Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

ATTORNEY-GENERAL v MARK DAVID CHISNALL
(SC 26/2022) [2025] NZSC 126

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

On 19 December 2024, this Court found that aspects of the extended supervision order (ESO) and public protection order (PPO) regimes are inconsistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The Court decided it would issue declarations of inconsistency with s 26(2) of the Bill of Rights in respect of the PPO regime and the detention-authorising aspects of the ESO regime. The Court sought submissions from the parties on the exact wording of these declarations. This judgment addresses the wording of the declarations.

What is a declaration of inconsistency?

When legislation cannot be given a meaning that is consistent with the Bill of Rights, the courts may make a declaration of inconsistency. A declaration is not a review of Parliament's legislative choices, but rather the court exercising its duty under the Bill of Rights to assess whether limitations on rights are justified. Parliament has recognised this power and has its own processes to respond. It is important to note that a declaration does not invalidate the law—the statute in question remains in full force and effect. Nor will it affect the current orders applying to Mr Chisnall in this case.

Background

The ESO and PPO regimes are post-sentence orders under the Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 respectively. They apply to people who, having committed certain categories of offences in the past, are assessed as posing a high, or very high, risk of serious sexual or violent offending in future. Orders are made by a court, on the

application of the Chief Executive of Ara Poutama Aotearoa | the Department of Corrections, following consideration of reports prepared by health assessors relevant to that risk.

The standard conditions attached to an ESO are largely the same as parole conditions. Special conditions amounting to detention can also be imposed, including intensive monitoring and residential restrictions for up to 24 hours a day. A PPO allows for the detention of a person, potentially for life, in a building on prison grounds. Neither regime provides for an absolute right to rehabilitation or therapeutic support.

An ESO or PPO can be made even when the offence making the person eligible was committed before the regimes were enacted—in other words these orders can be made "retrospectively". This was considered necessary to manage the risk posed by offenders who had committed offences before the regime had been enacted—and who posed a real and ongoing risk of similar offending in future.

Result

The Court makes the following declarations of inconsistency:

> Public protection orders made under the Public Safety (Public Protection Orders) Act 2014 are a second penalty for offences for which offenders have already been punished. They therefore limit the right to be free from second penalty protected by s 26(2) of the New Zealand Bill of Rights Act 1990. This limitation is not justified under s 5 of the New Zealand Bill of Rights Act. To the extent that s 3 of the Public Safety (Public Protection Orders) Act authorises the retrospective application of public protection orders, that limitation cannot be justified. Therefore, provisions in the Public Safety (Public Protection Orders) Act that authorise the making of public protection orders are inconsistent with s 26(2) of the New Zealand Bill of Rights Act.
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> To the extent that ss 15, 107FA, 107IA, 107IAC and 107K of the Parole Act 2002 authorise the imposition of special conditions requiring detention as an aspect of an extended supervision order, they are a second penalty for offences for which offenders have already been punished. They therefore limit the right to be free from second penalty protected by s 26(2) of the New Zealand Bill of Rights Act 1990. This limitation is not justified under s 5 of the New Zealand Bill of Rights Act. To the extent that s 107C(2) of the Parole Act authorises the retrospective application of detention-authorising special conditions as an aspect of an extended supervision order, that limitation cannot be justified. Therefore, to the extent that ss 15, 107FA, 107IA, 107IAC and 107K of the Parole Act authorise the imposition of special conditions requiring detention as an aspect of an extended supervision order, they are inconsistent with s 26(2) of the New Zealand Bill of Rights Act.

The appellants must pay the respondent one set of costs of $70,000 plus usual disbursements. We allow for second counsel.

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