IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA21/20
[2021] NZCA 616

BETWEEN	MARK DAVID CHISNALL Appellant/Cross-Respondent
AND	THE ATTORNEY-GENERAL First Respondent/Cross-Appellant
AND	THE CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORECTIONS Second Respondent

Hearing:	2 and 3 February 2021
Court:	Cooper, Brown, Clifford, Gilbert and Collins JJ
Counsel:	A J Ellis, B J R Keith and G K Edgeler for Appellant D J Perkins and M J McKillop for First Respondent No appearance for Second Respondent
Judgment:	22 November 2021 at 2 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is dismissed.

C Counsel are to confer about the form of declarations that should be made and file memoranda in accordance with [231] of this judgment.

D Unless the Court orders otherwise, the Court will determine the form of the appropriate declarations on the papers.

E The first respondent must pay the appellant costs for a complex appeal on a band B basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] Under pt 1A of the Parole Act 2002 a sentencing court may make extended supervisions orders (ESOs). Such orders may be made in respect of offenders whose conduct has exhibited a pervasive pattern of serious sexual or violent offending, and who pose a high risk of committing such offending in the future.[1]

[2] Under the Public Safety (Public Protection Orders) Act 2014 (the PS (PPO) Act) the High Court may make a public protection order (PPO) if it is satisfied, on the balance of probabilities, that the threshold for a PPO has been met and there is a very

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

high risk of imminent serious sexual or violent offending once a person is released from prison into the community or, in any other case, left unsupervised.[2]

[3] Both statutory regimes have the purpose of protecting the public. In the case of ESOs the purpose stated in s 107I(1) of the Parole Act is "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences". In the case of PPOs, s 4(1) of the PS (PPO) Act states that the Act's objective is "to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences".

[4] These purposes are sought to be achieved by very significant restrictions on the rights of those subject to the orders. In the case of ESOs there are standard conditions requiring the person to report to a probation officer who may exercise control in relation to the person's place of residence, employment, associates and contacts.[3] Additional restrictions may also be imposed as special conditions.[4]

[5] The consequence of a PPO is to require the person against whom it is made to stay in the residence that the Chief Executive of the Department of Corrections (the Chief Executive) designates by written notice.[5] The resident must comply with every lawful direction given by the residence manager or a staff member, corrections officer or police employee.[6] Written communications may be checked and withheld,[7] items intended for the person may be inspected,[8] telephone calls may be monitored,[9] and residents may be searched.[10] Residents may be placed in seclusion and restrained.[11]

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2 Public Safety (Public Protection Orders) Act 2014 [PS (PPO) Act], s 13(1).
3 Parole Act, s 107JA(1).
4 Sections 107K and 15.
5 PS (PPO) Act, s 20.
6 Section 22.
7 Section 45.
8 Section 48.
9 Section 52.
10 Section 63.
11 Sections 71 and 72.

[6] On the application of the Chief Executive, the High Court may also order that a person subject to a PPO be detained in prison instead of at a residence.[12] Such an order may be made if detention or further detention in a residence would pose an unacceptably high risk, whether to the person subject to the order or others, such that the person cannot be safely managed in the residence.[13] A person subject to a prison detention order is treated in the same way as a prisoner who is remanded in custody.[14]

[7] The appellant Mr Chisnall has a history of serious sexual offending. He was due for release from custody on 27 April 2016, having served a sentence of 11 years' imprisonment for two convictions of sexual violation by rape. However, on 15 April 2016 the Chief Executive applied for a PPO or, as an alternative, an ESO. An interim detention order was granted on 22 April 2016, under s 107 of the PS (PPO) Act.[15] An appeal to this Court against the interim detention order was dismissed on 19 December 2016.[16] Leave to appeal to the Supreme Court was granted,[17] but the appeal was dismissed.[18]

[8] Mr Chisnall sought declarations in the High Court that the PPO and ESO regimes are inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). The orders sought were as follows:

> 1. Declaring that section 13(1) of the Public Safety (Public Protection Orders) Act is inconsistent with section 26(1) of the New Zealand Bill of Rights Act, as informed by Articles 15 and 26 of the International Covenant on Civil and Political Rights.
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> 2. Declaring that section 13(1) of the Public Safety (Public Protection Orders) Act is inconsistent with section 26(2) of the New Zealand Bill of Rights Act, as informed by Articles 14(7) and 26 of the International Covenant on Civil and Political Rights.
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> 3. Declaring that the manner and method of obtaining information for a psychological report in support of the application for a public protection order breached, and the making of a public protection order against

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12 Section 85(1).
13 Section 85(2).
14 Section 86(a).
15 *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 784 [Results judgment]; and *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796 [Reasons judgment].
16 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620.
17 *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 50.
18 *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83.

> Mr Chisnall would breach, his rights under sections 9, 18, 22, 23(5), 24(e) 25(a), (c) and (d), and 27 of the New Zealand Bill of Rights Act 1990, as informed by Articles 9, 10, 12, 14, and 26 of the International Covenant on Civil and Political Rights.
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> 4. Declaring that section 107I(2) of the Parole Act 2002 is inconsistent with section 26(1) of the New Zealand Bill of Rights Act, as informed by Articles 15 and 26 of the International Covenant on Civil and Political Rights.
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> 5. Declaring that section 107I(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act, as informed by Articles 14(7) and 26 of the International Covenant on Civil and Political Rights.
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> 6. Declaring that the manner and method of obtaining information for a psychological report in support of the application for an extended supervision order breached, and the making of a public protection order against Mr Chisnall would breach, his rights under sections 18, 22, 23(5), 25(a), (c) and (d), and 27 of the New Zealand Bill of Rights Act 1990, and Articles 9, 10, 12, 14, and 26 of the International Covenant on Civil and Political Rights.

[9] In the judgment giving rise to this appeal Whata J concluded that s 107I(2) of the Parole Act is inconsistent with s 26(2) of the Bill of Rights Act insofar as it applies retrospectively.[19] Section 26(2) provides, amongst other things, that no one who has been finally convicted of an offence shall be tried or punished for it again. After receiving further submissions from the parties, the Judge made the following declaration:[20]

> Section 107C(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990, to the extent that it permits the retrospective application of section 107I(2) of the Parole Act 2002.

[10] He declined to make any other declaration. After Mr Chisnall made the application for a declaration of inconsistency, a PPO was made against him on 14 December 2017. However, his appeal to this Court against the order was successful, and the matter was remitted to the High Court.[21] Following the High Court's reconsideration of the Chief Executive's application, a final PPO against Mr Chisnall was made on 27 January 2021.[22]

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19 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 [High Court judgment] at [161].

20 *Chief Executive of the Department of Corrections v Chisnall (No 2)* [2020] NZHC 243 at [14].

21 *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510.

22 *Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32.

The appeal and cross-appeal

[11] Mr Chisnall now appeals. He claims that the High Court should have held that both s 107I(2) of the Parole Act and the PS (PPO) Act are inconsistent with s 26(2) of the Bill of Rights Act regardless of when the person to whom an ESO or PPO is applied committed the qualifying offence. He also submits that the High Court should have made declarations that both the ESO and PPO regimes are inconsistent with ss 9, 18, 22, 23(5), 25(a), (c) and/or (d) and 27(1) of the Bill of Rights Act. Those provisions affirm rights not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment (s 9); to freedom of movement (s 18); not to be arbitrarily arrested or detained (s 22); to be, when deprived of liberty, treated with humanity and respect for the inherent dignity of the person (s 23(5)); to certain minimum standards of criminal procedure (s 25); and to natural justice (s 27(1)).

[12] The Attorney-General cross-appeals. He submits that the High Court was wrong to hold that the ESO regime is penal in nature thus imposing limitations on the rights protected by ss 25(g) and 26(2).[23] The Attorney-General therefore submits the High Court was wrong to make a declaration that s 107I(2) of the Parole Act is inconsistent with s 26(2) of the Bill of Rights Act, insofar as it applies retrospectively. The cross-appeal also challenges aspects of the High Court judgment concerning the PPO regime, including:

(a) observations about the ability of potential applicants to seek declarations of inconsistency on the basis that particular PPOs might be shown to be punitive in effect, and therefore inconsistent with ss 25(g) and 26(2) of the Bill of Rights Act; and

(b) what was in effect a contingent conclusion that if the High Court was wrong to hold that a PPO did not constitute a penalty, a PPO would impose unjustified limits on those rights.

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[23] Section 25(g) of the New Zealand Bill of Rights Act 1990 articulates the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

[13] Together, the appeal and the cross-appeal require us to analyse the effect of the provisions of the Parole Act and PS (PPO) Act constituting the ESO and PPO regimes. It will then be necessary to consider how those regimes impact on the rights guaranteed and affirmed by the Bill of Rights Act, and whether the limitations they impose on those rights are demonstrably justified. The outcome of that analysis will lead to a consideration of whether the declaration of inconsistency made by the High Court should be upheld and whether further declarations should be made.

The role of the Court

[14] Because of the important public interests engaged it is appropriate to restate at the outset the nature of the Court's role in this kind of case. We are not in any sense called on to exercise a judgment as to the competence of the legislature to enact laws it considers appropriate for the protection of the public, or any other purpose. The legislative objectives of protecting the public from serious sexual or violent offending can hardly be criticised, and, in any event, it is for the legislature to decide what laws should be enacted. But this is a democratic society based on the rule of law and the rights affirmed in the Bill of Rights Act reflect foundational values that have informed our laws from the time New Zealand became a Crown colony, and are part of the legacy of the common law. The long title of the Bill of Rights Act reflects this, by stating that it is an Act:

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

[15] Thus, and as reflected in s 2, the rights and fundamental freedoms are affirmed, not conferred, by the Act. And in making that affirmation the legislature seeks also to protect and promote those rights and freedoms. It does so for the purposes of New Zealand's domestic polity and to reflect our membership of the international community that has committed to the International Covenant on Civil and Political Rights (the ICCPR).[24] It is these rights and freedoms that define the nature of our society. That is reflected in the fact that s 3 of the Bill of Rights Act applies to acts

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

done by the legislative branch as well as the executive and judicial branches of the Government of New Zealand. Any doubt about the jurisdiction of the High Court to make declarations concerning the inconsistency of legislation with the Bill of Rights Act has been removed by the decision of the Supreme Court in *Attorney-General v Taylor*.[25]

[16] The essential questions for the Court in this appeal are whether the ESO and PPO regimes impose unjustified limitations on rights contained in the Bill of Rights Act, and whether we should make declarations saying so. To answer those questions is not to challenge the power of the legislature but to fulfil the role of the courts under our constitutional arrangements.

Summary

[17] We begin by outlining the ESO and PPO regimes. We then refer to the relevant Bill of Rights Act provisions and the judgment of the High Court, before addressing the arguments on the appeal and cross-appeal.

[18] For reasons we explain, we conclude that both the ESO and PPO regimes impose unjustified limitations on the right to immunity from second penalty, affirmed by s 26(2) of the Bill of Rights Act. It follows that the appeal is allowed, and the cross-appeal is dismissed.

The ESO regime

[19] Part 1A of the Parole Act sets out the ESO regime. It was inserted by the Parole (Extended Supervision) Amendment Act 2004 and has been amended by Acts subsequently passed in 2007 and 2014.[26] In *Belcher v Chief Executive of the Department of Corrections*, this Court found that the ESO regime, as it stood prior to the changes enacted in 2014, was inconsistent with the Bill of Rights Act unless able to be justified under s 5.[27]

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25 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.
26 Parole Amendment Act 2007; and Parole (Extended Supervision Orders) Amendment Act 2014.
27 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [57].

[20] The summary that we now give is not intended to be complete, but refers to the provisions that establish the main features of the regime.

Eligibility for ESOs

[21] Section 107F authorises the Chief Executive to apply to the sentencing court for an ESO in respect of an "eligible offender". There is a definition of such offenders in s 107C. They are persons who are not subject to an indeterminate sentence, but have been sentenced to imprisonment for a relevant offence and remain subject to a sentence of imprisonment, release conditions or an ESO previously made.[28] The definition also extends to persons subject to the Returning Offenders (Management and Information) Act 2015.[29]

[22] The expression "relevant offence" is defined in s 107B(1). The term includes offences specified in subss 2, 2A and 3, attempts and conspiracies to commit such offences and offences committed overseas that would come within the descriptions of those offences if committed in New Zealand. The definition reaches back to offences of an equivalent kind, committed against provisions of the Crimes Act 1961 that have subsequently been repealed.[30]

[23] The offences specified in s 107B(2) are defined by reference to a broad class of sexual offending. Subsection 107B(2) provides:

> (2) In this Part, an offence against any of the following sections of the Crimes Act 1961 is a **relevant sexual offence**:
>
> (a) section 128B(1) (sexual violation):
>
> (b) section 129(1) (attempted sexual violation):
>
> (c) section 129(2) (assault with intent to commit sexual violation):
>
> (d) section 129A(1) (sexual connection with consent induced by certain threats):

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28 Parole Act, s 107C(1)(a). The definition also includes persons who have arrived in New Zealand within six months of ceasing to be subject to any sentence, supervision conditions or order imposed for a relevant offence by an overseas court, have been in New Zealand for less than six months since that arrival and reside or intend to reside in New Zealand: section 107C(1)(b).

29 Section 107C(1)(c) and (d).

30 Section 107B(1)(e).

(e) section 129A(2) (indecent act with consent induced by certain threats), but only if the victim of the offence was under the age of 16 at the time of the offence:

(f) section 130(2) (incest):

(g) section 131(1) and (2) (sexual connection with dependent family member):

(h) section 131(3) (indecent act on dependent family member), but only if the victim of the offence was under the age of 16 at the time of the offence:

(i) section 131B (meeting young person following sexual grooming):

(j) section 132(1), (2), and (3) (sexual conduct with child under 12):

(k) section 134(1), (2), and (3) (sexual conduct with young person under 16):

(l) section 135 (indecent assault):

(m) section 138(1), (2), and (4) (sexual exploitation of person with significant impairment):

(n) section 142A (compelling another person to do indecent act with animal):

(o) section 143 (bestiality):

(p) section 144A(1) (sexual conduct with children and young people outside New Zealand):

(q) section 144C(1) (organising or promoting child sex tours):

(r) section 208 (abduction for purposes of marriage or sexual connection).

[24] This definition is followed by a definition of "relevant violent offence" in s 107B(2A). This provides:

(2A) In this Part, an offence against any of the following sections of the Crimes Act 1961 is a **relevant violent offence**:

(a) section 172(1) (murder):

(b) section 173 (attempt to murder):

(c) section 174 (counselling or attempting to procure murder):

(d) section 176 (accessory after the fact to murder):

(e) section 177 (manslaughter):

(f) section 188(1) and (2) (wounding with intent):

(g) section 189(1) (injuring with intent to cause grievous bodily harm):

(h) section 191(1) and (2) (aggravated wounding or injury):

(i) section 198(1) and (2) (discharging firearm or doing dangerous act with intent):

(j) section 198A(1) and (2) (using firearm against law enforcement officer, etc):

(k) section 198B (commission of crime with firearm):

(l) section 199 (acid throwing):

(m) section 209 (kidnapping):

(n) section 234(2) (robbery):

(o) section 235 (aggravated robbery):

(p) section 236(1) and (2) (assault with intent to rob).

[25] It can be seen that the provisions setting out relevant offences for the purposes of the ESO regime cover most serious criminal offending in the category of crimes against the person.[31]

[26] Under s 107F, the Chief Executive may apply for an ESO at any time before the later of the expiry date of the sentence to which the offender is subject, and the date on which the offender ceases to be subject to any release conditions.[32] If the offender is already subject to an ESO, an application for a new ESO may be made at any time before the expiry of the existing order.[33] Other provisions govern when an application may be made in respect of a person returning to New Zealand from overseas.[34]

[27] An important feature of the ESO regime is the requirement under s 107F(2) that an application must be accompanied by a report by a health assessor

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31 Section 107B(3) extends the ESO regime to offences under the Films, Videos, and Publications Classification Act 1993 involving objectionable material relating to children or young persons.

32 Section 107F(1)(a).

33 Section 107F(1)(b).

34 Section 107F(1)(c) and (d).

(an expression defined in s 4 of the Sentencing Act 2002). The health assessor's report must address one or both of the following two questions:[35]

> (a) whether—
>
> > (i) the offender displays each of the traits and behavioural characteristics specified in section 107IAA(1); and
> >
> > (ii) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> (b) whether—
>
> > (i) the offender displays each of the behavioural characteristics specified in section 107IAA(2); and
> >
> > (ii) there is a very high risk that the offender will in future commit a relevant violent offence.

[28] The section differentiates between relevant sexual offending and relevant violent offending. Under s 107IAA(l) a court may determine that there is a high risk an eligible offender will commit a relevant sexual offence only if it satisfied that the offender:

> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and
>
> (d) displays either or both of the following:
>
> > (i) a lack of acceptance of responsibility or remorse for past offending:
> >
> > (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

[29] In the case of relevant violent offending, s 107IAA(2) provides that a court may determine that there is a very high risk of such offending if it is satisfied that the offender:

> (a) has a severe disturbance in behavioural functioning established by evidence of each of the following characteristics:
>
> > (i) intense drive, desires, or urges to commit acts of violence; and

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35 Section 107F(2A).

(ii) extreme aggressive volatility; and

(iii) persistent harbouring of vengeful intentions towards 1 or more other persons; and

(b) either—

(i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or

(ii) has limited self-regulatory capacity; and

(c) displays an absence of understanding for or concern about the impact of his or her violence on actual or potential victims.

Imposition of ESOs

[30] The power of the sentencing court to make an ESO is set out in s 107I. As noted earlier, subs (1) of that section states that the purpose of an ESO is "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences". Subsection (2) then provides:

(2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—

(a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and

(b) either or both of the following apply:

(i) there is a high risk that the offender will in future commit a relevant sexual offence:

(ii) there is a very high risk that the offender will in future commit a relevant violent offence.

[31] Under subs (4), every ESO must state the term of the order, which may not exceed 10 years. The term of the order must be the minimum period required for the purposes of the safety of the community in light of the level of risk posed by the offender, the seriousness of the harm that might be caused to the victims and the likely duration of the risk.[36] The implication of the Chief Executive's ability to apply for an

[36] Section 107I(5).

ESO before the expiry of an existing order is that an offender may be subject to an ESO for a period that, in total, exceeds 10 years if a court deems that the relevant risk still exists when the application for a new order is made.

[32] An ESO may not be made without giving the offender an opportunity to be heard. Relevant procedures are set out in s 107G. Its provisions require service of a copy of the application, the health assessor's report and any affidavits accompanying the application on the offender.[37] There must also be a notice setting out the offender's rights and the procedures relating to the application.[38] Section 107G(4) provides that the offender must be present at the hearing of the application and may be represented by counsel.

Conditions of ESOs

[33] Section 107J(1) provides that ESOs are subject to the standard extended supervision conditions set out in s 107JA, and any special conditions imposed by the Parole Board under s 107K. The standard extended supervision conditions apply throughout the term of the ESO, except where the Parole Board considers they should be suspended because of incompatibility with special conditions it has imposed.[39] Special conditions apply for such period as is determined by the Parole Board.[40]

[34] The standard conditions include conditions requiring offenders:[41]

(a) to report in person to a probation officer within 72 hours of commencement of the ESO and thereafter as and when required;

(b) to notify a probation officer of their residential address and where they are employed when asked to do so;

(c) to obtain prior written consent of a probation officer before moving to a new residential address;

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37 Section 107G(1)(a), (b) and (c).
38 Section 107G(1)(d).
39 Section 107K(3)(c).
40 Section 107J(1)(b).
41 Section 107JA.

(d) not to reside at any address at which a probation officer has directed them not to reside;

(e) not to leave or attempt to leave New Zealand without the prior written consent of a probation officer;

(f) to allow the collection of biometric information if directed by a probation officer;[42]

(g) to obtain prior written consent of a probation officer before changing their employment;

(h) not to engage in any employment or occupation in which a probation officer has directed them not to engage;

(i) to take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer;

(j) not to associate with or contact persons under the age of 16 years, except with prior written approval of a probation officer and in the presence and under the supervision of an adult who is aware of the relevant offending and has been approved in writing by a probation officer;

(k) not to contact or associate with a victim of the offender without prior written approval of a probation officer; and

(l) not to associate with or contact any persons or class of persons specified in a written direction given to the offender.

[35] Special conditions the Parole Board may impose include conditions:[43]

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[42] Section 107JB sets out the purposes for which biometric information collected under s 107JA(1)(eb) may be used. Those purposes are to manage offenders to ensure public safety, identify offenders before they leave New Zealand and enforce the condition requiring them not to leave New Zealand without prior written consent.

[43] Sections 107K and 15.

(a) as to the offender's place of residence, finances or earnings;

(b) imposing residential restrictions, including the power to require the offender to stay at a specified residence at all times for a period of up to 12 months;[44]

(c) requiring participation in a programme designed to provide for rehabilitation and reintegration;

(d) prohibiting the offender from using controlled drugs or psychoactive substances, or consuming alcohol;

(e) prohibiting the offender from associating with persons or particular classes of persons;

(f) requiring the offender to take prescription medication;

(g) prohibiting the offender from entering or remaining in specified areas, at special times or at all times; and

(h) requiring the offender to submit to electronic monitoring of compliance.

[36] Under s 107IAC(1) the court may, on application by the Chief Executive under s 107IAB(1), make an order requiring the Parole Board to impose an intensive monitoring condition. An intensive monitoring condition is a condition:[45]

> … requiring an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved, by a person authorised by the chief executive, to undertake person-to-person monitoring.

[37] The maximum duration of an intensive monitoring condition is 12 months.[46] When an order is made under the section, the Parole Board is then obliged to impose

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44 Section 33(2) and (3).
45 Section 107IAC(2).
46 Section 107IAC(3).

an intensive monitoring condition on the offender as a special condition.[47] The court may exercise this power only once, even where an offender is subject to repeated ESOs.[48]

Appeal, review and penalties

[38] The decisions to make to an ESO and to impose an intensive monitoring condition may be appealed by the offender, and the Chief Executive may appeal against the refusal to make such orders.[49] Every such appeal is to this Court.[50]

[39] Section 107RA(1) provides for review of ESOs by the sentencing court to ascertain whether the risks of offending which led to the imposition of the order will apply for the remainder of its term. Such a review must be commenced on or before the "review date" which is ascertained in accordance with s 107RA(2). That subsection provides:

> (2) The review date of an extended supervision order is,—
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> (a) if an offender has not ceased to be subject to an extended supervision order since first becoming subject to an extended supervision order, the date that is 15 years after the date on which the first extended supervision order commenced; and
>
> (b) thereafter, 5 years after the imposition of any and each new extended supervision order.

The court may confirm the order only if it is satisfied that the relevant risks continue, on the basis of the matters set out in s 107IAA.[51]

[40] Section 107RB provides for the biennial review of "high-impact conditions". A high-impact condition means either a residential condition requiring the offender to stay at a specified residence for more than a total of 70 hours during any week, or a condition requiring the offender to submit to a form of electronic monitoring that enables the offender's whereabouts to be monitored when not at his or her residence.[52]

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47 Section 107IAC(4). Under s 15(3)(g), the Parole Board may only impose an intensive monitoring condition if ordered to do so by a court.
48 Section 107IAC(5).
49 Section 107R(1).
50 Section 107R(2).
51 Section 107RA(6).
52 Section 107RB(1).

These reviews must take place every two years after the later of the date on which the high-impact condition was imposed, or the date on which the condition was confirmed or varied under ss 107O or 107RB.[53] The Parole Board is empowered to confirm, discharge or vary the condition after considering a recommendation made by the Chief Executive, and having advised the offender of the review and that he or she may make a written submission to the Board.[54]

[41] We mention also s 107T, which provides that it is an offence to breach any conditions of an ESO. Conviction carries a possible term of imprisonment not exceeding two years.

[42] Section 107TA makes specific provision for offences in relation to drug or alcohol conditions included in an ESO. It is an offence for the offender to refuse or fail without reasonable excuse to undergo testing, submit to continuous monitoring when required, comply with instructions that are reasonably necessary for the effective administration of continuous monitoring, accompany authorised persons to facilitate testing and otherwise cooperate for the purposes of the tests.[55]

[43] Finally, we note that s 107X provides that proceedings under pt 1A of the Parole Act are criminal proceedings for the purposes of legal aid.[56]

[44] It is evident from the foregoing discussion of the relevant provisions that those to whom ESOs apply are made subject to extensive restrictions on their personal autonomy.

Evidence relating to ESOs

[45] Ms Rachel Leota, the National Commissioner of the Department of Corrections, swore an affidavit in the High Court proceedings on 1 March 2019 in support of the Attorney-General's opposition to Mr Chisnall's application. In that

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53 Section 107RB(2).
54 Section 107RB(3) and (5).
55 Section 107TA(1). Maximum penalty two years' imprisonment: s 107TA(2).
56 Although s 107X refers to the Legal Services Act 2000 that Act has now been repealed and replaced with the Legal Services Act 2011.

affidavit she records that as National Commissioner she has delegated power from the Chief Executive to make applications for ESOs.[57]

[46] Ms Leota states that at the time the affidavit was sworn, there were 263 offenders subject to an ESO. She explains that although standard conditions apply to every order, special conditions are tailored to each individual based on their particular reoffending risks and rehabilitation or reintegrative needs. The variable nature of conditions means that the restrictions on an offender vary considerably. She explains that offenders subject to an ESO with intensive monitoring may be located together in a residential facility such as Spring Hill Village: these are self-care units situated on the property of Spring Hill Corrections Facility, but outside the "wire". On the other hand, offenders might live in their own homes and be engaged in employment, although subject to exclusion zones (such as schools and playgrounds) and reporting requirements. She states that at the time she made her affidavit there were seven offenders in the community subject to an ESO with a special condition of intensive monitoring. Twenty-three others were subject to "bespoke programme" conditions that involved their participation in reintegration programmes and engagement with an agency, including a level of support and supervision by the agency.

[47] Ms Leota states that rates of reoffending of a serious nature for those subject to an ESO are "generally low". She notes that the Department of Corrections has collected data on the general rates of reoffending which have resulted in sentences of imprisonment, which she reports as follows:

(a) Within 12 months, a rate of 0.23 in a group of 446 offenders.

(b) Within 24 months, a rate of 0.32 in a group of 396 offenders.

(c) Within 36 months, a rate of 0.35 in a group of 355 offenders.

(d) Within 48 months, a rate of 0.38 in a group of 334 offenders.

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[57] Ms Leota said the Deputy Chief Executive has that delegation for PPO applications.

(e) Within 60 months, a rate of 0.40 in a group of 307 offenders.

[48] Ms Leota also records that a significant number of ESOs have expired, without the need for further management of the offender. It was her evidence that of the 491 ESOs imposed since 2004, 124 came to an end at the expiry of the order, and in only nine cases was another ESO then imposed. She notes that a further 34 ESOs came to an end when they were cancelled by subsequent sentences or orders, of which 22 were sentences of preventive detention, 11 were renewed ESOs before the ESO expired (largely attributable to persistent breaches of conditions) and one was a PPO. Thirty-four ESOs came to an end when the offender died and 28 were terminated as a consequence of successful appeals or court applications. There were two cases where the ESO terminated as a consequence of deportations.

The PPO regime

[49] We have already noted that s 4(1) of the PS (PPO) Act states that:

> The objective of the Act is to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences.

[50] Unusually, subs (2) then contains a statement about what is *not* an objective of the Act: it is "not an objective of this Act to punish persons against whom orders are made under this Act". That theme is continued in the first of the principles which are stated in s 5. That section provides:

> **5 Principles**
>
> Every person or court exercising a power under this Act must have regard to the following principles:
>
> (a) orders under this Act are not imposed to punish persons and the previous commission of an offence is only 1 of several factors that are relevant to assessing whether there is a very high risk of imminent serious sexual or violent offending by a person:
>
> (b) a public protection order should only be imposed if the magnitude of the risk posed by the respondent justifies the imposition of the order:
>
> (c) a public protection order should not be imposed on a person who is eligible to be detained under the Mental Health

(Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:

(d) persons who are detained in a residence under a public protection order should have as much autonomy and quality of life as possible, while ensuring the orderly functioning and safety within the residence.

Imposition of PPOs

[51] Section 8 of the PS (PPO) Act provides that the Chief Executive may apply for a PPO against a person who meets the threshold for such an order. Applications must be made to the High Court by way of originating application.[58]

[52] Under s 13(1) the Court may make a PPO after considering all of the evidence offered, and in particular the evidence given by two or more health assessors (including at least one registered psychologist), if the Court is satisfied on the balance of probabilities that:

(a) the respondent meets the threshold for a public protection order; and

(b) there is a very high risk of imminent serious sexual or violent offending by the respondent if,—

(i) where the respondent is detained in a prison, the respondent is released from prison into the community; or

(ii) in any other case, the respondent is left unsupervised.

[53] Section 13(2) provides that the Court may not find that there is a very high risk of imminent serious sexual or violent offending by the respondent unless satisfied that "the respondent exhibits a severe disturbance in behavioural functioning established by evidence to a high level" of each of the following four characteristics:

(a) an intense drive or urge to commit a particular form of offending:

(b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:

(c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims (within the general sense of that term and not merely as defined in section 3):

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58 PS (PPO) Act, s 104.

(d) poor interpersonal relationships or social isolation or both.

[54] It can be inferred that the use of the statutory language "evidence to a high level" is intended to ensure that although the balance of probabilities standard is referred to in s 13(1), the Court must find that standard to be clearly met.

Threshold for PPOs

[55] Section 7 contains the prescription of what is necessary to establish that the respondent meets the threshold for a PPO. In the first category are persons detained in a prison under a determinate sentence for a serious sexual or violent offence, who must be released from detention not later than six months after the date on which the Chief Executive applies for a PPO against the person.[59] In the second category are persons subject to an ESO who are, or have been, subject to a condition of full-time accompaniment and monitoring imposed under s 107K of the Parole Act, or subject to a condition of long term full-time placement for the purposes of a programme under ss 15(3) and 16(c) of the Parole Act.[60]

[56] Other categories of persons who may meet the threshold for a PPO are persons subject to a protective supervision order,[61] and persons who have arrived in New Zealand after ceasing to be subject to sentences or other controls having committed serious sexual or violent offences overseas.[62]

[57] The expression "serious sexual or violent offence" is broadly defined in s 3 of the PS (PPO) Act. The sexual offending is described by reference to sexual crimes under pt 7 of the Crimes Act which are punishable by seven or more years' imprisonment. The violent offending lists the same offences as appear in the equivalent definition applicable to ESOs in the Parole Act.[63]

[58] The right to apply for a PPO is given to the Chief Executive under s 8(1). The application must be accompanied by at least two reports separately prepared by

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59 Section 7(1)(a)(i).
60 Section 7(1)(b).
61 Section 7(1)(c). We discuss protective supervision orders below at [73]–[75].
62 Section 7(1)(d).
63 With the addition of abduction of a young person under the age of 16: Crimes Act 1961, s 210.

health assessors (one of whom is to be a registered psychologist) which address whether the respondent exhibits "to a high level" each of the four characteristics described in s 13(2) and whether there is "a very high risk of imminent serious sexual or violent offending by the respondent".[64]

Effect and conditions of PPOs

[59] Once a PPO is made the respondent becomes subject to the legal custody of the Chief Executive.[65] The means by which the respondent becomes a "resident" is a matter of inference rather than direct statement in the PS (PPO) Act. However, the definition of "resident" refers to a person who is subject to a PPO.[66]

[60] Section 20 provides that "[a] resident must stay in the residence that the chief executive designates by written notice given to the resident and to the manager of that residence". A number of further restrictions are then applied to residents. Significantly, they are obliged to comply with every lawful direction given to them by the manager of the residence, a staff member of the residence, or a corrections officer or police employee acting under s 73(1).[67]

[61] Residents may not possess "prohibited items",[68] a term expansively defined in s 3. The definition includes any article that could be harmful to the resident or to any other person, any medicines, controlled drugs, psychoactive substances, alcohol, tobacco, pornography, computers or other electronic devices on which prohibited items are stored, electronic communication devices, live animals and any other article referred to in rules specifically made for the residence by its manager under s 119.

[62] A resident may leave the residence only with the leave of the Chief Executive. The Chief Executive is empowered to grant such leave for limited purposes set out in s 26(1). Those purposes are medical or dental examinations and treatment, to attend hearings and proceedings under the Act to which the resident is a party, to attend any other court proceedings which the resident is required to attend, to attend a

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64 Section 9.
65 Section 21(1).
66 Section 3.
67 Section 22. Section 73 provides for the escort of residents from place to place.
68 Section 23.

rehabilitation programme which has been identified in the resident's management plan and, broadly, "for humanitarian reasons".[69] During such leave of absence, the resident must be escorted and supervised.[70]

[63] Section 27(1) provides that residents have the rights of persons of full capacity who are not subject to a PPO, except to the extent that those rights are limited by the Act; rules, guidelines, instructions or regulations made under the Act; or decisions of the manager of the residence taken in accordance with the section. Under s 27(3), the manager may limit the rights of a resident to the extent reasonably necessary to prevent self-harm, harm to others or disruption of the orderly functioning of the residence. So the apparently broad conferral of rights with which the section begins can be subject to restriction by the manager. In making a decision that affects a resident the manager must afford as much autonomy and quality of life to the resident as is compatible with the health, safety and wellbeing of the resident and other persons, and the orderly functioning of the residence.[71] Where a decision has an adverse effect on a resident it must be "reasonable and proportionate to the objective sought to be achieved".[72] These powers of the manager mean that the rights of residents may be limited, for the reasons given, in a manner that reflects the reality that they are detained in a residence that must be effectively and safely managed.

[64] In addition, some rights are specifically mentioned in the statute. These are the rights:

(a) to retain any money earned by working, with the approval of the relevant manager, in the residence or the prison;[73]

(b) to obtain legal advice "on his or her status as a resident and on any other relevant legal question";[74]

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69 Section 26(1)(e).
70 Section 26(3).
71 Section 27(4)(a).
72 Section 27(4)(b).
73 Section 28.
74 Section 29(1).

(c) to be registered as an elector and to vote;[75]

(d) to participate in "recreational, educational and cultural activities within the residence";[76]

(e) to receive and send written communications;[77] and

(f) to have access to news media and, if internet facilities are available in the residence, to internet sites approved by the manager (but without the right to unsupervised access to the internet or the use of email).[78]

In addition, residents may receive visits from persons who are permitted by the manager to visit the residence.[79]

[65] There is a right to medical treatment and health care to a standard that is reasonably equivalent to the standard of health care available to the public.[80] Rehabilitative treatment is also provided for:

> **36 Right to rehabilitative treatment**
>
> A resident is entitled to receive rehabilitative treatment if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident.

[66] A resident is also entitled to be dealt with in a manner that respects the resident's cultural and ethnic identity, language and religious or ethical beliefs.[81]

[67] Sub-part 4 of pt 1 of the PS (PPO) Act contains provisions for "management" of residents. Section 41(1) requires the manager of the residence at which the resident is to stay to assess the needs of the resident in a consultative process. That assessment is to identify any special medical requirements, cultural or religious needs, skills or capacities and educational needs of the resident, and "steps to be taken to facilitate the

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75 Section 30.
76 Section 31.
77 Section 32.
78 Section 33.
79 Section 34(1).
80 Section 35.
81 Section 38.

resident's rehabilitation and reintegration into the community".[82] After completing the assessment, the manager must prepare a management plan which must set out the needs identified in the assessment, the extent to which the needs can reasonably be met within the residence and a personal management programme "for the goals of the resident that will contribute towards his or her eventual release from the residence and reintegration into the community".[83] The plan must also set out "any treatment and programmes that may be offered to the resident in accordance with section 36, and that the resident elects to receive or participate in".[84]

[68] Other provisions in this part of Act provide for the monitoring of written communications and withholding them in certain cases;[85] prohibiting delivery of items to a resident unless approved by the resident's manager and providing for inspection of any items delivered;[86] monitoring of telephone calls;[87] drug or alcohol tests;[88] and for search of any resident, the residence and persons seeking to enter the residence,[89] including with the use of dogs "with decency and sensitivity".[90]

[69] The manager may place a resident in seclusion if that is necessary for reasons connected with health or safety, care and wellbeing of other persons and the orderly functioning of the residence.[91] Such seclusion may be for no longer "than is necessary to achieve the purpose of placing the resident in seclusion".[92] Residents may also be restrained if that is necessary to prevent them from endangering the health or safety of the resident or others, seriously damaging property, seriously compromising the care and wellbeing of the resident or other persons or escaping from lawful custody.[93]

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82 Section 41(2).
83 Section 42(3)(c).
84 Section 42(3)(f).
85 Section 45.
86 Sections 47 and 48.
87 Sections 51 to 61.
88 Section 68.
89 Sections 63 and 64.
90 Section 66.
91 Section 71.
92 Section 71(3)(a).
93 Section 72(1).

Prison detention orders

[70] Sub-part 6 of pt 1 of the PS (PPO) Act deals with prison detention orders. Under s 85, the Chief Executive may apply for an order that a person subject to a PPO be detained in a prison instead of a residence. Such an order may be made if the Court is satisfied that further detention of the person in the residence would "pose such an unacceptably high risk to himself or herself or to others, or to both, that the person cannot be safely managed in the residence" and that all less restrictive options for controlling the behaviour of the person have been considered and tried.[94] The Court may make an order for detention in prison "immediately after making a public protection order against that person".[95] Such orders therefore need not follow a period of detention in a residence.

[71] Section 86 then provides that persons subject to a prison detention order must be treated in the same way as persons committed to prison solely because they are awaiting trial, and have the rights and obligations of such prisoners. Other rights conferred on residents by the statute are retained, but only to the extent compatible with the provisions of the Corrections Act 2004 for remand prisoners.[96]

Review of PPOs

[72] Once a PPO has been made it must be reviewed by a review panel.[97] Such reviews must take place within one year after the order is made, and within each succeeding year unless there has been an application to the Court.[98] Under s 16(1) the Chief Executive must apply to the Court for review at five yearly intervals or whenever the review panel directs the Chief Executive to apply. The person subject to the order may also apply, but only with the leave of the Court.[99] The Court must consider whether there remains a very high risk of imminent serious sexual or violent offending. If it concludes there is no longer such a risk, it must make a finding to that effect.[100]

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94 Section 85(2).
95 Section 85(3).
96 Section 86(c).
97 Section 15. A review panel is made up of six members appointed by the Minister of Justice under s 122. It is chaired by a judge or retired judge. It must have at least four members who have experience in the operation of the Parole Board and at least two who are health assessors.
98 Section 15(1).
99 Section 17(1).
100 Section 18(4).

[73] Sub-part 7 of pt 1 of the PS (PPO) Act contains provisions that apply where the Court conducts a review of a PPO and determines that there is no longer a very high risk of imminent serious sexual or violent offending by the person subject to the order. Once that position is reached s 93(1) provides that the Court must cancel the PPO and impose a protective supervision order on the person. After affording the parties an opportunity to be heard as to the requirements that should be included in the protective supervision order,[101] the Court can include "any requirements that the court considers necessary" to reduce the risk of offending by the person under protective supervision, facilitate or promote the person's rehabilitation and reintegration into the community or provide for the reasonable concerns of victims.[102]

[74] It is an offence to breach any requirements included in a protective supervision order. The maximum penalty is two years' imprisonment.[103]

[75] Further provisions were inserted in this sub-part by the Public Safety (Public Protection Orders) (Drug and Alcohol Testing) Amendment Act 2016 providing specifically for drug and alcohol requirements included in protective supervision orders. In broad terms these provisions enable constables or employees of the Department of Corrections authorised by the Chief Executive to require persons subject to a protective supervision order with a drug or alcohol condition to undergo drug and alcohol testing and submit to continuous monitoring.[104]

[76] It is clear from this summary of the PPO scheme that a PPO results in even more extensive restrictions on personal autonomy than apply in the case of ESOs.

Evidence relating to PPOs

[77] In her affidavit mentioned above, Ms Leota states that there is currently only one PPO residence, called Matawhāiti. She describes this as a 1.055 hectare secure civil detention facility surrounded by a four metre "energised fence" within the external boundary of Christchurch Mens' Prison, but outside the perimeter of the

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101 Section 93(2).
102 Section 94.
103 Section 103.
104 Section 95B.

prison itself. She states it is a "community-like residence" with people accommodated in blocks of three separate self-contained units. It is envisaged that it will eventually have eight blocks; two had been built at the time she made her affidavit, affording six residential units. One has been designed to accommodate a person with physical disabilities.

[78] She records that there were three individuals subject to a PPO, and one subject to an interim detention order.[105] No protective supervision or prison detention orders have been made. She notes that because of the low numbers of persons subject to PPOs and the recency of the orders imposed, there is as yet no detailed information about the length of PPOs, or any impact they may have had on the reduction of reoffending.

The High Court judgment

[79] Whata J considered the central issue raised was whether the ESO and PPO regimes unjustifiably infringe the rights affirmed by ss 25(g) and 26(2) of the Bill of Rights Act. The extent to which the regimes infringed other rights affirmed by the Bill of Rights Act was secondary to that issue.[106]

[80] Section 25 of the Bill of Rights Act lists a number of "minimum rights" of persons charged with an offence, in relation to the determination of the charge. Section 25(g) provides:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

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105 Section 107(2) provides that the Court may order that a respondent be detained by a person, and in a place, specified in the order until an application for a public protection order is finally determined.

106 High Court judgment, above n 19, at [13].

[81] There was no reference to s 25(g) in the application for declarations of inconsistency. Although the Judge did not expressly explain why that provision was relevant, we infer it was because the PPO regime and the ESO regime (in its current form) were introduced after Mr Chisnall committed the relevant offending.

[82] Section 26 provides:

> **26 Retroactive penalties and double jeopardy**
>
> (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
>
> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[83] The Judge described the ss 25(g) and 26(2) rights as providing immunities respectively from "increased penalty" and "second penalty".[107]

[84] He noted a broad correspondence between s 25(g) and art 15 of the ICCPR,[108] which is the following terms:

> **Article 15**
>
> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[85] The Judge also drew a parallel between s 26(2) and art 14(7) of the ICCPR.[109] The latter states:

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107 At [2].
108 At [21].
109 At [24].

Article 14

…

(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[86] The Judge noted the right in s 25(g) had been described as unable to be subject to limitations and non-derogable, referring to the discussion in various Supreme Court and Court of Appeal authorities.[110] He considered the same could also be said in the case of s 26(2), but only to the extent it prohibits retroactive penalties. He held:

> [25] Furthermore, insofar as s 26(2) provides immunity from a retroactive or retrospective second penalty, it is similarly impregnable. Section 26(2) is also, however, directed to a broader principle, namely double punishment, which may include but is not limited to retroactive penalty. As the Court of Appeal said in *Daniels*, it is "concerned with criminal process and prevents the punishment function of that process being revisited"[111] and "it accords with the long standing common law principles of autrefois acquit or autrefois convict".[112]

[87] So, while the Judge concluded that s 26(2) provided immunity from "prospective" as well as retrospective second penalties, he thought that the prospective immunity did "not appear to carry the same prescriptive weight as the immunity from retrospective penalty".[113] He observed that unlike art 15 of the ICCPR, "the right affirmed by art 14 is not listed as a non-derogable right".[114]

The ESO regime

[88] After discussing the statutory provisions constituting the ESO regime, and this Court's judgment in *Belcher v Chief Executive of the Department of Corrections,*[115] the Judge concluded that ESOs limit the rights and immunities against increased and second penalties affirmed by ss 25(g) and 26(2) of the Bill of Rights Act.[116] The Judge

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110 At [18]–[23], citing *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [13] per Elias CJ and Keith J; *R v Pora* [2001] 2 NZLR 37 (CA) at [79] per Gault, Keith and McGrath JJ; and *R v Poumako* [2000] 2 NZLR 695 (CA) at [6] and [33] per Richardson P, Gault and Keith JJ.

111 *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 33. The decision was upheld on appeal in *W v W* [1999] 2 NZLR 1 (PC).

112 At 34.

113 High Court judgment, above n 19, at [29].

114 At [29].

115 *Belcher v Chief Executive of the Department of Corrections*, above n 27.

116 High Court judgment, above n 19, at [90].

concluded that although the legislation had been changed since *Belcher* was decided, its effect continued to be punitive.

[89] The Judge also addressed whether s 26(2) of the Bill of Rights Act was engaged in relation to an ESO imposed on an offender who committed a qualifying offence after the ESO regime, as amended in 2014, came into effect. He thought it significant that the decision to impose an ESO, and its nature and scope, would be determined following a "second criminal justice procedure" focused on an assessment of apparent risk rather than the commission of a further offence.[117] But for the qualifying offending and the subsequent process, no ESO could be imposed. On that basis, the Judge considered the prospective imposition of an ESO engaged the immunity from double punishment affirmed by s 26(2).[118]

[90] The next issue was justification under s 5 of the Bill of Rights Act, which the Judge approached by dealing separately with retrospective and prospective ESOs. He considered that the legislative objective of public protection from a high risk of sexual offending and a very high risk of violent offending was rationally connected to the limitation on the immunity from retrospective increased penalty imposed by an ESO.[119] The Judge said that, for his part:[120]

> … no legislative fact or scientific evidence is necessary to prove the rational connection to and the reasonableness of this impairment [of the right to immunity from retrospective penalty] and/or the proportionality of the impairment to the importance of the objective.

[91] Further, such impairment was reasonably necessary and proportionate, since it could be tailored to the nature and scale of the risk posed in individual cases.[121] In addition, he considered there was scope for an ESO to be made which was "genuinely directed" to the rehabilitation of and therapy for a high risk person, which might be a reasonable and proportionate response for the purpose of public protection.[122]

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117 At [89].
118 At [89].
119 At [93].
120 At [94].
121 At [93].
122 At [95].

[92] Nevertheless, having regard to the impregnable and non-derogable nature of the right to immunity from retrospective penalty and the broader significance of that right, the public protection purpose was not sufficiently important to justify imposition of a retrospective penalty, particularly of the type and duration empowered by the ESO regime.[123]

[93] He reached a different conclusion in respect of "the prospective second penalty imposed by the ESO regime".[124] In that case the prospect of an ESO would be capable of being known at the time of the offending. Furthermore, the availability of an ESO would in many cases be a factor tending against the imposition of a sentence of preventive detention. In the circumstances, the ESO could be seen as a mechanism for managing the long term risk to the public without the immediate imposition of "the most severe sentence that can be lawfully imposed".[125] He concluded:

> [99] Accordingly, while there remains something unfair about subjecting an offender to the prospect of an indefinite number of post sentence ESOs, the extent to which a prospective ESO is an unjustified limitation of the immunity from second penalty needs to be worked out on the facts of the specific case, and in particular in light of the conditions of the ESO and its implementation.

[94] It was on these bases that the Judge was prepared to make a declaration that s 107I(2) of the Parole Act was inconsistent with s 26(2) of the Bill of Rights Act insofar as it applied retrospectively, but not insofar as it authorised orders subsequently made.

The PPO regime

[95] The Judge then addressed the PPO regime. After mentioning the relevant statutory provisions, he expressed the view that aspects of it were punitive, others non-punitive and some therapeutic.[126] The Judge considered the following were punitive factors that pointed to a regime that was penal in nature:[127]

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123 At [96]–[97].
124 At [98].
125 At [98].
126 At [138].
127 At [139].

(a) The decision to impose a PPO is predicated on the existence of a qualifying sexual or violent offence.

(b) A PPO is an order of indefinite duration.

(c) Affected persons are detained on prison grounds and subject to various security measures set out in ss 63 to 72 including extensive search powers.

(d) PPOs may be applied retrospectively without a requirement for further offending, and may be imposed prospectively and for a period "without end".[128]

(e) The right to rehabilitation is conditional on that rehabilitation reducing the affected person's risk.

(f) A person subject to a PPO may be imprisoned (as if on remand) for risk management purposes without committing a criminal offence.

[96] However, the Judge identified a number of important "countervailing factors".[129] First, the PS (PPO) Act is expressly non-punitive. Secondly, persons exercising powers under the legislation are obliged to have regard to the principles set out in s 5 including the principle that the autonomy and dignity of the detained person must be respected. That was given effect by the rights expressly enumerated in the Act at ss 27 to 39, which are to be curtailed only so far as necessary to secure the protection of the detained person or the public. Thirdly, the process for the imposition of a PPO is not criminal; it is commenced by an originating application to the High Court in its civil jurisdiction. The Judge considered that was a significant difference from the ESO regime.

[97] Fourthly, an eligible person may be redirected to the other statutory regimes referred to in s 12 of the PS (PPO) Act, namely the Mental Health (Compulsory

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128 At [139(e)].
129 At [140].

Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.[130]

[98] Finally, and importantly, every major step in the PPO process is subject to judicial oversight, including reviews of PPOs. This meant that the provisions were to be interpreted and applied in the context of human rights obligations "protective of liberty and suspicious of retrospective penalty".[131] The Judge considered judicial oversight in this context gave assurance that a PPO would not be imposed unless the qualifying criteria were clearly met, and that a rights-consistent administration of the PPO regime would be preferred.[132]

[99] For these reasons, the Judge was satisfied that a PPO is not presumptively a penalty. That did not preclude the possibility that on the facts of a particular case a PPO might constitute a penalty. The Judge said:[133]

> Detention without rehabilitation on prison grounds might attract such a finding. Imprisonment of a person subject to a PPO without having committed a further [offence] may also qualify as a penalty. But those outcomes cannot be presumed, for the reasons already noted.

[100] The Judge considered that conclusion meant it was not strictly necessary to examine whether the limits imposed on rights by a PPO were demonstrably justified in accordance with s 5 of the Bill of Rights Act. However, he noted that PPOs were directed to public protection, and the limitations (save for the punitive components) were rationally and proportionally connected to the objective. He also indicated that if the PPO regime were properly regarded as imposing a penalty, then he would hold the limitations on the immunity from retrospective penalty or prospective second penalty were unjustified. He said:[134]

> A retrospective penalty and[/]or prospective second penalty of the form, type and potentially indefinite duration envisaged by a PPO is not capable of reasonable justification given the derogation that entails from the corresponding immunities affirmed by s 25(g) and s 26.

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130 At [140].
131 At [141], citing *Chisnall v Chief Executive of the Department of Corrections*, above n 18, at [38] per Elias CJ.
132 At [141].
133 At [142].
134 At [144].

[101] He also held that the conditionality of rehabilitation, detention on prison grounds and imprisonment without further offending also "raise[d] the prospect of s 26(2) rights infringement".[135] He therefore considered the issue of justification in this context. Referring first to the requirement that rehabilitation must reduce risk, the Judge noted that a PPO serves to protect the public from persons who present a clear and very high risk of danger. While therapy directed to risk reduction would serve the purpose of protecting the public, he considered the conditionality "appears to cut across the non-punitive and dignity principles of the Act".[136] The Judge held that therapy was a prerequisite to humane treatment of a person detained, perhaps indefinitely, pursuant to a PPO. In the circumstances, the requirement for risk reduction as a condition of rehabilitation was "evidently disproportionate on the face of the legislation".[137] However:[138]

> … what therapy qualifies as risk reducing must be defined in a way that is sufficiently generous to conform to the non-punitive and dignity principles. This will inevitably bear on the legality of any decision not to enable therapy. Given this, the prospect of detention without therapy would be small.

[102] Finally, the Judge recorded his view that the prospect of imprisonment at any time without further offending was disproportionate to the goal of public protection. He considered that offended against the immunity from retrospective and prospective second penalty in a fundamental way, and was inconsistent with the non-punitive and dignity principles of the PS (PPO) Act. He recorded he was "presently unable to find demonstrable justification for it or read the provision in a rights compliant way".[139]

[103] In summary, the Judge said that "overall" the PPO regime was not punitive and a PPO was not presumptively a penalty.[140] There might be cases where a PPO was imposed in a punitive way or with punitive effect, but the evident purpose, policy and scheme of the PS (PPO) Act was not of that nature.

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135 At [145].
136 At [146].
137 At [146].
138 At [146].
139 At [148].
140 At [149].

Outcome

[104] For the reasons given, the Judge considered it appropriate to make a declaration that s 107I(2) of the Parole Act is inconsistent with s 26(2) of the Bill of Rights Act insofar as it applies retrospectively.[141] As we have seen he declined to make any of the other declarations sought.

The issues in this Court

[105] We turn now to the issues in this Court. Although both the ESO and PPO regimes will need to be separately addressed, the analysis in each case turns on an evaluation of the impact of the statutory provisions on the rights affirmed by ss 25(g) and 26(2) of the Bill of Rights Act. We have set these out above.[142] The former provides that everyone charged with an offence has, as one of the minimum rights enumerated in s 25, the right if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing to the benefit of the lesser penalty. Under s 26(2), no one finally acquitted or convicted of an offence may be tried or punished for it again.

[106] Mr Perkins, who appeared for the Attorney-General in this Court, describes the central question raised by the appeal and cross-appeal as whether ESOs and PPOs amount to "penalties" thereby limiting the rights affirmed by ss 25(g) and 26(2).

[107] Mr Perkins argues that a close examination of the ESO and PPO regimes reveals a focus on community protection and rehabilitation. It is said that each scheme provides for "civil committal" on the basis of traits and behavioural characteristics establishing future risk demonstrated by the evidence of health assessors. The obligation of the court is to consider all relevant prior conduct tending to establish the required traits and behavioural characteristic and the future risk. The hallmarks of penal provisions such as retribution, denunciation and deterrence play no part in the ESO or PPO regimes, and while conviction for a qualifying offence is the entry point, that is insufficient to render either order a penalty. The assessment required is not controlled by the circumstances of the qualifying offending. Given these features of

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141 At [157] and [161].
142 Above at [80]–[82].

the legislative schemes it is said that the High Court gave undue weight to the ESO regime's criminal procedural form. Mr Perkins maintains that, in substance, neither ESOs nor PPOs are criminal in nature.

[108] Consequently, the Attorney-General's cross-appeal claims that the High Court erred by holding that an ESO with retrospective effect (that is, imposed on offenders who committed the qualifying offences before the relevant provisions of the Parole Act came into force) would result in unjustified limits on the rights protected by ss 25(g) and 26(2). Accordingly, it is submitted the Judge was wrong to declare s 107I(2) of the Parole Act inconsistent with s 26(2) of the Bill of Rights Act, insofar as it applied retrospectively.

[109] On the other hand, counsel for Mr Chisnall submit that the relief granted by the Judge was too narrow. They argue that both the ESO and PPO regimes involve the imposition of additional criminal penalties. Both orders are able to be made only in respect of those who have already been convicted. The ESO regime is said to breach the right to immunity from second penalties affirmed by s 26(2) of the Bill of Rights Act and arts 14(7) and 15(1) of the ICCPR, as well as being contrary to longstanding common law principle, regardless of when an offender committed the qualifying offence. The PPO regime is also said to impose limitations on the s 26(2) right because (potentially life-long) detention under the PS (PPO) Act, subject to severe restrictions and with curtailed rights to treatment, rehabilitation and eventual release, constitutes a further penalty. It is submitted that both the ESO and PPO regimes cannot be justified under s 5 of the Bill of Rights Act.

[110] We deal first with the issue of whether an ESO is a penalty thus engaging ss 25(g) and 26(2) of the Bill of Rights Act.[143]

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[143] As we have mentioned above at [81], counsel for Mr Chisnall do not seek a declaration of inconsistency in respect of s 25(g). Accordingly, that provision is only relevant to this part of the appeal insofar as it refers to a "penalty".

Is an ESO a penalty?

[111] The appropriate starting point for the consideration of this issue is this Court's decision in *Belcher*, to which we have referred.[144] In *Belcher* the Court traced the genesis of the ESO legislation to a report prepared within the Ministry of Justice for the Cabinet Social Development Committee in 2003 "Extended Supervision of Child Sex Offenders". In its judgment, the Court quoted a lengthy extract from the 2003 paper, including the following paragraphs:[145]

> 2. Public concern and media attention over the risks posed by child sex offenders in the community is high.
>
> 3. Improved knowledge about child sex offending recognises the distinct and long-term risks posed by this group of offenders to a vulnerable group of society and the need to manage those risks. Tools are now available to more accurately assess an offender's risk of re-offending and there is increased knowledge of how to treat, support and monitor offenders both in prison and in the community.
>
> 4. A critical gap in the ability to monitor offenders beyond the end of parole has been identified. This proposal seeks to address this gap by introducing an extended supervision regime to allow for the monitoring of medium-high and high risk child sex offenders sentenced to a finite period of imprisonment (not including preventive detainees) for up to 10 years from the end of their sentence.
>
> 5. Under the proposed regime, applications for an extended supervision order will be able to be made in respect of persons convicted of a specified sexual offence involving a child victim who receives a finite term of imprisonment. After completing an assessment of an offender's risk of re-offending, the Department of Corrections will be able to apply to the sentencing court for an extended supervision order. Before making an order the Court must be satisfied that there is a substantial risk of re-offending beyond the period of parole or release conditions. In practice, this will mean that the Department of Corrections will make applications for extended supervision orders in relation to offenders assessed as being at medium-high and high risk of re-offending.
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> …

[112] The Court also quoted from the Attorney-General's report to Parliament under s 7 of the Bill of Rights Act.[146] That report noted that the Bill introducing the ESO regime clearly placed it "within the rubric of the criminal justice and penal system",[147]

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144 *Belcher v Chief Executive of the Department of Corrections,* above n 27.

145 At [30].

146 At [31].

147 At [31], quoting Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill*

and connected the imposition and conditions of an ESO with the previous conviction for a relevant sexual offence. The report also observed:

> 12. The possible imposition of significant movement restrictions, electronic monitoring and home detention, strengthens the argument that the retrospective imposition of these aspects of the ESO on an individual who has been convicted of a relevant offence prior to the Bill coming into force should be viewed as a "punishment" for the purposes of s 26(2) of the Bill of Rights Act. Such individuals can be viewed as duly completing (or having duly completed) the penalty imposed for their previous offence; indeed, they may well have made decisions about how to plead to charges they faced on the basis that the only punishment they were thereby liable to was a term of imprisonment (of possibly relatively short duration – a significant factor if the defendant had been remanded in custody pending trial). But the Bill allows the further imposition of significant restrictions explicitly connected to the previous conviction. In the case of those already released into the community (ie the transitional offenders and current parolees) this is being done without further evidence of inappropriate behaviour by them after they have been released into society.
>
> 13. I am also conscious that in *R v Poumako* and *R v Pora* … the Court of Appeal took a firm line that s 26(2) was triggered, even though the amendments in question only affected parole eligibility and not overall sentence length.
>
> 14. Accordingly, I consider that the provisions of the Bill that allow for the more significant restrictions of liberty (i.e. significant restrictions of movement and association, electronic monitoring, and 12 months home detention) available under the ESO to be (retrospectively) imposed on transitional eligible offenders and current inmates and parolees, constitute a *prima facie* infringement of s 26(2) of the Bill of Rights Act that is not capable of justification under s 5 of the Act.
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> (Footnotes omitted.)

[113] After referring to the report of the Justice and Electoral Committee,[148] the Court observed the Committee's suggestion that there was scope for debate as to the correctness of the conclusion that retrospective implementation of the ESO scheme was in breach of s 26(2) of the Bill of Rights Act. However, having considered the later parliamentary debates, the Court concluded the enactment of the legislation had proceeded on the basis that it was justified on public policy grounds.[149]

(5 September 2002) at [11].

148 At [33].

149 At [34].

[114] The Court addressed the argument advanced for the Crown that the ESO regime should not be regarded as providing for penalties or punishment. The Court noted that it was not uncommon for legislation to restrict the rights of those posing a high risk of future criminal, dangerous or otherwise anti-social behaviour.[150] The relevant powers might be clearly criminal (as in the case of the imposition of sentences of preventive detention) or plainly not criminal in nature (for example powers conferred under the Mental Health (Compulsory Assessment and Treatment) Act). But the Court also identified a third category of schemes where the status of the powers was debateable.

[115] After referring to statutory provisions and case law in the United Kingdom, United States and Australia the Court held that a number of factors supported the view that an ESO was imposed by way of punishment. Those factors were:[151]

> (a) The triggering event is a criminal conviction;
>
> (b) The respondent to an ESO application is, throughout the ESO legislation, referred to as "the offender";
>
> (c) Eligibility for an ESO (in non-transitional cases) depends upon an application either before sentence expiry date or while the offender is still subject to release conditions;
>
> (d) An application for an ESO is made to … "the sentencing court";
>
> (e) Where an application is made, a summons may be issued to secure the attendance of the offender and the provisions of s 24 – 25 of the Summary Proceedings Act 1957 apply (s 107G(2));
>
> (f) Alternatively, the appearance of the offender can be secured by the issue of a warrant for the offender's arrest (s 107G(3)), in which case ss 22 and 23 of the Summary Proceedings Act and s 316 of the Crimes Act apply;
>
> (g) The offender must be present at the hearing (s 107G(4));
>
> (h) If the proceedings are adjourned, the offender, if not already in custody, can be remanded to the new date at large, on bail or in custody (although only for periods of up to eight days (s 107G(5) – (6));
>
> (i) Sections 71, 201, 203, 204 and 206 of the Summary Proceedings Act, ss 138 – 141 of the Criminal Justice Act 1985 and the Costs in Criminal Cases Act 1967 apply to applications for ESOs (s 107G(7) – (10));

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150 At [37].
151 At [47].

(j) Victims are to be notified of hearings and may make submissions in writing or, with the leave of the Court, orally (s 107H(5));

(k) The consequences of an ESO are in effect a subset of the sanctions which can be imposed on offenders and extend to detention for up to 12 months (in the form of home detention) (ss 107J and 107K);

(l) The right of appeal is borrowed from the Crimes Act (s 107R);

(m) It is an offence to breach the terms of an ESO and an offender is liable to up to two years imprisonment; and

(n) Applications for ESOs are classed as being criminal for the purposes of the Legal Services Act 2000 (s 107X).

[116] Importantly the Court observed that it was not decisive that the aim of the ESO scheme was to reduce offending and that ESOs were made for that purpose as opposed to the direct sanctioning of the offender for the purposes of denunciation, deterrence or holding to account.[152] The same could be said of many criminal law sanctions, for example sentences of preventive detention and supervision, which were nonetheless plainly penalties. It concluded:[153]

> … the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour amounts to punishment and thus engages ss 25 and 26 of the [Bill of Rights Act]. We see this approach as more properly representative of our legal tradition. If the imposition of such sanctions is truly in the public interest, then justification under s 5 is available and, in any event, there is the ability of the legislature to override ss 25 and 26.

[117] The Court held it was clear that the legislation was intended to be retrospective in effect.[154] It also observed that the Crown, although not conceding the retrospectivity could not be justified under s 5 of the Bill of Rights Act, had not sought to justify it by reference to the s 5 criteria.[155] That meant it was appropriate for the Court to approach the key issues of interpretation on the basis that that the retrospective nature of the ESO regime was not justified for the purposes of s 5.[156]

[118] The position reached was that while the legislation was considered inconsistent with ss 25 and 26 of the Bill of Rights Act (unless justified under s 5), the fact that it

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152 At [48].
153 At [49].
154 At [52].
155 At [50].
156 At [51].

could be applied to offenders retrospectively was apparently the intention of the legislature.[157] The Court reserved for further argument consideration of whether it should make a declaration of inconsistency, noting that it expected the arguments would address, among other things, the question of whether the Crown sought to justify the retrospective nature of the ESO regime, and if so why.[158] The Court noted this might have to be the subject of evidence.

[119] The further argument never took place. Following delivery of the Supreme Court's judgment in *Taunoa v Attorney-General*,[159] the Court held it did not have jurisdiction to make a declaration of inconsistency because the case had come before it in the form of an appeal in the Court's criminal jurisdiction, and a declaration of inconsistency had not been sought in the civil jurisdiction of the High Court. It was said that the Court could not exercise what would be an originating jurisdiction to make a declaration of inconsistency.[160]

[120] Mr Perkins submits that we should approach the question of the character of post-sentence orders unconstrained by *Belcher* on the basis that the judgment in that case does not directly apply to the ESO regime following its amendment in 2014, nor to the PPO regime. Apart from making the point that the judgment applied to the ESO regime before its amendment in 2014, Mr Perkins essentially invites us to reach a different conclusion from that reached in *Belcher*. He argues that *Belcher* contains no clear test of what constitutes a "penalty" and submits that the Court had wrongly emphasised the criminal procedural elements of the ESO regime, inviting us instead to look at the purpose and substance of it.

[121] He concedes that even on a purpose and substance-focused test of "penalty", it would have been understandable for the Court in *Belcher* to discern penal purpose in the former ESO regime. This was based on a claim that the former regime did not require courts to establish any relationship between traits and behavioural characteristics and a risk of reoffending. He also submits that under the current form

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157 At [56].
158 At [58]–[59].
159 *Taunoa v Attorney-General* [2006] NZSC 95.
160 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [11].

of the legislation orders of long duration would not be made without reference to prospects of treatment.

[122] We are not persuaded that the differences between the present and former ESO regime have the significance which Mr Perkins claims. The principal differences between the current ESO regime and the regime that applied when this Court decided *Belcher* may be described as follows:

(a) When this Court decided *Belcher*, a "relevant offence" was defined in s 107B to include only sexual offending against children under the age of 16 or certain offences against persons with a significant impairment. The Parole (Extended Supervision Orders) Amendment Act 2014 significantly widened the scope of the ESO regime to include sexual offending against adults and violent offending.

(b) Consistent with that change, the stated purpose of ESOs has been broadened to include protection of the community from those who pose a risk of "committing serious sexual or violent offences".[161]

(c) Under the previous ESO regime, s 107I(6) provided that if a person was already subject to an ESO, any new order could not be made for a period that, when added to the unexpired portion of the previous order, exceeded 10 years. Further, under s 107N, the sentencing court had the power to extend an ESO imposed for less than 10 years at any time before its expiry, provided the extension did not result in the total term of the ESO exceeding 10 years. These provisions have now been repealed. The court may impose an ESO for up to 10 years and then make further orders for subsequent periods of up to 10 years at any time on an ongoing basis.

(d) The 2014 amendments added ss 107IAB and 107IAC. The former section authorises the Chief Executive to apply to the sentencing court for the imposition of an intensive monitoring condition at the same time

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

as seeking an ESO. The latter provides that when making an ESO the court may also make an order requiring the Parole Board to impose an intensive monitoring condition as a special condition.

(e) The test for imposing an ESO has been changed. When *Belcher* was decided, s 107I(2) enabled the court to impose an ESO if it was satisfied, having considered the matters in the health assessor's report, that the offender was "likely to commit" any of the relevant offences in s 107B(2) on ceasing to be an eligible offender. The health assessor's report was required to address the nature of any likely future sexual offending by the offender, the offender's ability to control his or her sexual impulses, the offender's predilection and proclivity for sexual offending, the offender's acceptance of responsibility and remorse for his or her offending and any other relevant factors. Now s 107I(2) provides that the court may impose an ESO if satisfied the offender has or has had a "pervasive pattern of serious sexual or violent offending" coupled with posing a high risk of committing a relevant sexual offence or a very high risk of committing a relevant violent offence in future.

(f) Section 107IAA was also enacted in 2014. As earlier explained, it contains statutory directions about when the court may determine that the relevant risks of future offending have been established. Coupled with these provisions, there are now different requirements as to the matters that must be addressed in the health assessor's report (s 107F(2A)).

(g) The statutory provisions relating to conditions of ESOs have also been amended. The standard ESO conditions are more onerous in respect of contact between offenders and young persons. Section 107JA(1)(i) adds a standard condition providing an offender must not associate with or contact a young person under the age of 16 unless with the prior written consent of a probation officer and under supervision.

(h) Further, a new s 107JA(1)(eb) provides that an offender must, if so directed by a probation officer, allow the collection of biometric information.[162]

[123] We do not consider any of these changes make a material difference to the characterisation of the current ESO regime for present purposes.

[124] While we accept that the Parole Act now contains more detail (in the form of the new s 107IAA) about the matters of which the court must be satisfied before making an ESO, it is wrong to suggest that the previous ESO regime did not require a link between traits and behavioural characteristics and a risk of reoffending. The need for such a link was inherent in the fact that then, as now, s 107I(2) required the sentencing court, having considered a health assessor's report, to be satisfied that the offender was likely in future to commit a relevant offence. And the required contents of the health assessor's report were clearly such as to require a link between the offender's behavioural characteristics and the likelihood of reoffending. The Parole Act prior to amendment in 2014 provided:

> **107I Sentencing court may make extended supervision order**
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> …
>
> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2), that the offender is likely to commit any of the relevant offences referred to in section 107B(2) on ceasing to be an eligible offender.

[125] Mr Perkins refers to cases decided since *Belcher* which he says show that it is possible to tailor the appropriate duration of an ESO so that it is no longer than is necessary to manage the risk presented by the offender. He refers to discussions in a number of decisions of this Court and the High Court in which terms less than the maximum 10-year period have been imposed. For example, in *Chief Executive, Department of Corrections v Alinizi* this Court considered an ESO for a period of six years would be sufficient.[163] Mr Perkins claims that prospects of treatment are

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[162] This provision was inserted on 22 August 2017 by s 53 of the Enhancing Identity Verification and Border Processes Legislation Act 2017.

[163] *Chief Executive, Department of Corrections v Alinizi* [2016] NZCA 468 at [39]–[40].

now routinely taken into account when setting the duration of an ESO, resulting in orders much shorter than the maximum.[164] He also emphasises comments made by the Judge in the present case to the effect that the ESO regime in its current form affords scope to apply "a genuinely rehabilitative and therapeutic approach directed to the offender's risk factors".[165]

[126] Mr Perkins submits that what he describes as "*Belcher*'*s* injunction that treatment planning should not be a factor in determining the length of an ESO" has effectively been overtaken by this Court's judgment in *Alinizi.*

[127] We accept that in *Belcher* the Court upheld a 10-year ESO, stating that there was "ample support" for the imposition of the maximum term and observing that it saw no reason to depart from his approach.[166] But that was plainly a decision made on the facts before the Court rather than a general statement about how the ESO regime should be applied.

[128] The judgment in *Belcher* referred in passing to observations made by Panckhurst and John Hansen JJ in *Chief Executive of Department of Corrections v McIntosh* who referred to the protective focus of the ESO regime, and observed that orders were not to be made for the minimum period required to facilitate treatment, but rather, for the minimum period required to achieve protection of vulnerable members of the community.[167] This simply reflects the terms of s 107I(5).

[129] We accept on the basis of the various authorities to which Mr Perkins refers that courts have apparently been more willing to focus on the possibility of treatment and rehabilitation in cases decided subsequent to *Belcher*, but we see that primarily as a development attributable to judicial decision-making rather than driven by the 2014 amendments. In this respect, it is pertinent to note that s 107I(4) and (5), which provide respectively that the term of an ESO must not exceed 10 years and must be

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164 Citing *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171 at [40]–[41]; *Chief Executive of the Department of Corrections v Hawkins* [2019] NZHC 482 at [83]–[86]; *Chief Executive of the Department of Corrections v Thompson* [2018] NZHC 1821 at [93]; and *Chief Executive of the Department of Corrections v SRA* [2017] NZHC 1088 at [86].

165 High Court judgment, above n 19, at [95].

166 *Belcher v Chief Executive of the Department of Corrections*, above n 27, at [109].

167 At [108], citing *Chief Executive of Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [27].

the minimum period required for the purposes of the safety of the community, were not amended in 2014. And the statutory requirements to consider the level of risk posed by the offender, the seriousness of the harm that might be caused to victims and the likely duration of the risk were features of the law prior to 2014. Those provisions lay behind what this Court said in *Moeke v Chief Executive of the Department of Corrections*:[168]

> [28] We consider, and suggest the respondent ensure in future cases where extended supervision orders are being sought, that the psychological reports provided include a considerably greater focus on the appropriate s 107I(5) minimum term. There was some suggestion in counsel's submissions that the respondent, relying on the assessment tools it employs, almost invariably seeks a ten year minimum term. Whether the maximum prescribed by Parliament should usually be the minimum; whether the statistical information is unassailable; and indeed whether the respondent has any such practice, are not matters about which we will speculate in this appeal.
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> [29] Nonetheless we consider that the materials placed before a court invited to make an extended supervision order should include:
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> (a) a section in the psychological report that addresses fully the minimum term sought for the particular offender against the s 107I(5) criteria;
>
> (b) a thorough assessment of the efficacy and suitability of post-release plans including their nature and duration;
>
> (c) relevant updating information at the date of the extended supervision order hearing; and
>
> (d) steps which the offender has taken to address perceived risks.

[130] Consequently, it cannot be said that the ability to take into account the consequences of treatment and rehabilitation is a feature of the current ESO regime that was not inherent in the regime as it stood when considered by this Court in *Belcher*.

[131] We add that every one of the aspects of the pre-2014 regime which this Court identified in *Belcher* as indicative of a penalty remain features of the current ESO regime. We have quoted those above.[169] While it is correct, as Mr Perkins submits, that many of the matters to which this Court referred reflect the fact that Parliament placed the ESO provisions in a criminal procedural context, we do not consider it

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168 *Moeke v Chief Executive of the Department of Corrections* [2010] NZCA 60.
169 Above at [115].

accurate to say the decision turned on that context. Rather, it is clear the Court in *Belcher* thought it significant that the regime contemplated the consequences of an ESO would be "in effect a subset of the sanctions which can be imposed on offenders and extend to detention for up to 12 months (in the form of home detention)".[170] As this Court emphasised, it was the imposition through the criminal justice system of significant restrictions (including detention) that amounted to punishment and consequently engaged ss 25 and 26 of the Bill of Rights Act.[171] We therefore do not accept the submission that the Court in *Belcher* over-emphasised procedural aspects of the ESO regime.

[132] Another strand of Mr Perkins' argument is that the concept of a penalty must invariably involve the goals of retribution and denunciation or punishment, as well as an aspect of public warning referred to as "deterrence". He argues that in the absence of these features the statute should not be characterised as involving a penalty. He developed this argument by referring to *Daniels v Thompson*, where the question raised was whether a civil claim could be brought for exemplary damages in respect of conduct that constituted a criminal offence.[172] This Court held that the "true nature" of exemplary damages is punitive, observing:[173]

> … punishment is the aim, and through the instrumentation of the Court they reflect society's condemnation of the particular conduct. The close relationship to criminal punishment cannot be doubted.

The Court nevertheless held that s 26(2) of the Bill of Rights Act was not a bar to a claim for exemplary damages, because that section is "concerned with the criminal process, and prevents the punishment function of that process from being revisited".[174]

[133] Mr Perkins also refers in this context to *Accident Compensation Corporation v Curtis*,[175] in which this Court had to consider s 92(1) of the Accident Compensation Act 1982 concerning personal injury suffered in the course of criminal conduct. That provision contemplated that the Accident Compensation Corporation might

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170 *Belcher v Chief Executive of the Department of Corrections*, above n 27, at [47(k)].
171 At [49].
172 *Daniels v Thompson*, above n 111.
173 At 30.
174 At 33–34.
175 *Accident Compensation Corporation v Curtis* [1994] 2 NZLR 519 (CA).

decline to give rehabilitation assistance and pay compensation to persons injured whilst committing an offence for which they were sentenced to imprisonment, if to do so would be repugnant to justice. Mr Perkins notes that this Court considered the word "justice" used in the section referred to "the justice of penalising criminals for their past misdeeds".[176] The Court emphasised the need to strike a careful balance between the statutory objective of comprehensive cover under the Accident Compensation Act and "the demands of retribution, denunciation, deterrence and reparation on the other".[177]

[134] The very different questions before this Court in *Daniels v Thompson* and *Accident Compensation Corporation v Curtis* mean these judgments are of limited value in the present context. As counsel for Mr Chisnall observe, those cases involved measures far less restrictive of rights than are contemplated by both the ESO and PPO regimes. It may also be emphasised that the ESO regime remains closely integrated into the criminal procedure process, applies only to persons who have been convicted of qualifying offences and contemplates further detention and other substantial restrictions after or in anticipation of the expiry of sentences previously imposed. This difference in context is important.

[135] A perhaps more relevant line of authority is cases which have discussed the registration of child sex offenders under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. In *Bell v R*, this Court noted that the effect of the legislation was punitive, "even if its primary purpose is the protection of further potential victims from harm".[178] Further, in *Taitapanui v R* this Court said:[179]

> [33] This Court has previously accepted, in *Bell v R*, that the Child Protection Act has a punitive aspect, even if its primary purpose is the protection of further potential victims from harm.[180] Indeed, as Ellis J observed in *Bird v Police*, the Child Protection Act authorises the ongoing intrusion into all aspects of an offender's private life for the duration of the registration period.[181] The report of the Attorney-General under s 7 of the [Bill of Rights Act] on the Child Protection (Child Sex Offender Register) Bill concluded that the legislation would offend both the right not to be subjected

176 At 525.
177 At 526.
178 *Bell v R* [2017] NZCA 90 at [26].
179 *Taitapanui v R* [2018] NZCA 300.
180 *Bell v R*, above n 178, at [26]. See also *Bird v Police* [2017] NZHC 1296 at [37].
181 *Bird v Police*, above n 180, at [37].

> to disproportionately severe treatment or punishment under s 9 of the [Bill of Rights Act] and the right to be free from double jeopardy, protected by s 26(2) of the[Bill of Rights Act].

[136] Both decisions were discussed with apparent approval by the Supreme Court in *D v Police,* in which the Court unanimously agreed that registration under that Act was a penalty for the purposes of s 25 of the Bill of Rights Act and s 6 of the Sentencing Act.[182] Relevantly, the following appears in the judgment of Winkelmann CJ and O'Regan J:

> [58] We accept that the purpose of the Registration Act is to reduce sexual reoffending against children. But that does not change the fact that a registration order restricts a person's liberty (albeit to a considerably lesser extent than an ESO). And as the Court of Appeal noted in *Belcher*, that the aim of the legislation is to reduce offending is not decisive in determining whether a consequence of criminal offending is a penalty.
>
> (Footnotes omitted.)

[137] We take this reference to *Belcher* as authoritative endorsement of the conclusion in that case that the fact the ESO regime had the purpose of reducing offending rather than directly sanctioning the offender for purposes of denunciation, deterrence or holding the offender to account did not mean that an ESO was not a penalty.

[138] All this leads us to the conclusion that under the amended ESO regime, an ESO should properly be regarded as a penalty. The imposition of an ESO on persons previously convicted and sentenced therefore constitutes a second punishment engaging s 26(2) of the Bill of Rights Act.

When is s 26(2) of the Bill of Rights Act engaged?

[139] Mr Perkins concedes that, if we decided an ESO was a penalty, s 26(2) would be engaged in Mr Chisnall's case because his qualifying offence was committed prior to the enactment of the 2014 amendments. Mr Chisnall had not previously been eligible for an ESO and subjecting him to one would necessarily be a second punishment for the same offence. However, Mr Perkins submits that it is only when

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[182] *D v Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [59] per Winkelmann CJ and O'Regan J, [159] per Ellen France J, [161] per Glazebrook J and [278] per William Young J.

a second penalty is retrospectively added that the right is engaged. He contends that "[i]t is clear as a matter of logic" that ESOs would amount to a second penalty only if they were not available at the time a determinate sentence was imposed, but then provided for by Parliament and imposed by a court at the end of that determinate sentence.

[140] We do not accept that proposition. It seems to us to confuse the availability of the power to make an ESO with the actual making of one.

[141] It is of course clear that s 26(2) is engaged in Mr Chisnall's case for the reason that Mr Perkins identifies. But we do not accept that s 26(2) would not be engaged by the imposition of an ESO on a person who committed a qualifying offence after the introduction of the current ESO regime. As we understand it, Mr Perkins' submission turns on the notion that such a person would be liable to be subject to an ESO as part of the penalty for the qualifying offence. That argument is very difficult to sustain having regard to the definition of "eligible offender" in s 107C(1)(a). The provision assumes that an eligible offender has already been sentenced to imprisonment for a relevant offence, and the whole concept of "extended supervision" presupposes the need to protect the public from the offender at the end of the relevant sentence of imprisonment, release conditions or an ESO. Consequently, imposition of an ESO will constitute a second punishment and thus limit s 26(2) of the Bill of Rights Act, whether the qualifying offence was committed before or after the introduction of the ESO regime.

[142] We infer, in fact, that the potential reach of s 26(2) of the Bill of Rights Act lay behind the wide terms of s 107C(2) of the Parole Act, which provides:

> **107C Meaning of eligible offender**
>
> …
>
> (2) To avoid doubt, and to confirm the retrospective application of this provision, despite any enactment or rule of law, an offender may be an eligible offender even if he or she committed a relevant offence, was most recently convicted, or became subject to release conditions or an extended supervision order before this Part and any amendments to it came into force.

[143] Mr Perkins endeavoured to support this part of his argument by reference to the fact that the availability of an ESO is a matter taken into account by the courts when deciding whether or not to impose a sentence of preventive detention.[183] He submits Parliament must be taken to have intended that any penal effect ESOs might have was part of the "arsenal" of penal responses to a particular crime. The fact that such orders are made after sentencing at a later time should not be seen as "double punishment" for that offence.

[144] We do not accept that submission, which does not reflect the reality of what occurs. The decision to impose an ESO will generally be made towards the end of a long determinate sentence and based on an assessment of the offender's characteristics and traits at that point. Unless it is to be said that in absence of the Chief Executive's ability to apply for ESO a sentence of preventive detention would inevitably have been imposed at the time the offender was originally sentenced, it is difficult to see why s 26(2) of the Bill of Rights Act would not apply.

[145] For all these reasons we consider an ESO results in the imposition of a second penalty, regardless of when an offender committed his or her qualifying offence.

[146] We next consider whether a PPO is also a penalty.

Is a PPO a penalty?

[147] Much of the foregoing discussion is relevant to this question as well. But there are different issues that also need to be addressed. Among them is the issue of whether the legislature's placement of the PPO regime in a civil procedural context should have the result that a PPO should not be considered a penalty.

[148] As we have noted above, there is no doubt that, in terms of the effect on a person subject to a PPO, the restrictions are even greater than in the case of an ESO. As Mr Perkins put it, PPOs are the most restrictive post-sentence order available. They result in detention in a residence, which must be a building (and any adjacent land) designated as such and located in a prison precinct. PPOs may also be applied

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183 Citing *R v Parahi* [2005] 3 NZLR 356 (CA) at [87].

retrospectively without any requirement for further offending, and for an indefinite period. We think there is little doubt that if the impact of a PPO is considered, it is more significant than an ESO and must be seen as a penalty unless other aspects of the PPO regime necessitate a different conclusion.

[149] In relation to PPOs, Mr Perkins relies on the same argument advanced in respect of ESOs based on the significance of the absence of a purpose of punishment. In support of that proposition, he relies first on the stated objective of the PS (PPO) Act set out in s 4. As we have noted above, under s 4(1) the objective is plainly stated as public protection. And s 4(2) expressly says that "[i]t is not an objective of this Act to punish persons against whom orders are made under this Act".

[150] Secondly, he refers to the statement of principle in s 5 which requires every person or court exercising a power under the Act to have regard to principles which include the fact that orders under the Act are not imposed for the purposes of punishment.[184] And he emphasises that the previous commission of an offence is only one of several factors that are relevant to assessing the risk posed by the respondent.

[151] It is clear that these considerations were influential in persuading the Judge that a PPO is not presumptively a penalty. He was also influenced by the following observations of Elias CJ in the Supreme Court judgment dismissing Mr Chisnall's appeal against his interim detention order:[185]

> [38] The availability of extended supervision orders and interim supervision orders as alternative means of monitoring risk is a factor that bears on whether the more restrictive public protection order (and interim detention order pending its determination) is appropriate. The policy of the [PS (PPO)] Act expressed in its purpose and the principles contained in s 5 emphasise that orders made under it are not punitive and are directed at public safety. The high threshold set by the legislation for public protection orders and the availability of less intrusive means of protecting public safety in orders under the Parole Act indicate a legislative scheme that the "very high risk of imminent serious sexual or violent offending by the respondent" is risk which cannot be acceptably managed by conditions under an extended supervision order or interim supervision order. The [PS (PPO)] Act is to be interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty.

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184 PS (PPO) Act, s 5(a).

185 *Chisnall v Chief Executive of the Department of Corrections,* above n 18 (footnote omitted).

[152] As noted earlier, other considerations that were of importance to the Judge's decision that a PPO is not presumptively a penalty were the statutory affirmation of the rights of residents in ss 27 to 39 of the PS (PPO) Act; the possibility that persons mentally disordered or intellectually disabled could be redirected to the appropriate statutory schemes dealing with such persons; and the fact that, at various points in the statutory process, PPOs are subject to judicial oversight and control.[186] The Judge considered that would give assurance that a rights-consistent approach to the administration of the PPO regime would be preferred.

[153] There is no doubt that the PPO regime lacks some of the elements that led this Court in *Belcher* to the view that an ESO is imposed by way of punishment. Notably:

(a) Different nomenclature is used (orders are made against a "respondent" rather than an "offender").

(b) An application is made to the High Court,[187] (rather than to the "sentencing court").

(c) The Costs in Criminal Cases Act 1967 does not apply.

(d) Victims are not notified of the hearing of the application and given the right to make submissions (rather, the PPO regime requires the Chief Executive to advise "every victim of the respondent" of the outcome of any application for a PPO).[188]

(e) There is no right of appeal "borrowed" from the relevant statute providing for criminal appeals (now the Criminal Procedure Act 2011).[189]

[154] However, other features of the ESO regime do apply to PPOs. Significantly, the triggering event remains a criminal conviction for a serious sexual or violent

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186 High Court judgment, above n 19, at [140]–[141].
187 PS (PPO) Act, s 3.
188 Section 14.
189 *Belcher v Chief Executive of the Department of Corrections*, above n 27, at [47(l)].

offence whether in New Zealand or overseas.[190] The respondent must either be detained, due for release within six months or subject to an ESO or protective supervision order when the application for a PPO is made. Special provisions apply in the case of those who offended when overseas.[191] Attendance of the respondent at the PPO hearing can be compelled,[192] and the legislation creates offences for breaching orders and conditions relating to protective supervision orders.[193]

[155] Most importantly, however, the sanctions which result from imposition of a PPO are, as we have already noted, far more severe than those that flow from an ESO. And although the application is made in an originating application, indicating a civil and not a criminal process, the consequences of a PPO are unlike any that accompany a civil judgment. In this context it is ultimately the substance of the order that should matter, not the form of the application necessary to obtain it.[194]

[156] Given the effect of a PPO, the fact that one of the Act's objectives is protection of members of the public does not militate against a conclusion that a PPO constitutes a penalty. The direct statement in the legislation that it is not an objective of the Act to punish the persons against whom orders are made is not decisive. The nature of the PPO regime must be ascertained by looking at the consequences of the orders it authorises. Our task in a case such as the present is to determine whether the statutory scheme complies with the Bill of Rights Act. In the end, the fact the stated purpose is not punitive does not determine the effect of the legislative provisions.

[157] We are also not persuaded that the principles set out in s 5 of the PS (PPO) Act assist in determining whether a PPO is a penalty. The principle in s 5(a) repeats that orders made under the Act are not imposed to punish persons, but does not add anything of significance for present purposes. It is clear that whether or not an order is made will be an issue that is determined having regard to the health assessors' reports, which must accompany any application for a PPO. A respondent must meet the threshold (that is, have the relevant history of serious sexual or violent offending)

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190 PS (PPO) Act, s 7(1).
191 Section 7(1)(d).
192 Section 11.
193 Sections 103–103B.
194 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [31]–[32] per Elias CJ, Blanchard and McGrath JJ. See also [51]–[52] per Tipping J and [54]–[56] per Eichelbaum J.

and pose the "very high risk of imminent serious sexual or violent offending" which the statute requires.[195] That conclusion will turn on whether the evidence satisfies the Court that the respondent exhibits the "severe disturbance in behavioural functioning" established by evidence to a high level of an "intense drive or urge to commit a particular form of offending", "limited self-regulatory capacity", "absence of understanding or concern for the impact … on actual or potential victims" and "poor interpersonal relationships or social isolation" referred to in s 13(2). Since the statutory criteria for making a PPO are not based on punishment, the principle in s 5(a) will not affect the question of whether or not an order should be made.

[158] Section 5(b) provides that a PPO should be imposed only if the magnitude of the risk posed justifies making the order. However, that does not add anything to the essential factual inquiry on which the Court must embark under s 13.

[159] The principle stated in s 5(c) is that a PPO should not be imposed on a person who is eligible to be detained under the statutes applicable in the case of mentally disordered or intellectually disabled persons.[196] This merely reflects the power given by s 12(2) of the Act for the Court to order the Chief Executive to consider making an application under those statutes. That power is exercisable where the Court is satisfied that a PPO could be made against a respondent, and it appears to the Court that the respondent may be mentally disordered or intellectually disabled.[197] But the fact that such diversion is possible does not assist in the assessment of the nature of a PPO when it is made. Further, the Court has no power to direct the Chief Executive to make an application under the relevant statutes. The Chief Executive may choose not to do so, in which case we infer there could be a further application for a PPO. In the meantime, the respondent would remain subject to an interim detention order.[198]

[160] This brings us to s 5(d) which sets out the principle that persons who are detained in a residence should have as much autonomy and quality of life as possible, while ensuring the orderly functioning of and safety within the residence. The Judge

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195 PS (PPO) Act, s 13(1).
196 Mental Health (Compulsory Assessment and Treatment) Act 1992; and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
197 PS (PPO) Act, s 12(1).
198 Section 12(3).

described this principle as one requiring that "the autonomy and dignity of the detained person must be respected".[199] As he pointed out, the principle finds more specific expression in ss 27 to 39 of the Act which we have previously mentioned. The broad conferral of rights in s 27(1) is subject generally to discretionary restriction by the manager, determined by the broadly stated considerations set out in s 27(3) and (4). Those subsections provide:

> (3) The manager may limit the rights of a resident to the extent reasonably necessary to prevent the resident from harming himself or herself or any other person or from disrupting the orderly functioning of the residence.
>
> (4) In making a decision that affects a resident, the manager must be guided by the following principles:
>
> (a) a resident must be given as much autonomy and quality of life as is compatible with the health and safety and well-being of the resident and other persons and the orderly functioning of the residence:
>
> (b) a decision that adversely affects a resident must be reasonable and proportionate to the objective sought to be achieved.

[161] As we said earlier, the powers of the manager to restrict rights are obviously necessary to ensure that a residence is able to be safely and efficiently managed and they reflect the fact that residents will generally be detained in the residence against their will. The persons subject to the order will be in the legal custody of the Chief Executive, living in a residence located on prison grounds. The manager will effectively control their movements and who may visit them, and has the extensive powers we have earlier described.

[162] All these features of the PPO regime must bear on the assessment of its nature for the purposes of the s 26(2) Bill of Rights Act analysis. We consider they point to the conclusion that a PPO is a penalty, notwithstanding the fact that it involves resort to the High Court in its civil jurisdiction by way of an originating application.

[163] We do not overlook the other issue that influenced the Judge, namely the scope afforded by the legislation for judicial oversight at various stages in the process,

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199 High Court judgment, above n 19, at [140].

including the periodic reviews the PS (PPO) Act requires.[200] And we accept the force of the observations (quoted earlier) of Elias CJ that the Act is to be "interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty".[201] But the possibility that aspects of the PPO regime may be ameliorated in this way does not have the effect that the regime itself does not involve the imposition of a penalty: the observations of Elias CJ about how the PS (PPO) Act is to be applied were not made in the context of an application for declarations about the compliance of the legislation with the Bill of Rights Act.

[164] There is another consideration that supports our conclusion that the PPO regime is penal in nature. Once a PPO is made, a resident has the right granted by s 36 "to receive rehabilitative treatment if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident". The qualified nature of this right means that rehabilitative treatment might never be provided. And the statute is silent about the process that might be followed in making the decision to withhold rehabilitative treatment. The implication is that a PPO may result in indefinite detention in a residence or prison, after the expiry of a determinate sentence, as a result of the respondent's personality characteristics assessed under s 13(2), with no attempt being made by the state to treat those characteristics.

[165] This may be compared to a regime centred on the provision of medical and therapeutic treatment, with the potential to alter the character of detention and to provide a key rights-compliant justification for it. This issue has arisen in Germany, where preventive detention may be ordered under the German Criminal Code in addition to a determinate sentence, if public safety requires it.[202] Applications by persons detained under the German regime have required the courts to consider the nature of the preventive detention once the determinate sentence has been served.

[166] The Federal Constitutional Court considered the preventive detention scheme as it then stood in a judgment delivered in 2011.[203] It concluded that the provisions unjustifiably encroached on personal liberty. It noted that art 7(1) of the European

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200 At [141].
201 *Chisnall v Chief Executive of the Department of Corrections,* above n 18, at [38].
202 Strafgesetzbuch – StGB [German Criminal Code], s 66.
203 *B v R* 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011.

Convention on Human Rights required a scheme depriving persons of their liberty for "preventive" reasons to be defined more precisely, and to be distinct from the execution of a custodial sentence (called the "distance requirement").[204] It observed:[205]

> … preventive detention is only justifiable at all if the legislature, in designing it, takes due account of the special character of the encroachment that it constitutes and ensures that further burdens beyond the indispensable deprivation of "external" liberty are avoided. This must be taken account of by a liberty-orientated execution aimed at therapy which makes the purely preventive character of the measure plain both to the detainee under preventive detention and to the general public. The deprivation of liberty must be designed in such a way – at a marked distance from the execution of a custodial sentence … that the prospect of regaining freedom visibly determines the practice of confinement. *What is required for this is a freedom-orientated overall concept of preventive detention with a clear therapeutic orientation towards the objective of minimising the danger emanating from the detainee* and of thus reducing the duration of deprivation of liberty to what is absolutely necessary.

Since the relevant provisions of the German Criminal Code did not meet those requirements, they were unconstitutional.

[167] The Federal Constitutional Court's judgment drew a comprehensive response from the legislature in the form of amendments to the German Criminal Code, including a new provision specifying how preventive detention was to be implemented and recognising the need to provide appropriate therapy for detainees.[206]

[168] These amended provisions of the German Criminal Code came before the European Court of Human Rights in *Bergmann v Germany*.[207] The Court noted its opinion that, "as a rule", preventive detention implemented in accordance with the revised scheme would still constitute a "penalty" for the purposes of art 7(1) of the European Convention on Human Rights.[208] However, in the applicant's case the focus on his rehabilitation and treatment in the detention facility meant his situation was

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204 At [100]. Article 7(1) of the European Convention on Human Rights proscribes conviction for an offence that did not exist at the time the impugned conduct occurred, and also provides that a heavier penalty shall not be imposed than the one that was applicable at the time a criminal offence was committed. It therefore covers similar ground to ss 26(1) and 25(g) of the Bill of Rights Act.

205 At [101] (emphasis added).

206 German Criminal Code, s 66c.

207 *Bergmann v Germany* [2016] ECHR 14.

208 At [181].

distinguished from detainees who were only offered the treatment also available to ordinary offenders detained in prison.[209] His detention therefore did not amount to an additional penalty. The Court considered that where preventive detention is extended only because of a person's mental disorder and the need to treat it, the nature and purpose of preventive detention would change to the extent that it was no longer properly classified as a penalty.[210]

[169] Preventive detention ordered under the German Criminal Code was also considered in *Ilnseher v Germany*, which was referred to by the Judge in the High Court,[211] and given some prominence in the arguments of counsel for Mr Chisnall and Mr Perkins in this Court. In that decision, the Grand Chamber of the European Court of Human Rights considered the preventive detention of an applicant found to be suffering from a mental disorder, namely sexual sadism.[212] The Court discussed evidence, which was not contested, of how preventive detention was enforced following the changes to the German Criminal Code.

[170] It found that the medical and therapeutic care which the applicant received was significant. This was said to have altered the nature and purpose of the detention of persons such as the applicant and transformed preventive detention into a measure focussed on the medical and therapeutic treatment of persons with a criminal history.[213] Consequently, although it remained a precondition for ordering or prolonging preventive detention that a person had previously been convicted of a serious offence, the Court found that:[214]

> … having regard to the setting in which preventive detention orders are executed under the new regime, … the focus of the measure now lies on the medical and therapeutic treatment of the person concerned. The medical and therapeutic provision was central to the specific measures of care provided to the applicant. This fact altered the nature and purpose of the detention of persons such as the applicant and transformed it into a measure focused on the medical and therapeutic treatment of persons with a criminal history.

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209 At [176]–[177].
210 At [182].
211 High Court judgment, above n 19, at [43]–[49].
212 *Ilnseher v Germany* [2018] ECHR 991 (Grand Chamber).
213 At [227].
214 At [227].

[171] The Court concluded:[215]

> The punitive element of preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances that the measure was no longer a penalty.

[172] However, the Court clarified that consistently with the decision in *Bergmann v Germany*, "ordinary" preventive detention not executed with a view to treating a person's mental disorder should still be considered a penalty, despite the legislature's amendments to the German Criminal Code.[216] The improved conditions and care for detainees were insufficient to counteract the factors indicative of a penalty.

[173] Mr Perkins points out that in *Ilnseher v Germany*, the European Court of Human Rights had examined the impact of the statutory regime on Mr Ilnseher in concluding that, in the circumstances of his case, preventive detention should no longer be considered a penalty. He argues that in the case of PPOs, protected rights *might* be engaged despite an order being made under a civil scheme, if the order could have a penal effect rather than rehabilitative or protective one. In those circumstances, there could effectively be a second penalty engaging s 26(2) of the Bill of Rights Act, inhumane treatment engaging s 23(5) or, in extreme cases, disproportionately severe punishment engaging s 9. Mr Perkins contends that dismissal of Mr Chisnall's application for a declaration of inconsistency would not prevent future claims that particular PPOs (or ESOs) amount to a penalty. Such claims would be assessed on a case by case basis, without a conclusion that the statute was presumptively penal in nature.

[174] We do not accept that submission. The existence of a possibility that the PPO regime will be applied in a way that results in the rehabilitation of a person does not justify characterising the regime as having a medical, therapeutic or rehabilitative purpose.

[175] The treatment of persons subject to a PPO cannot be presented as the central focus of a scheme that makes no reference to a rehabilitative purpose in the statement of principles set out in s 5, contemplates rehabilitative treatment only if it offers a

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215 At [236].
216 At [228].

reasonable prospect of reducing the risk to public safety posed by the respondent, and otherwise emphasises the procedural arrangements necessary for the orderly functioning of the residence while contemplating transfer to a prison should that be considered necessary.

[176] We reiterate that our task is to decide whether the PPO regime complies with the Bill of Rights Act. We do not think it would be right to avoid dealing with that issue on the basis that a PPO might in a particular case be administered in a way more favourable to a detained person than might otherwise be the case. In the context that PPOs inevitably result in very comprehensive restrictions on rights, the legislative scheme must guarantee therapeutic and rehabilitative interventions by the state in order to avoid the conclusion that it is penal. Unless the guarantee is in the statute itself, consistency with the Bill of Rights Act cannot be assured.

[177] Accordingly, we hold that orders made under both the ESO and PPO regimes are penalties, and the regimes therefore impose limitations on the proscription on second penalties affirmed in s 26(2). Accordingly, the ESO and PPO regimes will be inconsistent with s 26(2) of the Bill of Rights Act unless they can be justified in accordance with s 5. We turn now to the issue of justification.

Justification

[178] Under s 5 of the Bill of Rights Act, the rights and freedoms it contains may be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[179] As noted earlier, the Judge held that a retrospectively imposed ESO could not be justified for the purposes of s 5.[217] However, the ESO regime could be justified insofar as it contemplated a prospective second penalty, because the prospect of an ESO would be knowable at the time of the offending, and its availability might in some cases justify non-imposition of a sentence of preventive detention.[218] Whether any

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217 High Court judgment, above n 19, at [96]–[97].
218 At [98].

particular ESO could not be justified under s 5 would fall to be considered on a case by case basis.[219]

[180] As to the PPO regime, the Judge was satisfied that a PPO was not presumptively a penalty although, again, individual PPOs might be seen as such.[220] He acknowledged this meant he did not have to decide the justification issue, but he observed that if a PPO was properly to be characterised as a penalty it was not capable of reasonable justification.[221]

[181] The question raised by s 5 in this case is whether the limitations to which the right affirmed in s 26(2) has been subjected are both reasonable and demonstrably justified in a free and democratic society. The required approach to determining whether a limit is reasonable and justified was summarised by Tipping J in *R v Hansen*:[222]

> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

[182] As Tipping J observed in *Hansen*, it is significant that Parliament has described New Zealand as a free and democratic society in s 5.[223] But Parliament has also constrained the extent to which the rights enumerated in the Bill of Rights Act may be restricted. This carries with it the connotation that Parliament has disclaimed presumptive justification arising from the fact that it has legislated to impose a particular limit on a right.[224] The requirement for there to be a demonstrable justification shows that the party claiming the limits to be justified, generally the

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219 At [99].
220 At [142].
221 At [143]–[148].
222 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.
223 At [101] and [107].
224 At [108].

Crown, must shoulder the onus of establishing the justification. As Tipping J observed in *Hansen*:[225]

> Had s 5 not required *demonstrable* justification for any Bill of Rights limiting provision, respect for the separation of powers and Parliament's sovereign and exclusive law-making function might have encouraged the Courts to afford the benefit of any judicial doubt as to justification of the limit to Parliament. But that cannot be so where the limit must not simply be justified but must be demonstrably justified. If anything, the benefit of the doubt should go against justification of the limit, the onus of showing such demonstrable justification being on the party claiming the limit to be justified.

[183] A preliminary question is whether the right in question is capable of justification at all. The open language used in s 5 might be thought to suggest that reasonable limits which can be demonstrably justified might be placed on any of the rights and freedoms contained in the Bill of Rights Act. The authors of *The New Zealand Bill of Rights Act: A Commentary* suggest that is the case:[226]

> It is sometimes suggested that a number of the rights set out in Part II of [the Bill of Rights Act] cannot ever be limited under s 5 of [the Bill of Rights Act]. Section 26 of [the Bill of Rights Act], which protects against retrospective criminal legislation (s 26(1)), and the principle against double jeopardy (s 26(2)) is frequently cited as an example. Other examples include the right not to be tortured, the right to refuse medical treatment, the right to the presumption of innocence, and the right to a fair trial. However, in our view such an approach is mistaken. …
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> In our view, the correct approach is to accept that the rights set out in Part II are capable of being limited in terms of s 5 of [the Bill of Rights Act].

[184] However, this claim is too wide. There is now clear authority that some rights are so fundamental they cannot be subject to reasonable limits. For example, in *Fitzgerald v R*, which was delivered while we were deliberating our decision, the Supreme Court held that the right not to be subjected to torture or cruel treatment affirmed in s 9 of the Bill of Rights Act was absolute and limits on the right were not capable of justification under s 5.[227] That case concerned the interpretation of the

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225 At [110].

226 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.5.2]–[6.5.3] (footnotes omitted).

227 *Fitzgerald v R* [2021] NZSC 131 at [38], [47] and [78] per Winkelmann CJ, [160] and [175] per O'Regan and Arnold JJ and [241] and [244] per Glazebrook J. To similar effect are the observations of Elias CJ in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [77] where she referred to the s 9 right as "an irreducible requirement". Compare *Borrowdale v Director-General of Health* [2021] NZCA 520 where limitations on other rights (freedom of peaceful assembly, association and movement) were capable of justification under s 5.

"three strikes" regime, and whether s 86D of the Sentencing Act could be construed as subject to a limitation such that the requirement to sentence an offender to the maximum sentence did not apply where that would breach s 9 of the Bill of Rights Act. Because any limitation on s 9 was not capable of justification, the majority did not engage in a s 5 analysis and started with whether s 86D could be interpreted in a manner consistent with the Bill of Rights Act under s 6. They concluded that a rights-consistent interpretation was possible and allowed the appeal on that issue.[228]

[185] There are also cases which put s 25(g) into an absolute and non-derogable category. In *R v Poumako,* Gault J (who wrote also for Richardson P and Keith J) said that the fundamental character of the principle against retrospective criminal liability does not allow for any "reasonable limits" or "emergency derogations".[229] The reasons for the principle were long established and "impregnable".[230] These included prior directions and deterrence, the consequent possibility of knowing compliance and the justice of not being subject to unknown penalties. In *R v Pora*, the rule against the imposition of retrospective criminal penalty was described as "fundamental",[231] and it was said that:

> [79] The rule has a categorical or absolute character that appears, first, from the strong and unusual wording of the New Zealand prohibition originally enacted [by the Criminal Justice Amendment Act 1980] – the rule is to operate "notwithstanding any other enactment or rule of law to the contrary" and, second, from two features of the [ICCPR] provision mentioned in *Poumako* at paras [3] and [6]: the prohibition in art 15 is not subject to any possible limit (as for instance are the rights to freedom of expression and freedom of association), and it is not subject to derogation in time of public emergency threatening the life of the nation (again unlike those freedoms and also the other rights in respect of criminal proceedings).

[186] On the basis of these cases Whata J discerned that the right affirmed in s 25(g) was more "impregnable" than the right in s 26(2), except to the extent the latter provides for immunity from retrospective second penalty.[232] Some justification for that approach may be found in the link between s 25(g) of the Bill of Rights Act and art 15(1) of the ICCPR. Article 4(2) of the ICCPR provides that there may be no

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228 At [139] per Winkelmann CJ, [219] per O'Regan and Arnold JJ and [244] per Glazebrook J.
229 *R v Poumako*, above n 110, at [6].
230 At [6].
231 *R v Pora*, above n 110, at [70] per Gault, Keith and McGrath JJ.
232 High Court judgment, above n 19, at [25].

derogation from art 15 (amongst other articles)[233] in times of public emergency threatening the life of the nation. Section 26(2) of the Bill of Rights Act however traces its lineage to art 14(7) of the ICCPR, which is not one of the articles covered by the art 4 proscription of derogation.

[187] Counsel for Mr Chisnall submit this should not matter. They argue that the s 26(2) right should also be regarded as impregnable because it is analogous to the rule against the imposition of an increased penalty for the same offence contained in art 15(1). They contend that this approach is necessary because both s 26(2) and art 14(7) are aimed at prohibiting repeat prosecutions: since ESOs and PPOs are not a consequence of a second prosecution it is necessary to address their impact through the lens of art 15(1). The double punishment embraced by s 26(2) would then be treated as an increased penalty falling foul of s 25(g).

[188] We are not persuaded that approach is right. The corresponding provision of the ICCPR in the case of s 26(2) of the Bill of Rights Act is art 14(7). It would be artificial to say that the non-derogable status of art 15(1) also attaches to the right to immunity from second penalty in s 26(2), when art 14(7) is clearly not listed as one of the rights from which states cannot derogate, exhaustively set out in art 4(2). The issues addressed by ss 25(g) and 26(2) of the Bill of Rights Act are distinct, and adequately encapsulated by the respective concepts of increased penalty and second penalty. The second punishment proscribed by s 26(2) need not be preceded by a second trial: the rule against second punishment may stand alone.

[189] We also do not accept the submission advanced on behalf of Mr Chisnall that the Supreme Court determined in both *R v Mist* and *Zaoui v Attorney General (No 2)* that the s 26(2) right cannot be subject to limitation.[234] It is clear that the observations of Elias CJ and Keith J in *Mist* on which counsel rely were immediately referable to

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233 These articles relate to the right to life (art 6); not to be subject to torture or to cruel, inhuman or degrading treatment or punishment (art 7); not to be held in slavery or servitude (paras 1 and 2 of art 8); not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (art 11); recognition as a person before the law (art 16); and freedom of thought, conscience and religion (art 18).

234 *R v Mist*, above n 110; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

s 4(1) of the Crimes Act and art 15 of the ICCPR,[235] and then s 25(g) of the Bill of Rights Act.[236] The discussion relied on in *Zaoui* was specifically about torture and arbitrary deprivation of life, and there was reference to the non-derogable nature of those rights in the context of art 4 of the ICCPR.[237]

[190] Although the right to immunity from second penalty in s 26(2) is not one of those rights that can never be subject to reasonable limits, on any view the right is clearly of fundamental importance. Any departure from its provisions will require strong justification. The question for present purposes is whether the form of the ESO and PPO regimes can be demonstrably justified.

[191] On this issue, Mr Perkins submits that if this Court found the criminal procedural "form" of ESOs was decisive as to whether ESOs limit s 25(g) and/or s 26(2), the Attorney-General would not advance any s 5 justification argument because the ESO regime would necessarily fail at the "minimum impairment" stage. He contrasts this with the "civil procedural form" with which PPOs were enacted, which demonstrates it is possible to enact a post-sentence system of controls responding to traits and behavioural characteristics that indicate a risk of serious offending without applying the "procedural veneer of the criminal justice system".

[192] It will be apparent from the preceding discussion in this judgment that in the case of both regimes we consider their most important feature is the fact that they result in the imposition of penalties, regardless of whether the process is described as criminal or civil. An important aspect of that reasoning is that the previous commission of serious offending is a necessary pre-requisite to the making of either order. Another central feature of our finding that the regimes are penal is the range of restrictions on rights, some of them severe, that flow from the making of both ESOs and PPOs.

[193] Leaving aside issues related to the form in which applications are made and considered, Mr Perkins frames the justification issue as turning on whether a second

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235 *R v Mist*, above n 110, at [13].
236 At [15]–[20].
237 *Zaoui v Attorney-General (No 2)*, above n 234, at [16] and n 6.

penalty is justified in circumstances where the offender poses a high risk of reoffending at the end of the sentence or, in the case of PPOs, a very high risk of imminent reoffending. He submits that such measures are justified even if they have a substantively penal effect, on the basis that:

(a) Prevention of serious sexual and violent offending is a goal of pressing and substantial importance.

(b) Judicially imposed restraints on the liberties of an offender at high risk of sexual or violent reoffending (or in the case of PPOs, a very high risk of imminent reoffending) are measures rationally connected to the goal.

(c) ESOs and PPOs collectively permit a graduated response to persons presenting the relevant risks, from the imposition of standard release conditions (at the lowest end) to detention (at the highest end). Any penal impact is secondary to the primary purpose of community protection and rehabilitation. They can therefore constitute minimally impairing limitations on s 26(2).

(d) The salutary effect of the ESO and PPO regimes (namely, the prevention of serious crime) may be considered to outweigh the harmful impacts of imposing a second penalty. In this way, such measures are a proportionate response to a pressing issue, and limits on s 26(2) are justified.

[194] Mr Perkins' submission is grounded in part on the idea that an ESO would reduce the opportunities for an offender to reoffend while in the community, and facilitate rehabilitation and reintegration. He points to the fact the Parole Board might impose a requirement that the offender participate in a rehabilitative or reintegrative programme. Further, he submits that if an ESO were insufficient to address the risk, and a PPO were made, there would be a clear and rational connection to any resulting detention in a PPO residence to protect the public who would otherwise be at risk.

[195] However, no affidavit evidence has been filed to underpin these submissions as to justification. There can be no doubt that the prevention of serious sexual and violent offending is a very important objective. It might also be the case that judicially imposed restraints on the liberties of offenders associated with the relevant risks addressed in the statutory regimes are rationally connected to the goal of preventing serious sexual and violent offending. However, the question of whether the ESO and PPO regimes represent a proportionate response is less clear. It is necessary to ask whether the range of orders possible under the two statutory regimes may be said to be rationally connected to the statutory objectives, are proportionate to those objectives and go no further than is necessary to achieve them.

[196] In some cases, evidence about what has been described as "legislative fact" may assist the court to understand why the legislature thought it appropriate to enact legislation which imposes limits on rights set out in the Bill of Rights Act. In *R v Hansen,* Elias CJ noted:[238]

> As Professor Davis first identified in 1942 and developed further in his 1958 treatise *Administrative Law*, legislative facts are general facts, not concerning the immediate parties, which help the tribunal determine the content of law as a matter of policy. Kokott in *The Burden of Proof in Comparative and International Human Rights Law* (1998), pp 34 – 35 has drawn attention to the use of such evidence in human rights judging if Courts are not to rely on intuitive judgments and to stretch judicial notice unacceptably.

[197] In other cases, the issues relevant to the determination of rational connection and proportionality may be able to be resolved without the need for such evidence, because the relevant considerations bearing on the policy issues are clear. In *R v Hansen* McGrath J said*:*

> [232] As Richardson P pointed out in *Attorney-General v Prince and Gardner*,[239] in some cases relevant considerations bearing on an issue of policy are "patent". They may be implicit in the relevant legislation, or readily identifiable and capable of evaluation without support from legislative fact material. …

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238 *R v Hansen,* above n 222, at [9], n 9. See also [230] per McGrath J.

239 *Attorney-General v Prime and Gardner* [1998] 1 NZLR 262 (CA) at 267–268.

[198] We have not felt able to reach the conclusion that this case is in that category. Before stating why that is so, it is appropriate that we refer to the relevant material that was before the High Court and before us on appeal.

[199] We mention first the evidence of Ms Leota, which we have already summarised.[240] While she addresses the practical working of the legislation, her evidence does not assist significantly with the proportionality assessment. No other affidavit was filed. The further material on which the Attorney-General relied in the High Court included Cabinet papers and the explanatory notes to the legislation when introduced.

[200] One Cabinet paper to which Mr Perkins refers is from the Minister of Justice to the Cabinet Social Development Committee.[241] It includes a regulatory impact statement about the extended supervision of child sex offenders. This refers to research indicating that a minority of child sex offenders pose a high risk of reoffending and that recidivism rates among child sex offenders do not decline over time. It continues:[242]

> Improvements in the treatment of child sex offenders and research into patterns of re-offending have led to the view that long term management and support is required to reduce the risks posed by child sex offenders to the community. Improvements in risk assessment tools mean that resources can be effectively targeted and provide a substantiated basis on which to identify offenders who require extended monitoring and supervision.
>
> Work by several government agencies on issues relating to the long term management of child sex offenders has identified a critical gap in the ability to manage child sex offenders in the community once offenders are no longer subject to parole or release conditions. The consequence of this gap is that there is currently no means available to actively manage the long term risk of re-offending posed by a small but significant group of child sex offenders.

[201] It appears that this paper dates from August 2003 and concerns the development of the ESO regime that was before this Court in *Belcher*. In a statement that perhaps reflects its comparatively early stage in the development of the ESO regime, the document includes the following statement:[243]

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240 Above at [45]–[48] and [77]–[78].
241 Cabinet Paper "Extended Supervision of Child Sex Offenders" (28 August 2003).
242 At 17.
243 At 18.

Risks and limitations of extended supervision

…

30. The proposal is also likely to be contentious. Effective monitoring and control of offenders over a long period of time can be viewed as an encroachment on the civil liberties of offenders. This is especially so for high-level interventions such as electronic monitoring. The parameters of the legislative scheme will need to be carefully crafted and all Bill of Rights implications assessed. [Redacted]

[202] Another Cabinet paper to which Mr Perkins refers, dated 27 November 2013, is from the Minister of Corrections and deals with the subject of enhanced ESOs.[244] That paper was evidently written at a late stage in the development of policies which were subsequently reflected in the ESO and PPO regimes in 2014. We accept that the paper explains the proposed legislation and the way in which it would reduce risk in accordance with the statutory regimes about to be introduced. Paragraph 78 of the paper, under the heading "Human Rights" commences with a statement that the existing ESO legislation has previously been found to be non-compliant with the Bill of Rights Act. Paragraphs 79 to 82 which follow, and which presumably discuss matters which might have been thought to justify the new legislation notwithstanding non-compliance with the Bill of Rights Act, have been redacted in the document made available to the High Court. That section of the paper ends with a conclusory statement in these terms:

83. Given the significant risk of serious harm posed by offenders who will be subject to an extended supervision order, the proposed amendments strike an appropriate balance between the need to protect the public from serious sexual and violent re-offending and the need to protect the rights of offenders.

[203] There is however little reasoning in the document which is of assistance in terms of the proportionality analysis. Effectively, it is a statement of the risk posed by individuals convicted of serious offending, and of the legislative means proposed to deal with that risk once their sentences have been served.

[204] Counsel for Mr Chisnall draw attention to a letter dated 3 November 2014 addressed by the Chief Policy Advisor of the Department of Corrections to the

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[244] Cabinet Paper "Paper 2: Enhanced Extended Supervision Orders" (signed by the Minister on 27 November 2013).

Chairperson of the Law and Order Committee. The letter was in response to a request from the Committee made during its consideration of the Parole (Extended Supervision Orders) Amendment Bill on 29 October 2014. The Committee sought information on the possibility of making the ESO regime civil in nature. That request followed the Attorney-General's s 7 report to Parliament, which had concluded that an ESO remained a criminal penalty and the limitation on the s 26(2) right was "not demonstrably justified in a free and democratic society".[245]

[205] The advice given by the Chief Policy Advisor in her 3 November 2014 letter was that:

> 4 Corrections has given preliminary consideration to what amendments may be needed to make the ESO regime civil in nature, and in particular re-creating ESOs as part of a civil framework with PPOs. This would be a substantial piece of work requiring a wide range of issues to be identified and resolved.
>
> 5 It is important that the ability to safely manage high risk offenders on ESOs and protect the community from the risk of serious harm not be compromised by work to make the regime civil in nature. Given the urgency of the ESO Bill, Corrections considers that retaining the existing regime, although deemed criminal in nature, provides the best means at the current stage of achieving the objective of protecting public safety and upholding the rights of victims and offenders.

[206] We were not referred to any further steps that had been taken to consider the possibility identified by the Law and Order Committee in 2014 of making the ESO regime civil in nature.

[207] In addition to these, counsel for Mr Chisnall draw our attention to another paper, addressed to the Cabinet Social Policy Committee from the Ministers of Justice and Corrections dated 21 March 2012.[246] The Ministers authored this report for the purpose of securing approval for the drafting of the legislation that was to become the PS (PPO) Act. Salient features of this paper include the following, set out in the executive summary:

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[245] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) Amendment Bill* (27 March 2014) at [20]. It is plain from a reading of the s 7 report that its reasoning was strongly influenced by the placement of the ESO regime in the Parole Act, where it "form[ed] part of the process of criminal justice": at [13].

[246] Cabinet Paper "Public Protection Orders: Establishing a Civil Detention Regime" (21 March 2012).

> 3. Public safety is jeopardised by a small number of people who reach the end of a finite prison sentence and pose a very high risk of imminent and serious sexual or violent reoffending. A public protection order would allow for the detention of an individual at a secure facility within prison precincts. Less intrusive forms of supervision are not adequate to prevent further offending. The detention would be subject to continuing review and there would be credible pathways to release.
>
> 4. The public protection order regime seeks a proportionate balance between the right of everyone to be safe from harm (by protecting them from individuals who are a very high risk of imminent and serious sexual or violent reoffending), and the right of individuals under public protection orders to be subject to the least intrusive form of detention to achieve that aim. The objective of the public protection order regime is to enhance public safety. By comparison, the objectives of sentencing include (to varying degrees) retribution, denunciation, deterrence, incapacitation, rehabilitation, and restitution.

[208] There is also an acknowledgement in the paper that protecting the community from the small number of people who reach the end of a finite prison sentence and pose a very high risk imminent and serious sexual or violent offending raises some "profound challenges".[247] It is acknowledged that it is "not acceptable for the State to punish people twice for the same offence (double jeopardy) or to arbitrarily detain people".[248]

[209] The report further notes that a PPO would allow for the detention of an individual at a secure facility within prison grounds and that less intrusive forms of supervision were not adequate to prevent further offending.[249] It is then noted that the objective of the PPO regime is to enhance public safety, and a contrast is drawn with the objectives of sentencing, said to "include (to varying degrees) retribution, denunciation, deterrence, incapacitation, rehabilitation and restitution".[250]

[210] The Ministers summarise the nature of the regime proposed as follows:

> 27. The package of proposals in this paper aims to balance fundamental principles. The regime we recommend aims to ensure that any post-sentence detention of offenders is: proportionate to the risks posed to the community; the least restrictive possible while still

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247 At [23].
248 At [23].
249 At [24].
250 At [25]. There was no mention of the reference in s 7(1)(g) of the Sentencing Act 2002 to "protect[ing] the community from the offender".

> meeting the key policy objectives; and has high legal tests, protections and robust processes.

[211] The "balance" sought to be achieved is illustrated in an appendix to the paper. This includes an item with a number of listed criteria briefly summarised. One of these is titled "Meets human rights obligations". This item reads:

> There are some aspects of the proposed public protection order regime that may raise human rights concerns. These include the application of the regime solely to offenders – arbitrary; the location of the detention facility in the prison precinct – and the associated restrictions and requirements on detainees and visitors; the likely limitation of the provision of treatment for detainees; and the risk that detainees rights and freedoms will be unduly curtailed.
>
> There is a risk that these features of the regime will be interpreted as infringing on the rights to not be subject to retroactive penalties or double jeopardy.

[212] This summary presumably gives some idea as to what was said in the body of the report under the heading "Human rights implications". That section of the report, at paragraphs 99 to 103, was redacted in the material provided to the High Court and to us on appeal. Consequently, the record does not really disclose the full basis upon which the Ministers weighed the implications of the proposed legislation against the rights contained in the Bill of Rights Act and assessed proportionality.

[213] Another item in the appendix is titled "Considered within civil jurisdiction". It reads:

> There is a risk that there could be challenges to the proposed regime. Many of the issues highlighted above in the discussion on human rights also raise issues about whether the proposed public protection orders are civil or in fact criminal.
>
> Public protection orders are targeted solely at convicted offenders – rather than being more widely applicable to individuals in the community who display the same characteristics. This implies a double standard and a link to prior offending. This is not consistent with a civil regime.
>
> Having the public protection orders administered by the Department of Corrections and having the facilities located within the prison precinct could also make the orders appear criminal rather than civil. Proposals relating to prison cell detention orders and the provision of company for detainees may be considered closer to a criminal order.
>
> These features also increase the risk that public protection orders may be considered punitive, with the individuals being punished twice for the same offence (double jeopardy).

[214] The explanatory notes to the legislation, in the case of both the ESO and PPO regimes, advance the issue of justification no further than the statutory objectives contained in the statutes when enacted.

[215] Among the materials provided to the High Court were materials from Hansard and Select Committee reports including statements expressing views of Members of Parliament that the statutory measures in question were a proportionate response to the problem sought to be addressed. It would not be appropriate for this Court to analyse that material and respond to it. Whilst the courts have often in recent years referred to parliamentary materials, including what has been said in Parliament (particularly by the Minister responsible for a Bill), that is normally done for the purpose of assisting the court to ascertain the purpose of legislation and in cases of doubt to assist in the interpretation of it.[251]

[216] This is not a case where there is any doubt about the purpose of the legislation, or its meaning. This Court's task is rather to undertake an analysis of whether the denial of rights guaranteed by the Bill of Rights Act is demonstrably justified. Since Mr Perkins has not sought to rely on the Hansard extracts in this Court, we do not need to consider the difficult issues that can arise if the Court is invited to consider such material in terms of parliamentary privilege and comity, discussed by this Court in *Attorney-General v Taylor*.[252] It was said in that case that courts must take care when admitting such material, and ensure that they do not endorse or criticise Parliament's treatment of the issues.[253] This would mean avoiding any critical reference to justifications for legislation advanced in parliamentary speeches.[254]

[217] We consider the limited legislative fact material to which we have been referred demonstrates that both the ESO and PPO regimes were designed to deal with the important objective of public protection from persons likely in future to commit

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251 See for example *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA) at 701; *R v Poumako*, above n 110, at [23]; and *R v Pora*, above n 110, at [107].

252 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24. The issue of parliamentary privilege was not before the Supreme Court on appeal: *Attorney-General v Taylor*, above n 25, at [19].

253 At [130]. In that case the Speaker of the House of Representatives was granted leave to intervene on the issue of whether the High Court had breached parliamentary privilege in the way in which it dealt with the Attorney-General's report under s 7 of the Bill of Rights Act.

254 At [135].

serious criminal offences. We accept also that the regimes are rationally connected with that purpose. But the importance of the s 26(2) right requires greater justification before it can be accepted that either regime is demonstrably justified in a free and democratic society, having regard to the need to establish both proportionality and minimum impairment of the right for achieving the purpose.

[218] ESOs and PPOs are imposed on persons nearing the end of the sentences imposed on them by the courts in response to their criminal offending, applying the purposes and principles of sentencing set out in the Sentencing Act including the important purpose of protecting the community from the offender. The restrictions which then flow from both ESOs and PPOs are potentially very severe, and in the case of PPOs can amount to indefinite detention. This is punishment, in the absence of trial and conviction for a further offence. It is a marked departure from the legal order reflected in s 26(2) of the Bill of Rights Act.

[219] For the ESO and PPO regimes to be justified under s 5, there would need to be a substantial showing by appropriate affidavit evidence that the regimes are justified as a minimum and necessary response to the potential harm caused by those against whom such orders would be made.

[220] We do not consider it is an adequate response to say, in assessing whether the limits on the right contained in the legislation have been demonstrably justified, that orders will not be made in individual cases without a full assessment by judicial officers. In essence that reduces the s 5 analysis to a case by case consideration without asking the essential question of whether the ESO and PPO regimes represent reasonable limits of the s 26(2) right. That is the question raised by s 3 of the Bill of Rights Act which applies the Act's provisions to acts done by the legislative branch of government, as well as the other branches. To say the Acts may be able to be applied in a rights-compliant way does not answer the central question, which is whether the relevant provisions of the Parole Act and the PS (PPO) Act delineate regimes that limit rights in a way, and to an extent, that has been demonstrably justified.

[221] We are conscious that in approaching the issue of justification, it is appropriate for the courts to afford Parliament's appreciation of the issues with what was described

in *Hansen* as a degree of "latitude".[255] The extent of this latitude will vary depending on the circumstances and the subject matter.[256] But that approach must be based on more than the fact that Parliament has chosen a particular legislative response. What is required is that the legislative choice be demonstrably justified.

[222] We do not see in any of the matters relied on as legislative fact a demonstrated justification for important aspects of both regimes.

[223] Regarding the ESO regime, as in *Belcher* we are unable to find justification simply on the basis of the importance of the problem the legislature seeks to address and the fact that it has chosen to enact the ESO regime in a particular form.[257] The most concerning aspects of the regime are the significant restrictions of movement and association, electronic monitoring and the potential for detention at home that remain features of the ESO regime, as summarised above. Since *Belcher* the coverage of the regime has been extended to a wider class of offenders, and there may now be repeated 10-year extensions of ESOs. The imposition of ESOs as a second penalty without trial and conviction for a further offence is a limitation on the s 26(2) right that has not been demonstrably justified on the material before the Court.

[224] The PPO regime involves restrictions that are even more severe. PPOs can result in indefinite detention in circumstances which can fairly be described as not far short of imprisonment, and the possibility of actual confinement in prison as if on remand. We have summarised above the various other aspects of the regime that cause us to conclude that PPOs are a penalty, including the qualified nature of the right to receive rehabilitative treatment; the broad powers of the manager of a residence to limit rights otherwise conferred on residents by the statute; and the extensive powers of search, seizure and surveillance. The clear limitation on s 26(2) of the Bill of Rights Act has again not been demonstrably justified on the material before the Court.

[225] The severe restrictions placed on those against whom ESOs and PPOs are made is clearly based on the legislature's view that without these restrictions the offenders

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255 *R v Hansen*, above n 222, at [111]–[119].
256 At [111] and [116].
257 *Belcher v Chief Executive of the Department of Corrections*, above n 27, at [59].

will constitute a danger to the public. The power of Parliament to implement that view is not and cannot be in doubt. It is obviously unaffected by this decision.

[226] What this case is about is whether the legislative response in the form of the ESO and PPO regimes is inconsistent with the Bill of Rights Act. To establish that required evidence about the basis on which the legislative choices were made such as would provide and submit to scrutiny the rational justification for the measures. This would enable the Court to assess the proportionality of the measures; whether a "justified end is achieved by proportionate means".[258] Without such evidence, we have not been able to find that the regimes are demonstrably justified under s 5 of the Bill of Rights Act.

Other rights

[227] As noted above, counsel for Mr Chisnall also referred to other rights in the Bill of Rights Act potentially engaged. Those provisions affirm rights not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment;[259] to freedom of movement;[260] not to be arbitrarily arrested or detained;[261] to be treated with humanity and respect for the inherent dignity of the person;[262] to certain minimum standards of criminal procedure;[263] and to justice.[264]

[228] We do not consider it necessary to embark on a similar exercise to the one we have already undertaken in respect of those rights. The right to immunity from second penalty was the principal issue addressed in argument, and there would be an artificiality in bringing inconsistency with other rights into account when any such inconsistency would be premised on the denial of the s 26(2) right.

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258 *R v Hansen*, above n 222, at [123].
259 Bill of Rights Act, s 9.
260 Section 18.
261 Section 22.
262 Section 23(5).
263 Section 25(a), (c) and/or (d).
264 Section 27(1).

Result

[229] It follows from the conclusions we have expressed that the appeal is allowed, and the cross-appeal dismissed.

[230] Given the clarification of the Court's power to make declarations of inconsistency following the decision of the Supreme Court in *Attorney-General v Taylor*, the importance of the s 26(2) right and the extent of the inconsistency, we consider it appropriate to confirm the declaration made in the High Court, but in addition to make declarations of inconsistency concerning both the PPO regime and the ESO regime as it applies prospectively. No further declarations need be made.

[231] In accordance with Mr Perkins' request in the event we arrived at this point, we invite the parties to confer about the form of declarations that should be made to reflect the terms of this judgment. Desirably that would result in an agreed joint memorandum. If agreement cannot be reached, the parties may submit memoranda not exceeding five pages in length. Any memoranda should be filed within 20 working days of the date of this judgment. Unless the Court orders otherwise, the Court will determine the form of the appropriate declarations on the papers.

[232] The appellant is entitled to costs. The first respondent must pay the appellant costs for a complex appeal on a band B basis and usual disbursements. We certify for two counsel.

Solicitors:
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Crown Law Office, Wellington for First Respondent