily apparent from this passage that public safety, in the event R was no longer subject to a CCO, was an essential underpinning to the order confirming the ESO on review. That is unsurprising given that the express purpose of an ESO is to protect members of the community from offenders who pose a real and ongoing risk.[61]

Court of Appeal judgment

[45] The Court of Appeal addressed three issues. The first of these was whether the ESO could be confirmed given the existence of a CCO. The argument made for R was that the IDCCR Act made him a care recipient on the basis he was no longer subject to the criminal justice system.[62] It was incompatible with this for him to be subject still to an ESO.

[46] The Court of Appeal rejected that argument. It noted, first, that the language of s 107P of the Parole Act was plain in not differentiating between types of care recipient.[63] Secondly, while there were similarities between the ESO and PPO regimes, there were important differences—in particular, the time constraints that applied under the ESO regime.[64] Thirdly, the CCO alone did not offer sufficient community protection when R was in community placement. That was because GPS

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61 Parole Act, s 107I(1).
62 CA judgment, above n 6, at [31]–[33].
63 At [35].
64 At [35]–[36].

monitoring was not available as an extra safeguard otherwise than through the ESO.[65] Accordingly, the Court said:[66]

> … as R's own case illustrates, the co-existence of the ESO can be of assistance to the recipient by broadening the care options. For that reason we do not consider there is a policy imperative to read down the provision.

The coexistence of the orders could therefore be justified by the combination of public safety measures and broader care options it enabled.

[47] The second issue the Court of Appeal considered was whether the evidence showed that R met the statutory test of a high risk of relevant reoffending. The Court affirmed Osborne J's conclusion.[67] It concluded that what was plain was that R continued to manifest sexualised conduct directed at women, and it was not likely to be solely non-contact conduct if the constraints under which he was presently managed were lifted.[68]

[48] The third issue was whether, the statutory preconditions for an ESO having been met, the Court should exercise its discretion to make the order. This required consideration of whether the continuation of the ESO was "strongly justified".[69] The Court of Appeal held continuation of the ESO "cannot be strongly justified solely by reason of the future protection it offers",[70] concluding, in reference to the IDO, that:[71]

> There is another order in place which can take effect immediately after the CCO ends, and a process to be revived that will allow ample protection if it is considered necessary. This conclusion is specific to R's situation where unusually a [PSPPO Act] assessment has already been made.

[49] Despite this finding, the Court of Appeal upheld Osborne J's exercise of discretion. It was satisfied there was "real utility in the existence of an ESO" and its necessity was "strongly justified".[72] It allowed a care regime "better suited" to R's

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65 At [37].
66 At [41].
67 At [49].
68 At [48].
69 At [53] citing *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [189]–[190].
70 CA judgment, above n 6, at [57].
71 At [57]. The order referred to was the second IDO described above at [25].
72 At [60].

treatment and rehabilitation while mitigating public safety issues.[73] Although public safety concerns could alternatively be addressed by returning R to a more secure facility, this would be a "retrograde step" in terms of his care programme.[74] A less secure facility was more appropriate, and the ESO facilitated R's access to such a facility by allowing GPS monitoring.[75] Further, it had not been shown that the ESO was operating in a discriminatory way. It existed because of the risks that R presented, not because of his intellectual disability.[76]

Leave to appeal to this Court

[50] As noted earlier, leave to appeal to this Court was granted, but on a more narrowly focused question than originally sought.[77] The approved question was whether closer analysis of the NZBORA should alter the review outcome where the appellant is subject to both a penal ESO and a non-penal CCO.[78] However, as noted above at [6], that question is left unanswered due to the altered circumstances of this appeal. Instead, we respond to two specific points arising from the parties' submissions and then make some brief observations regarding the approved question.

The respondent's change of stance: ESO "liberty-enhancing"

[51] In this Court, the respondent did not pursue its argument in the Courts below that the ESO was needed to manage the risk of the CCO coming to an end. And the respondent's secondary argument in the Court of Appeal now evolved to one in which ESO was said to be "liberty-enhancing" for R. The CCO did not enable GPS monitoring. Only the ESO authorised (and required) a GPS monitoring bracelet. That enabled monitoring of compliance with his whereabouts and night-time curfew conditions—a crucial element of the more liberal regime under which he is currently managed. But for the combination of orders, R's care coordinator would not have recommended transition to secure community care in 2020 or the reduction from

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73 At [60].
74 At [52].
75 At [58]–[60].
76 At [61].
77 SC leave judgment, above n 7.
78 The Court of Appeal found that ESOs are penal in nature in *Chisnall v Attorney-General*, above n 69, at [138]. That finding has not been challenged on appeal: *Attorney-General v Chisnall* [2022] NZSC 77 at [1].

secure to supervised care in 2022. The respondent submits that "[R]'s liberty interests are promoted rather than impaired by the multidisciplinary approach to his care prompted by the two overlapping regimes".

R's response to the respondent's change of stance

[52] The respondent's altered argument cut little ice with counsel for R. Mr Edgeler submitted the proposition that GPS monitoring made a material or "crucial" difference to R's liberty[79] was overstated and untested by cross-examination. And, as already noted at [41] above, cross-examination of Mr Carlyon in the High Court in fact elicited his opinion that a CCO secure care environment was more effective in reducing risk than the ESO. Mr Edgeler submitted that a further extension of the CCO could, and should, be granted, and that this would satisfactorily address the risk of reoffending. R accepted he should be subject to a CCO, just not the ESO.

[53] Mr Edgeler also submitted that the IDCCR Act might in fact be read so as to permit the imposition of electronic monitoring, thus providing the same purported benefits as an ESO but without the penal overlay. The imposition of electronic monitoring could perhaps be seen as falling within the power to direct a care recipient who is required to receive supervised care to stay in a designated facility or in a designated place.[80] If so, the respondent's argument that the ESO is liberty-enhancing would be commensurately weakened.

Discussion

[54] We start with what are really two preliminary points. First, whether the statutory scheme permits concurrent ESO and CCO orders. Secondly, whether GPS monitoring may be required under a CCO. We then turn, thirdly, to the disposition of the present appeal.

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79 See above at [8].
80 IDCCR Act, s 64(1).

Whether the statutory scheme permits concurrent ESO and CCO orders

[55] As we explain above at [35(c)], s 107P(3) of the Parole Act explicitly contemplates concurrent CCOs and ESOs. Counsel acknowledged this was implicit, although it is rather more than that. Mr Edgeler also submitted that an ESO could apply only to a recipient detained under a CCO with a mental illness from which they could recover. There is however nothing in s 107P(3) indicating that. As we see it, each order is potentially available under its own pathway, and s 107P(3) deals (at least in part) with the potential for conflict between them.

[56] By virtue of ss 94(1) and 6(3)(c) of the IDCCR Act, R is a "[c]are recipient no longer subject to the criminal justice system" because he was found unfit to plead. As we see it, however, that describes his CCO status but does not preclude an overlapping, continuing criminal justice status arising under a distinct and prior ESO. The correct characterisation here is that R's past criminal offending has resulted directly in the imposition of two ESOs, the most recent being in 2017. To that extent he does remain subject to the criminal justice system in respect of that offending. The immediate question under this issue is whether the fact of concurrency with a CCO, arising from R's unfitness to plead in 2019, should affect the imposition of the ESO and thereby take R outside that system.

[57] Mr Edgeler submitted the possibility of a concurrent CCO and ESO in this case arises only because of a quirk in the order in which they were imposed. Particular emphasis was put on s 107GAA of the Parole Act, which suspends an outstanding ESO application while a PPO application is determined. Had the respondent applied for the ESO after applying for a PPO, the ESO could not have been made as the PPO application has never been determined or withdrawn. In that case, R would be subject to the CCO alone, with the PPO application suspended for the duration of the CCO.[81] The appellant argued it would be arbitrary to allow the ESO to continue in this case simply because it was made prior to the PPO application. However, it is plainly legally possible to have an ESO in place prior to a PPO application, and there is no statutory bar to renewing the ESO thereafter.[82] It is also plainly possible to have both an ESO

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81 See above at [35(b)].

82 Indeed, the PSPPO Act expressly contemplates this sequence of orders by making an existing ESO one of the threshold criteria for imposing a PPO: s 7(1)(b).

and a CCO, though s 107P(3) of the Parole Act suspends ESO conditions where a CCO is also made. As we see it, the particular order of application as between the ESO and the PPO is immaterial to the operation of that provision.

Whether GPS monitoring may be required under a CCO

[58] Mr Edgeler's new argument set out at [53] above—that a power to require a care recipient to wear a GPS-monitoring bracelet may be inferred from the scheme of the IDCCR Act—was made orally in response to the respondent's new argument. It was not developed in any detail (unsurprisingly, given it was prompted by the respondent's new argument) and it was not suggested that such an implied power should be exercised in the present case. But it was neither consistent with R's written argument (which was premised on electronic monitoring being unavailable under the IDCCR Act) nor with the respondent's written argument (which submits that such monitoring is not available under that Act at all).

[59] This construction of the IDCCR Act, permitting electronic monitoring to be imposed on a care recipient, would seem to involve a substantial enlargement to the wording of s 64(1) of that Act. It would likely increase the extent to which the CCO regime may limit rights, adding another layer of restriction of freedom. It raises, therefore, a potential conflict with the interpretive direction in s 6 of the NZBORA. A meaning which is more consistent, or at least less inconsistent, with the affirmed right should be preferred.[83]

[60] There remains, however, the possibility that regardless of whether s 64(1) of the IDCCR Act permits imposition of a GPS-monitoring bracelet, R might himself give *informed consent* to wear one. That possibility was not explored before us, and we say nothing more about it here.

[61] We express no final view on this second preliminary point of whether GPS monitoring may be required under a CCO. It arises before us effectively at first

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[83] *R v Poumako* [2000] 2 NZLR 695 (CA) at [37]; *R v Pora* [2001] 2 NZLR 37 (CA) at [50], [53] and [57] per Elias CJ and Tipping J, [59] per Richardson P, [89] per Gault, Keith and McGrath JJ and [173]–[174] per Thomas J; and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92] per Tipping J.

instance. Together with informed consent (if suggested), it should be considered by the High Court in addressing the remittal of the ESO review.

Disposition of the appeal

[62] As we indicated at [6] above, the respondent's change of stance means it is necessary for us to remit the ESO review back to the High Court. That is so for two reasons. First, the evidence adduced by the respondent is new and untested—both as to the alleged rights-affirming qualities of an ESO, and the suggestion as to what would occur were the ESO not renewed on review. Secondly, R needs to be adequately informed of these developing events and have the opportunity to give informed instructions in accordance with his rights to do so under the NZBORA and the Convention on the Rights of Persons with Disabilities.[84] We accept that the way in which this development occurred forensically meant that did not occur prior to the hearing before us. Formally, we will allow the appeal.

[63] In these altered circumstances, we shall not evaluate the approved question upon which leave was granted, save to make these remarks. We record that the respondent has conceded that the electronic monitoring enabled by the ESO regime is needed, if at all, to enhance R's liberty, rather than to manage the risk of his further offending. While that may appear counter-intuitive, we do not discount that, practically, the implementation of GPS monitoring may enable R to receive greater freedom than he would otherwise have within the CCO regime. That object does not, however, appear to fall within the purpose for which the ESO regime was enacted, which is to protect the public from the risk of further serious sexual or violent offending.[85] Moreover, given the provisions of s 5 of the NZBORA, there remains a question whether those further restrictions could be demonstrably justified in a free and democratic society. These issues must, however, be evaluated against the background of properly tested facts.

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[84] Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

[85] Parole Act, s 107I(1).

Result

[64] The application by the respondent to adduce further evidence is granted.

[65] The appeal is allowed.

[66] The proceeding is remitted to the High Court for reconsideration in light of this judgment and any further evidence adduced in that Court. Pending the High Court's decision on review under s 107RA(5) of the Parole Act, R remains subject to the ESO.

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Appendix: Glossary of acronyms

Full term	Acronym
Compulsory care order	CCO
Criminal Procedure (Mentally Impaired Persons) Act 2003	CPMIP Act
Extended supervision order	ESO
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003	IDCCR Act
Interim detention order	IDO
New Zealand Bill of Rights Act 1990	NZBORA
Public protection order	PPO
Public Safety (Public Protection Orders) Act 2014	PSPPO Act