IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 26/2022**

BETWEEN	**ATTORNEY-GENERAL**
	First Appellant
AND	**CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS**
	Second Appellant
AND	**MARK DAVID CHISNALL**
	Respondent

APPELLANTS' SUBMISSIONS

2 September 2022

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COUNSEL FOR THE APPELLANT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

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SUMMARY OF ARGUMENT

1. This case is the second application for a declaration that an enactment is inconsistent with the New Zealand Bill of Rights Act 1990 (**BORA**) before this Court since *Taylor*.[1] It raises central questions about the nature of a Declaration of Inconsistency (**DOI**).

2. The appellants start with the uncontroversial proposition that Parliament is presumed not to empower statutory decision-makers to make decisions that are inconsistent with BORA rights, other accepted fundamental common law principles, or New Zealand's international obligations, unless clear language is used to demonstrate Parliament's intention.[2] If there is a reasonably tenable interpretive meaning that is rights-consistent, that meaning is to be preferred: s 6 BORA. If not, the Court must apply the rights inconsistent meaning: s 4 BORA.

3. Where there is no reasonably tenable, rights-consistent meaning – where application of an enactment leads inexorably to limit a BORA right in a way that cannot be demonstrably justified – the Court may declare an inconsistency between the enactment and the BORA.

4. A DOI is a remedy directed to the real circumstances of a litigant, or the feasible hypothetical circumstances of a person. It vindicates the rights of the litigant (or their stand-in) in the litigation itself, once the Court has concluded that an enactment unjustifiably limits a right.

5. The Court of Appeal found the extended supervision order (**ESO**) and public protection order (**PPO**) regimes are inconsistent with the right against second penalty in s 26(2) BORA and not demonstrably justified. The Court issued a DOI on the basis that, because the regimes empower the Court to impose ESOs or PPOs that limit rights affirmed by BORA, justification for Parliament's choice of that regime was required. It found there was insufficient evidence brought as to why Parliament enacted the regimes for the Court to conduct any analysis as to the justification of the potential

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1 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

2 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [119], [203] and [218]; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948; *Ye v Minister of Immigration* [2010] 1 NZLR 104 (SC); *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 (HL).

limits: [222]-[226].

6. The appellants agree with the Court below that the ESO and PPO regimes limit the right against second penalty in s 26(2) BORA and that the limit is capable of justification. However, the Court below wrongly proceeded from the basis that a regime that necessarily *impacts* on BORA rights but does not *require* a BORA inconsistent outcome could be subjected to an *Oakes* analysis[3] to determine whether the right is unjustifiably limited.

7. The ESO and PPO regimes are enabling. They provide a *discretion* to the Court to impose (or refuse) post-sentence orders – it must be assumed that only rights-consistent or justified rights limiting orders are permitted. The Court of Appeal should have left the analytical steps to determine justification of specific applications of the regimes to the Court engaged in determining ESO or PPO applications. Those Courts would determine an application for such orders based on whether the evidence connects the important policy objective to an individual's risk and behavioural profile, and whether the order is a proportionate one that represents the least impairment on the rights affected.

8. Only one element of the regimes creates a limit on rights that cannot be accounted for or ameliorated in the exercise of the power to make or decline an ESO or PPO: the eligibility criteria capture people whose conviction predates their enactment, and thus have a retrospective aspect. But this sort of retrospective application of the two regimes *is* demonstrably justified in light of the importance of the public safety objectives being pursued by Parliament, the severity of the specific risks the regimes respond to, and the ineffectiveness of a solely prospective regime to achieve that purpose.

9. The Attorney-General's appeal ought to be allowed and the DOI quashed.

BACKGROUND

10. The chronological history to this proceeding, and in respect of the specific applications for PPOs and ESOs on Mr Chisnall is outlined in the attached

[3] *R v Oakes* [1986] 1 SCR 103; adopted in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

chronology. Most recently, Mr Chisnall's PPO has been quashed by the Court of Appeal and replaced with an interim supervision order while the High Court considers the Chief Executive's application for an ESO.[4] The Chief Executive will be seeking an ESO with intensive monitoring. As noted by the Court of Appeal,[5] Mr Chisnall has indicated that he consents to an ESO being made.

ESOs and PPOs

11. ESOs are imposed under Part 1A of the Parole Act 2002. PPOs are imposed under the Public Safety (Public Protection Orders) Act 2014 (**PPO Act**). The regimes constitute Parliament's response to the risk posed to the community by people who, despite having served a finite sentence for a specified sexual and/or violent offence pose a real and ongoing (or imminent) risk of committing further serious sexual or violent offences.[6]

Historical development

12. ESOs were first introduced in 2004. Part 1A of the Parole Act 2002 permitted the Chief Executive of Ara Poutama Aotearoa – the Department of Corrections - to apply for an ESO in respect of anyone imprisoned for a child sex offence[7] who remained subject to that sentence.[8] The purpose of an ESO was "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons."[9] The Minister of Justice at the time described retrospectivity of the proposed ESO regime as "essential" to "cover high risk offenders sentenced prior to the 2002 sentencing reforms".[10]

13. ESOs could be made for up to ten years.[11] The period of an order was the "minimum period required for the safety of the community" in light of the

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4 *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402 **(401.0028).**
5 Ibid, [23].
6 Parole Act 2002, s 107I; Public Safety (Public Protection Orders) Act 2014, s 4.
7 Parole Act 2002, s 107B (as enacted).
8 Section 107C(1) (as enacted).
9 Section 107I(1) (as enacted).
10 **301.0015** (para 31). Following the 1999 justice referendum, the Government had very recently passed a comprehensive reform to the sentencing and parole regime and was envisaging that longer sentences and more sentences of preventive detention would be imposed under that reformed regime. The scope of preventive detention had been significantly widened to lower the age of eligibility from 21 to 18 at the time of the relevant offence, expand the range of eligible offending, and remove the requirement for multiple convictions before preventive detention could be considered: Criminal Justice Act 1985, s 75 (repealed) *c.f.* Sentencing Act 2002, s 87.

risk, its duration and the seriousness of the harm that would be caused if that risk were realised.[12] It was not possible to make more than one ESO unless special circumstances applied.[13] However many orders were made, the combined length could not exceed ten years.[14]

14. In 2014 the first ten-year ESOs were reaching the point at which they would lapse through effluxion of time.[15] At the same time, the government was concerned about the inconsistent treatment of child and adult sexual offending by the ESO regime,[16] and that ESOs were insufficient to address the reoffending risk posed by a very small cohort of the highest risk offenders. This had been borne out by the fact that, although ESOs greatly reduced reoffending rates compared with a control group, there had still been a number of instances of serious sexual reoffending by people subject to an ESO.[17] Parliament responded to that by enacting a two-tiered system of post-sentence orders in the PPO Act and the Parole (Extended Supervision Orders) Amendment Act 2014.[18]

Orders are made by the High Court and discretionary

15. The regimes both confer discretion on the Court to make ESOs or PPOs. The Court may make orders on application, but is not required to make orders where the subject of the application meets the criteria and is eligible to be subject to an Order.[19] The Court may impose special conditions on an interim basis or impose intensive monitoring conditions.[20]

16. Proportionality is built into the statutory regimes: ESOs, compulsory

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11 Section 107I(4).

12 Section 107I(5).

13 A person would need to either consent to a further order, or have been convicted of breaching an ESO within the preceding 12 months before an application was brought: Parole Act 2002, s 107N(2) (repealed). In two cases the High Court suggested that s 107I(6) permitted fresh applications to be made during the course of an ESO, but this was not generally followed: *CE, Department of Corrections v Taha* (2006) 22 CRNZ 453 (HC) at [38]; *CE Department of Corrections v Peterson* HC Auckland CRI-2007-404-0398, 24 April 2008, at [45].

14 Parole Act, ss 107I(6) and 107N(5) (repealed).

15 **301.0051** (para 30).

16 **301.0051** (para 30).

17 **301.0051** (paras 27-28). In her affidavit, Ms Leota notes that as of March 2019 16 ESOs had ended when preventive detention was imposed for new sexual or violent offending: **201.0006** (para 19).

18 In practice, however, the number of ESO extensions has been confined only to the highest risk offenders. Ms Leota deposes that in 71 of 80 cases arising after the 2014 amendments where the Department could have applied for a further ESO after the initial ten-year period, it chose not to and instead the ESO lapsed without being renewed: **201.0006** (para 18.1). There tends to be "a levelling off of risk over time as offenders 'age out'" of offending behaviour, meaning that only six offenders per year would warrant an order of longer than ten years, and three would warrant an order longer than twenty years, but it is possible that some offenders could pose a high risk of serious re-offending for the rest of their lives: **301.0076-8** (paras 23-28).

19 Parole Act, s 107I, PPO Act, s 13. See also *Department of Corrections v Gray* [2021] NZHC 3558.

20 Parole Act, ss 107IAB, 107IAC.

treatment orders, and compulsory care orders must all be preferred to a PPO, if they are sufficient to address the risk of harm posed by an eligible person.[21]

Components of the orders

17. The key characteristics of the two-tiered system are as follows.

17.1 *Eligibility:* ESO eligibility[22] was expanded in 2014 to include anyone convicted of a relevant sexual or violent offence.[23] This closely matches the PPO eligibility criterion of conviction for a "serious sexual or violent offence".[24]

17.2 *Traits and behavioural characteristics:* Before imposing an order the Court must be satisfied the offender displays certain traits and behavioural characteristics which indicate risk of further offending:[25]

17.2.1 To make an ESO, the Court must conclude the person demonstrates traits and behavioural characteristics including an intense drive, desire, or urge to offend; limited self-regulatory capacity; and an absence of understanding for or concern about the impact of offending on victims. They must also present either a high risk of sexual reoffending, or a very high risk of violent reoffending.[26]

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[21] Parole Act, s 107GAA; PPO Act, s 12; *Chisnall v Chief Executive, Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [37] and [83]. The same judge must where practicable consider both the PPO and ESO application where those are advanced in the alternative: Parole Act, s 107GAA(4). The intention of this is to ensure that courts impose the most appropriate form of management of the highest risk individuals: **301.0083** (table 4).

[22] Other than following a sentence of imprisonment for a relevant offence, the CE may also make an application in respect of a serious offender returning after being sentenced in a foreign jurisdiction per Parole Act 2002, s 107I(4). Even if an overseas offender is subject to conditions under the Returning Offenders (Management and Information) Act 2015, they may not be sufficient to manage that person's risk — intensive monitoring is not available, and the orders are of limited duration. The Returning Offenders Act is intended to complement not displace ESO and PPO eligibility: *CE Department of Corrections v Amohanga* [2017] NZHC 1406.

[23] Parole Act, s 107B.

[24] PPO Act, s 3.

[25] This stands in contrast to the former ESO scheme, where the Court was obliged to receive and consider a health assessor report which addressed certain traits and characteristics, but was not required to find that particular traits or characteristics were present or that they were linked to risk of reoffending: Parole Act 2002, ss 107F(2) and 107I(2) (as enacted).

[26] Parole Act, s 107IAA. The risk threshold for violent offending was intentionally set at a higher level than that for sexual offending, to avoid capturing people who were unlikely to go on to reoffend in a seriously violent manner and thus fail to meaningfully improve public safety: **301.0079** (para 33).

17.2.2 To make a PPO the Court must conclude the person demonstrates four traits and behavioural characteristics to a high level: an intense drive or urge to offend; limited self-regulatory capacity, absence of understanding or concern about the impact of their offending, and poor interpersonal relationships and/or social isolation.[27] They must also present a *very high* risk of *imminent* serious reoffending.

17.3 *Level of restriction:* PPOs are the most restrictive post-sentence order available. They require detention in a residence, which must be a building (and any adjacent land) designated as such in a prison precinct.[28] ESOs only require the imposition of standard release conditions and do not require detention,[29] but may include special conditions made by the Parole Board, which can in serious cases effectively result in detention.[30] An intensive monitoring condition may be imposed for up to 12 months,[31] (as the highest impact ESO special condition permitted) must only be imposed by the High Court[32] and may not be imposed more than once in respect of the same person, even if that person is subject to repeat ESOs.[33]

17.4 *Duration:* there is no limit on the total duration of post-sentence orders. The former limits on the maximum total length of ESOs were repealed.

Conditions and reviews of ESOs

18. After an ESO is made, standard conditions apply and special conditions may be imposed by the New Zealand Parole Board if necessary, in the same

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27 PPO Act, s 13. As the Court of Appeal noted, the required traits and behavioural characteristics were described as having only "very minor differences" between the two regimes: *Chisnall v CE Department of Corrections* [2019] NZCA 510 at [31] (**101.0217**).

28 PPO Act, s 114.

29 Parole Act, s 107JA.

30 *Chisnall v CE Department of Corrections* [2019] NZCA 510 at [58] (**101.0217**).

31 Parole Act, s 107K. Intensive monitoring was created in 2014 and was targeted at the very highest risk offenders who may be eligible for a PPO. An ESO with intensive monitoring is the "first line" option, and if this approach fails to address a person's risk then the person may become eligible for a PPO: PPO Act, s 7(1)(b)(i).

32 Parole Act, ss 107IAB-107IAC.

33 Parole Act, s 107IAC(5).

manner as for paroled offenders subject to a sentence of imprisonment.[34] The Board must review "high-impact" conditions every two years.[35] The standard conditions can also be cancelled by the Parole Board on application.[36]

19. The Court has no further role unless the offender or the Chief Executive applies for the order to be cancelled,[37] or a further application is made before the expiry of the ESO's term.[38] Where successive ESOs of cumulative length greater than ten years have been imposed, judicial supervision effectively takes place every five years.[39]

Conditions and reviews of PPOs

20. PPOs have no statutory time limit, but the High Court must re-examine the continuing need at least every five years.[40] A person subject to a PPO may seek leave of the High Court to apply for review at any time.[41]

21. PPOs must also be reviewed at least annually by a "review panel". If the panel concludes the person may no longer meet the PPO criteria, the Chief Executive must apply to the High Court review of the order.[42]

22. If on review the Court concludes the person no longer meets the PPO criteria, it must replace the PPO with a protective supervision order (**PSO**).[43] A PSO may include "any requirement the court considers necessary" to reduce reoffending risk, facilitate rehabilitation and reintegration, and provide for the reasonable concerns of victims.[44] A PSO attracts no minimum conditions. As with a PPO, a PSO must be reviewed at least every five years.[45] If at any stage a PSO is considered insufficient to manage the risk a person poses, the Court can make a further PPO.[46] A PSO can be cancelled if a person demonstrates it is no longer necessary

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34 Parole Act, s 107K.
35 Section 107RB.
36 Section 107O.
37 Section 107M.
38 Offenders with an existing ESO are eligible for a further ESO: ss 107C(1)(a)(iii) and 107F(1)(b).
39 Section 107RA.
40 PPO Act, s 16(1).
41 Section 17.
42 Section 15.
43 Section 93(1).
44 Section 94.
45 Section 99.
46 Section 7(1)(c).

after five years of compliance.[47]

DOI judgments in the Courts below

23. In both Courts below, the central issue was whether ESOs and PPOs are penalties, to which s 26(2) BORA relates. The Courts took different approaches to this question.

The High Court

24. In the High Court Whata J proceeded on the (correct) basis that a BORA-consistent application of the provisions and powers at issue is required. His Honour concluded that in most respects BORA consistency would fall to be achieved through a BORA consistent interpretive approach to the powers at issue in specific cases.[48]

25. Whata J concluded that PPOs were not penalties (a finding overturned by the Court of Appeal). However, his Honour found ESOs were penalties, and that in one respect the ESO regime gave rise to a second penalty that was not amenable to reasonable justification. That is, insofar as s 26(2) made available a new penalty not available at the time of Mr Chisnall's offending, it would be very difficult to identify any purpose important enough to justify limitation on the s 26(2) right.[49]

26. The resulting DOI was focused on s 107C of that Act, which Whata J treated as essentially incapable of justification insofar as it allows second penalties in respect of pre-regime offenders.[50]

27. His Honour made the following declaration:

> 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.

The Court of Appeal

28. Both parties appealed. The Court of Appeal allowed Mr Chisnall's appeal and dismissed the Attorney-General's.

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47 Section 102.
48 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, at [93]-[95] and [138] (**101.0021**).
49 Ibid at [96]-[97] (**101.0021**).
50 *Chief Executive of the Department of Corrections v Chisnall (No 2)* [2020] NZHC 243, at [14] (**101.0089**).

29. The Court outlined its approach at [14]-[16]. The Court noted that the rule of law and the foundational nature of the values underpinning BORA rights had resulted in the application of BORA to acts of the legislative branch, and the Court's jurisdiction to make DOIs. The Court then said:

> [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.

30. The Court of Appeal framed the "central question" as "whether the relevant provisions of the Parole Act and the [PPO] Act delineate regimes that limit rights in a way, and to an extent, that has been demonstrably justified", and held that the fact that "the Acts may be able to be applied in a rights-compliant way does not answer the central question".[51] The Court addressed its analysis not to the real or feasible applications of the PPO and ESO regimes, but instead to a high-level and hypothetical "range of orders possible".[52]

31. As we submit below, this *regime*-focused "central question" was the wrong question. It led the Court of Appeal to wrongly analyse the PPO and ESO regimes in an abstracted way,[53] without examining whether the carefully prescribed details of the regime must inexorably lead to a rights-inconsistency in respect of a litigant or of a reasonable hypothetical litigant.

32. Unlike a mandatory sentencing regime such as that considered in *Fitzgerald*,[54] the Parole Act and PPO Act authorise the imposition of orders that would limit certain BORA rights. The power is discretionary and is a judicial determination.

33. The Court's "regime"-focused approach is also reflected in the declarations made. Rather than focusing on particular provisions of the enactments that gave rise to an unjustifiable inconsistency with an affirmed right, the Court

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51 *Chisnall v Attorney-General* [2021] NZCA 616, at [220] (**101.0093**).
52 Ibid at [195] (**101.0093**).
53 Ibid at [176] and [220] (**101.0093**).
54 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

of Appeal made declarations that the statutory regimes were *in their entirety* inconsistent with s 26(2).[55]

Issues for determination in this Court

34. The appellants say the issues for determination in this Court are:

34.1 Whether an enactment that confers a discretionary power can be declared inconsistent even though it has not been determined that it positively requires a rights-inconsistent application in the instant case or a reasonable hypothetical case.

34.2 Whether the retrospective application of the PPO and ESO regimes is a justified limitation on relevant BORA rights.

Relevant law

35. As is evident, a range of rights guaranteed under the BORA may be impacted by an ESO or PPO.

36. Both Courts below gave declarations in respect of s 26(2) only, a hybrid provision affirming two overlapping and foundational aspects of New Zealand's criminal law, collectively referred to as "double jeopardy":

36.1 First, the long-standing common law criminal pleas of *autrefois convict* and *autrefois acquit*,[56] which remain a part of New Zealand's criminal law;[57]

36.2 Second, the "double punishment" principle, that nobody shall be punished twice in respect of the same offence, also long codified in New Zealand criminal law.[58]

37. Only the "double punishment" aspect of s 26(2) is engaged in this case. Section 26(2) is unconcerned with penalties *per se* – its ambit is penalties imposed "for an offence".[59] There is no need for a second trial before s

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55 *Chisnall v Attorney-General (No. 2)* [2022] NZCA 24, at [4] (**101.0173**).
56 *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 34 per Henry J.
57 Criminal Procedure Act 2011, s 45(1).
58 Criminal Code Act 1893 (57 Vict 1893 No 56), s 6; Crimes Act 1908, s 6; Crimes Act 1961, s 10(4).
59 *Daniels v Thompson* [1998] 3 NZLR 22 (CA). The Court there noted that, although s 26(2) did not preclude civil liability for exemplary damages (which have the purpose of punishing a defendant) in respect of acts or omissions that constitute a criminal offence, similar policy reasons precluded the availability of exemplary damages in such cases.

26(2) is engaged: "the rule against second punishment may stand alone."[60]

38. Eligibility for an ESO or PPO rests on a previous criminal conviction,[61] and the Court of Appeal held that ESOs and PPOs are penalties which are imposed in relation to that conviction. Even though PPO applications take a civil procedural form there is now no dispute that the powers to make ESOs and PPOs authorise a limitation on s 26(2).

39. The Court below found s 26(2) is amenable to limitation under s 5 and emphasised that the fundamental importance of the right means strong justification is required.[62] As the Court of Appeal held, s 26(2) is not an "impregnable" right. It is distinct from s 25(g) – the right to the benefit of a lesser penalty – which has been treated as being outside of any reasonable justification analysis by the senior courts,[63] a status that also reflects its link to art 15(1) of the International Covenant on Civil and Political Rights (**ICCPR**) which is a "non-derogable" right in times of public emergency.[64] Section 25(g) is in identical terms to s 6 of the Sentencing Act, which is framed as a "supreme" principle of sentencing, applying despite any other enactment or rule of law.[65] Whether limits on s 25(g) are never capable of justification doesn't arise in this case.

40. Section 26(2) reflects a different interest – freedom from a "second" penalty rather than increased penalty – and reflects a different ICCPR right (art 14(7)) which is not a "non-derogable" right.[66]

41. As a right subject to demonstrably justified limitation, limits on s 26(2) are authorised by law in a variety of contexts.[67] On the other hand, taking

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60 Court of Appeal judgment at [188] (**101.0093**).

61 Note *Daniels v Thompson* where the Court of Appeal contrasted civil proceedings by noting that "[t]he commission of an offence is not an ingredient of the causes of action or of the entitlement to relief…The acts of the particular defendant are relied upon – the fact that they also constituted criminal offending is incidental": [1998] 3 NZLR 22 (CA) at 34 per Henry J. A more modern example is found in the proceeds of crime regime, which has aspects that rely on a prior qualifying conviction (and thus are penalties for offending that engage s 26(2): Sentencing Act 2002, Subpart 5) and aspects which permit the forfeiture of property derived as a result of significant criminal activity without any need for a conviction, and which continue in force even if a criminal conviction was to be quashed (and thus do not engage s 26(2): Criminal Proceeds (Recovery) Act 2009.

62 Court of Appeal judgment at [190] (**101.0093**).

63 Court of Appeal judgment at [185] (**101.0093**), citing *R v Poumako* [2000] 2 NZLR 695 (CA) at [6] and *R v Pora* [2001] 2 NZLR 37 (CA) at [70] per Gault, Keith and McGrath JJ.

64 Court of Appeal judgment at [186] (**101.0093**).

65 Sentencing Act 2002, s 6(2).

66 Court of Appeal judgment at [188] (**101.0093**).

67 For example: ss 151 and 154 of the Criminal Procedure Act 2011 permit the High Court or Court of Appeal to order a retrial in the case of (respectively) a tainted acquittal, or if new and compelling evidence emerges (see *Solicitor-General v C* [2017] NZCA 380, at [19]); the Returning Offenders (Management and Information) Act 2015 permits new penal

recidivism into account in the sentencing process has been held not to amount to double punishment *per se*.[68]

SUBMISSIONS

Statutory discretions and BORA

42. The limits of a discretionary power will come from the enactment's text and purpose, along with the interpretive principle that any limit on protected rights must be prescribed by law, reasonable and demonstrably justified.[69]

43. In *D v New Zealand Police*, Winkelmann CJ and O'Regan J agreed that the *Hansen* methodology[70] is not appropriate when assessing the rights-consistency of a provision conferring a statutory power to be exercised by a BORA-actor.[71] This was also the position taken in *Cropp v Judicial Committee*.[72]

44. For completeness, while the *Hansen* methodology may not be appropriate in all cases,[73] it is more likely to be useful in cases where the rights-consistency issue lies necessarily in the statutory provision itself rather than the exercise of a statutory power.

The nature of the DOI remedy

45. As established by this Court a DOI is a remedy available to a litigant where the enactment in question cannot bear a BORA-consistent interpretation and a guaranteed right is unjustifiably limited.[74]

46. A DOI is a "formal declaration of the law and, in particular, of the effect of

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consequences of an overseas conviction, which are equivalent to the standard or special conditions of parole and ESOs (see ss 25-26); property forfeiture orders linked to criminal convictions have been treated as consequences imposed through a distinct and parallel process additional to the appropriate penalty demanded by the Sentencing Act, having a limited relevance to sentencing and not necessarily forming part of that penalty (see *Tapsell v R* [2014] NZCA 122, at [45]; *Ministry of Primary Industries v Sanjo Oyang Corp* [2014] NZCA 46, [2014] 2 NZLR 673, at [35]).

68 *Do v Police* [2017] NZSC 7, [2017] NZAR 284, at [8]; so long as the fact of previous convictions is not the sole reason for an uplift (with previous convictions instead being used as a proxy for assessing the deterrence effect and the offender's character: *R v Casey* [1931] NZLR 594 (CA) at 597; *R v Ward* [1976] 1 NZLR 588 (CA) at 591; *Beckham v R* [2012] NZCA 290, at [84].

69 *Hansen*, above n 3 at [89] per Tipping J; also *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, at [50]-[51]; *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213; *Fitzgerald*, above n 2.

70 *Hansen* at [92] per Tipping J.

71 Above n 69 at [101].

72 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [19] and see at [33], noting the *Hansen* analysis was also inappropriate because in the context of s 21 as an illimitable right, s 5 is not at play.

73 *Hansen*, above n 3 at [61] per Blanchard J, [93]-[94] per Tipping J and [192] per McGrath J.

74 *Attorney-General v Taylor*, above n 1.

the [enactment] on the respondents' rights and status."[75] Thus the jurisdiction to make a DOI is bounded in the meaning of the law as enacted. The Court is not determining whether the underlying policy to an enactment is good or bad, narrow or overbroad: the issue is whether rights are limited, and if so whether those limits are reasonable and capable of justification in a free and democratic society.

47. The DOI must therefore address how legislation affects the real or anticipated litigants who come before it. A declaration is a remedy for a breach of BORA. It is a judicial remedy "to those whose rights are affected, rather than one to assist Parliament in its function".[76]

The role of the Court in a DOI case

48. The Court's role is to analyse an enactment to determine if it actually limits rights – either those of the instant litigant (here, the lis between the Chief Executive and Mr Chisnall), or of reasonable hypothetical litigants. If those real or feasible scenarios mean the enactment is not capable of any other interpretation than that it unjustifiably limits rights, the Court may make a DOI.

49. However, the appellant submits that the Court of Appeal did not take this approach. Adopting a rights-consistent interpretation, wherever possible, is the first step a Court confronted with a DOI application takes. Rights-consistent interpretation is to be undertaken unless the enactment cannot bear a BORA-consistent meaning. A DOI ought not be made until the Court has determined that the BORA limiting provisions of an enactment cannot be cured by interpretative limit of the power exercised under that enactment.

50. Broadly speaking, judicial approaches to reaching BORA-consistent outcomes can be regarded as settling on two main methodologies, depending on the nature of the provision at issue.[77]

51. The first category of *self-executing* enactments attract an interpretive

[75] Ibid at [53] per Glazebrook and Ellen France JJ.
[76] Ibid at [66] per France and Glazebrook JJ and [107] per Elias CJ.
[77] See *D (SC 31/2019) v New Zealand Police*, above n 69 at [100].

approach. Such an enactment necessarily applies, without any further exercise of delegated power, and a Court ascertains the meaning of the provision in the circumstances of the case (including a reasonable hypothetical case) before it. The "act or omission" at issue in such cases is the statute itself, because the statute is immediately applicable to a given set of facts.

52. The second category of *discretion-conferring* enactments attract a different approach, focused on the exercise of power itself. That is, the "act or omission" at issue is that of the decision-maker.

53. The Court must identify the nature of the power under consideration before engaging in a BORA analysis, to ensure that it is properly analysing the act or omission that is actually relevant to the litigant's circumstances. In both kinds of case the Court is required by Parliament to safeguard rights where it can tenably do so. It can do this by either adopting a BORA-consistent interpretation of a self-executing provision, which might serve to exclude the facts of a litigant's case from its application (as in *Brooker v Police*, for example);[78] or by examining exercises of discretionary statutory power for consistency with BORA (as in *D (SC 31/2019) v Police*).[79]

54. If a BORA-consistent interpretation of a self-executing provision cannot be found, a DOI may be made. But because the scope of discretionary powers is bounded by BORA, a DOI may only be considered in the second category of case if Parliament has somehow framed or qualified a discretionary power in a way that prevents a rights-limiting feature of the regime from being factored into the exercise of that power.

55. Consistent with these propositions, the Court of Appeal in *R v Harrison* took a similar approach as this Court would later take in *Fitzgerald*. That case concerned a mandatory life sentence for a "second-strike" murder, as required by s 86E of the Sentencing Act, except in cases of "manifest injustice". The Solicitor-General appealed two decisions where a sentencing judge had applied the "manifest injustice" exception. The Court

[78] *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.
[79] Above n 69.

considered whether a DOI could be made with regards to breaches of rights that could result from s 86E, but noted that (putting aside any jurisdictional doubts about DOIs in criminal proceedings) a DOI could not be an available remedy in a case where:[80]

> …there is a "credible rights-consistent" interpretation of s 86E which we have adopted consistently with the "interpretive preference" in s 6 of the Bill of Rights Act.

56. Parliament's function, and the Court's function, are of course distinct. Parliament enacts laws that define the general circumstances to which statutory powers will apply. Courts determine the meaning of the law, adjudicate real (or feasible) disputes, and may issue remedies directed to those circumstances including DOIs. Thus a parliamentary bill of attainder tends to "usurp the judicial function."[81]

R v Nur

57. The Canadian Supreme Court in *R v Nur* sets out the approach to determining inconsistency between legislation and the Canadian Charter of Rights and Freedoms.[82] The appellant submits the same approach is properly applicable to DOI applications in New Zealand. *Nur* concerned a mandatory minimum sentence provision for a firearms offence. This was held to be inconsistent with s 12 of the Charter – the right not to be subjected to any cruel or unusual treatment or punishment (which includes grossly disproportionate sentencing).[83]

58. In *Nur* the majority decided that answering "yes" to either of the following questions would indicate Charter inconsistency:

    58.1 Does the statute compel a Charter-inconsistent outcome in the instant case?

    58.2 If not, does the statute nonetheless compel a Charter-inconsistent outcome in "reasonable hypothetical" cases? This means "a situation that may reasonably be expected to arise", rather than

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80 *R v Harrison; R v Turner* [2016] NZCA 381, [2016] 3 NZLR 602, at [119]-[120].
81 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24, at [52].
82 *R v Nur* [2015] 1 SCR 773.
83 Ibid at [39] per McLachlin CJ.

far-fetched or hard to imagine scenarios.[84]

59. *Nur* was decided on the basis that the appellants' sentences were *not* grossly disproportionate, but there were reasonable hypothetical cases in which the sentence *would be* grossly disproportionate and therefore the legislation breached s 12 of the Charter. As a result, the mandatory minimum sentence provisions of the Canadian Criminal Code at issue were held unconstitutional.

60. In the present case, the Court of Appeal failed to direct its attention to the real scenario of Mr Chisnall's circumstances, or the circumstances of reasonable hypothetical litigants who might come before the Court. Instead of identifying any act or omission that would amount to an actual limitation on a right that was not able to be justified, the Court focused instead on Parliament's decision to *authorise* limitations on rights. The appellants submit that Mr Chisnall has only been subject to orders that have limited his rights in demonstrably justified ways.

Oakes *analysis is not directly applicable to discretionary statutory powers*

61. The only previous DOI applications considered by this Court[85] have related to self-executing provisions. All sentenced prisoners and all 16- and 17-year-olds are affected by the provisions preventing their registration as electors. The approach to a self-executing provision is associated with the *Oakes* analysis adopted by this Court in *Hansen*.[86]

62. But BORA jurisprudence on statutory discretions does not tend to engage with the first three parts of the *Oakes* test. Those are the three stages of analysis which are, as the Supreme Court of Canada has noted, "anchored in an assessment of the law's purpose"; only the final stage "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'."[87] Rather than a scope-limiting interpretation of the power reliant on a full *Oakes* analysis, a simpler proportionality balancing approach is used, weighing the impacts of *exercise* of the power as against

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84 Ibid at [56] per McLachlin CJ.
85 In *Attorney-General v Taylor* (above n 1) and *Make It 16 Inc v Attorney-General* (SC 14/2022).
86 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [104].
87 *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, at [76] per McLachlin CJ.

the importance of the goals. As this Court noted in *D*:[88]

> …the level of risk that the offender poses must be of sufficient gravity to justify the making of a registration order with the consequent impacts on the rights of the offender. We do not consider any more complex an analysis is required…

63. The Court of Appeal erred in attempting an *Oakes* analysis at this stage because it is inapplicable to determine BORA consistent meaning in enactments that confer discretionary power.

64. The PPO and ESO regimes are well-defined, with a clear statutory purpose and criteria. The power to make orders have been delegated to the Court, with discretion to ensure rights-consistent outcomes. An *Oakes* analysis in order to ensure such outcomes is not required here.

65. Parliament has conferred powers to make PPOs and ESOs in accordance with exhaustive statutory criteria and tests, subject to the Court's ultimate discretion as to whether the limits on affirmed rights inherent in making such orders can be justified in each case. These criteria and tests apply to people with a prior serious or relevant sexual or violent conviction who have been assessed as posing a high, or very high, risk of further serious offending.

66. Such people are (as the Court of Appeal concluded) *evidently* appropriate to consider for further restrictive measures aimed at ameliorating that reoffending risk. Indeed, the Court of Appeal accepted that the objective of each regime was important, and that each regime was rationally connected with that purpose.[89]

67. The statutory purpose is so important, and the criteria and tests so demanding, that it is difficult to envisage a Court imposing a PPO or ESO that is not a demonstrably justified limitation on all of the BORA rights affected by the regimes. Further safeguards against BORA breach are found in the fact the power is exercised by a judge and is subject to a general appeal right.

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88 *D (SC 31/2019) v New Zealand Police*, above n 69 at [100] per O'Regan J.

89 Court of Appeal judgment at [14] and [217] (**101.0093**).

68. The Court below erred by undertaking its analysis divorced from the realities of the exercise of power and the requirement that a judge exercise a statutory discretion consistently with BORA. The Court accepted all the while that the powers to make ESOs and PPOs could be made consistently with BORA.

69. As a result, a DOI application in respect of a discretionary power ought to be dismissed unless there is some feature of the statutory regime that forces the decision maker to either:

69.1 disregard some rights-limiting aspect of the regime when exercising the statutory power; or

69.2 limit a BORA right that is not susceptible to limitation *per se*.

Some rights not capable of justified limits

70. Some guaranteed rights are not amenable to justified limitation. Such rights may either protect interests so important that they cannot be abridged, such as freedom from torture in s 9 BORA, be internally qualified by a term such as "unreasonable", "arbitrary" or "disproportionately severe", or be regarded as "non-derogable" in terms of the ICCPR.[90]

71. The Court below was right to find that the right against second penalty in s 26(2) is capable of justified limit.

72. The non-derogable[91] freedom from increased penalty between commission of a crime and sentencing – s 25(g) – has been found inapplicable to ESOs, as they are imposed post-sentence.[92] It is not inconceivable that s 25(g) may, in a compelling case, be capable of a justified limitation.[93] However, here s26(2) is the relevant right.[94]

73. But the timing of an ESO or PPO is not the only reason that s 25(g) does not apply. Preventive detention has long been treated as the relevant penalty

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90 This was the position accepted by the Crown in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC), at [16] per Keith J.

91 See discussion in the Court of Appeal judgment at [185]-[189] (**101.0093**).

92 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA), at [55].

93 See for example *R v KRJ* [2016] 1 SCR 906 where the Canadian Supreme Court considered limits on s 11(i) of the Charter (the Canadian equivalent of s 25(g)).

94 See also *R v Oran* (2003) 20 CRNZ 87 (CA) where the s 25(g) right was held to have been extinguished once sentencing has occurred. The word "sentence" in s 25 BORA was found to have a single consistent meaning referring to the sentencing process provided in connection with the determination of a criminal charge, and not to a broader concept of penalty

when calculating whether a statutory amendment leads to an "increased" penalty.[95]

74. The penalty of a determinate sentence plus a post-sentence PPO or ESO is highly likely to be the *lesser* penalty for the purposes of s 25(g), because the qualifying offending to which the regime applies has a maximum penalty of preventive detention.[96] Indeed Mr Chisnall was considered for preventive detention in 2006.[97]

Retrospective application of the PPO and ESO regimes is mandatory, but a justifiable limit on rights

75. The appellant submits that there is one aspect of the PPO and ESO regimes that is "self-executing" as described above at paragraph 51. The regimes have a retrospective aspect because they expressly apply to people whose convictions predate the regimes' enactment.

76. As was found by this Court in *D*,[98] and the Court of Appeal in *Pora*,[99] the retrospective application cannot be tempered through the exercise of the discretion conferred. Here, the eligibility criteria for making any ESO or PPO necessarily requires a retrospective application. Therefore, this is the only aspect of the enactments capable of an *Oakes* analysis at this stage to determine whether it is a reasonable and justified limit. If it is not, a DOI may follow.

77. The PPO Act's definition of "serious sexual or violent offence", essential to the threshold for making a PPO,[100] includes any conviction dated "before, on, or after the commencement of this section".[101] The ESO regime contains an "avoidance of doubt" clause that confirms the retrospective application of that regime.[102]

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imposition or correction: [18]-[19].

95 *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145, at [13] per Elias CJ and Keith J. This was an application of s 4(4) of the Criminal Justice Act 1985, which sat alongside s 25(g) for many years and expressly treated preventive detention as the maximum sentence in cases where it was available; there is no indication that a different approach was required when that provision was amended to more closely align with s 25(g) (see s 6 of the Sentencing Act 2002).

96 See Sentencing Act 2002, s 87(5); PPO Act, s 3 (definition of **serious sexual or violent offence**).

97 *R v Chisnall* HC Whanganui CRI-2005-083-806, 29 March 2006 (**401.0001**).

98 Above n 69 at [95].

99 Above n 63 at [3], [25], [116], [127] and [169].

100 PPO Act, s 7(1).

101 PPO Act, s 3.

102 Parole Act, s 107C(2). Indeed, this clause was recently used as an example of an expressly retrospective provision that would overcome the presumption of non-retrospectivity: *D (SC 31/2019) v Police*, above n 69 at [79] per O'Regan J. See

78. It is not open to a Court exercising the power to make a PPO or ESO to have regard to the date of offending as a part of the exercise of that discretion. Retrospective eligibility for consideration under the PPO and ESO regimes is determined by the statutes themselves, and Parliament's decision in this regard is not capable of being revisited by the Court in the ultimate exercise of its discretion to make an order.

79. None of the BORA rights that expressly prohibit retrospectivity are engaged in this case. Unlike ss 25(g) or 26(1), retrospective effect is not essential to a conclusion that s 26(2) is limited. Nor is non-retrospectivity an element of the other rights pleaded by Mr Chisnall, nor of other rights limited by the PPO and ESO regimes such as ss 14, 17 and 18 of BORA.

80. But non-retrospectivity is a cornerstone of the rule of law, which finds expression in myriad ways. These rule of law concerns mean that retrospectively changing the available penal consequences of a criminal conviction may increase the severity of limitations on the rights that are engaged. Whata J held that it was harder to justify limits on s 26(2) with retrospective effect (that is, on people whose convictions predated the regimes) than those with merely prospective effect (those convicted after the regimes were enacted).[103] This factor led his Honour to conclude that retrospective application of the ESO regime was not capable of being justified on a case-by-case basis, as opposed to its prospective application. The Court of Appeal, having declared the "regimes" as a whole to be inconsistent with s 26(2), did not engage with the retrospectivity aspect.

81. Because retrospectivity limits s 26(2) in a way that cannot be tempered through the exercise of discretion in an individual case by a judge, those limits on rights are amenable to an *Oakes* analysis, which is undertaken below.

82. The Attorney-General submits that this analysis leads to the conclusion that the eligibility criteria with retrospective application is a reasonable and justified limit on the right in s 26(2).

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also Baragwanath J's suggestion that the Court lacked any discretion on the basis of non-retrospectivity: *Chief Executive of the Department of Corrections v McDonnell* HC Auckland CRI-2005-404-000239, 19 May 2008, at [31].

Does the limiting measure serve a sufficient important purpose?

83. Framing an objective with a sufficient level of precision is essential to a cogent *Oakes* analysis:[104]

> The only reason for embarking on the search for the legislative objective is to determine whether there is a sufficient justification for an infringement of the Charter. The statement of the objective should therefore be related to the infringement of the Charter, rather than to other goals. In other words, the statement of the objective should supply a reason for infringing the Charter right.

84. The Court of Appeal held that "[t]here can be no doubt that the prevention of serious sexual and violent offending is a very important objective."[105] Accepting that this is a general statement of the regime's purpose, the Court erred in not identifying the purpose of the limiting measure. Here, what is the important purpose pursued by the PPO and ESO regimes *applying retrospectively*?

85. The appellants submit the following statement of objective in relation to the retrospective impact of those regimes, bringing together the purposes of the regimes with the retrospectivity provisions:

> To protect the public, from the commencement date of the enactments, from convicted sexual and/or violent offenders who continue to pose a significant threat of serious sexual or other violent offending at the end of their term of imprisonment.

86. The appellant submits this is an important objective capable of justifying limits on rights. The nature of the harm Parliament has sought to address is severe and traumatising, and certainly "pressing and substantial in a free and democratic society."[106]

87. Treating such a purpose as unimportant would permit only progressive realisation of that purpose through prospective application of the regimes which would require the community to bear an unmanaged risk of serious sexual and violent reoffending from known high risk offenders for many years after the passage of the regimes.

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[103] High Court judgment at [98] (**101.0021**).

[104] Peter Hogg *Constitutional Law of Canada* (2021, Thomson Reuters, Toronto) at 38.12; citing *RJR-MacDonald v Canada* [1995] 3 SCR 199, at [144] per McLachlin J.

[105] Court of Appeal judgment at [195] (**101.0093**).

[106] *R v Chaulk* [1990] 3 SCR 1303, at 1355; adopted in *Hansen*, above n 3 at [64] per Blanchard J.

Is the limiting measure rationally connected to purpose?

88. Rational connection is a second "threshold" criterion and the Court below readily found it present here.[107]

89. Rational connection may be difficult to establish by evidence,[108] particularly when a legislative measure is adopted on the basis of logical future impact rather than pre-existing evidence. Rational connection is therefore better regarded as a logical enquiry – the Crown must show "it is reasonable to suppose that the limit may further the goal, not that it will do so."[109]

90. Requiring the application of the PPO and ESO regimes retrospectively is logically connected to the goal of immediate, rather than progressive, realisation of the statutory goal of reducing serious sexual and violent reoffending.[110]

Does the limiting measure impair the right no more than is necessary to achieve the purpose?

91. The analysis of minimal impairment remains anchored in Parliament's objective, and requires a court to ask whether the limitation on rights is no greater than is reasonably necessary to achieve that objective.[111] It is important that a Court anchor its analysis in Parliament's actual objective, and not substitute its own view of what the objective ought to have been or to recommend ways of meeting different objectives.[112]

92. Hogg notes that the minimal impairment stage of the *Oakes* analysis has typically been decisive to the determination of most Canadian Charter cases.[113] But in recent years the trend has shifted towards determining cases at the final proportionality of benefits and detriments stage.[114] Courts have increasingly emphasised that the minimal impairment stage of

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107 Court of Appeal judgment at [195] (**101.0093**).
108 Hogg, above n 104 at 38.19.
109 *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, at [48] per McLachlin CJ; see also *Atkinson v Ministry of Health* (2010) 9 HRNZ 47 (HC) at [221] (adopting *Hutterian Brethren*); *RJR-MacDonald v Canada* [1995] 3 SCR 199, at [153] per McLachlin J; *R v KRJ*, above n 93 at [68] per Karakatsanis J.
110 See, to a similar effect, *KRJ,* ibid at [69] per Karakatsanis J.
111 *Hansen*, above n 3 at [126] per Tipping J.
112 "Less drastic means which do not actually achieve the government's objective are not considered at this stage": *Hutterian Brethren*, above n 109 at [54] per McLachlin CJ.
113 Hogg, above n 104 at 38.20.
114 See eg *Hutterian Brethren* (above n 109); *KRJ* (above n 93).

the analysis remains grounded in Parliament's objective, and that there is a reasonable margin of appreciation towards Parliament's choice of means to meet that objective.[115] As Abella J noted in *Hutterian Brethren*, "most of the heavy conceptual lifting and balancing ought to be done at the final step – proportionality."[116]

93. The tailoring of PPOs and ESOs to address only high reoffending risk,[117] and the fact that the schemes' "purely prospective application…would have compromised Parliament's full objective",[118] both support a conclusion that retrospective application of the schemes is a minimally impairing way of achieving Parliament's important objective.

94. One superficially attractive argument under this heading might be that *criminal* retrospectivity could have been avoided altogether by de-linking the PPO and ESO regimes from a criminal conviction. A "civil" regime would naturally make use of past conduct as indicia of risk, but would not have required a prior conviction for the same kind of offending targeted by the regimes.

95. This argument is only superficially attractive because it does not reckon with the purpose (which is plainly focused on *reoffending*, rather than offending *per se*) and because, by adopting that purpose and the statutory thresholds for orders, Parliament has already drastically narrowed the potential reach of the PPO and ESO regimes to those people with a history of the conduct at issue proven beyond reasonable doubt. The option of exposing many more people with similar risk profiles to potential orders through a civil regime would avoid "second penalty" issues altogether, but would overall result in a much broader regime with the potential to limit the freedoms of many more people.

Is the limiting measure in due proportion to the importance of the objective?

96. The final stage of the *Oakes* analysis allows the court to "stand back to determine on a normative basis whether a rights infringement is justified in

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[115] *KRJ*, ibid at [79] per Karakatsanis J.

[116] *Hutterian Brethren*, above n 109 at [149] per Abella J; *KRJ*, ibid at [78] per Karakatsanis J. See also Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 6.11.6.

[117] Tailoring retrospective penalties to risk was also held to meet the minimal impairment test in *KRJ*, ibid at [72].

a free and democratic society."[119] This involves making difficult value judgments. The Court of Appeal summarised this aspect of the *Oakes* analysis in *Child Poverty Action Group*:[120]

> [42] … This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?
>
> [43] … [This is the only part of the s 5 inquiry] where the attainment of the objective may be weighed against the impact on the right.

97. It is important to carefully define what the nature of the detriment is in this case, for a claimant in Mr Chisnall's position or a reasonable hypothetical claimant. The abstract value of non-retrospectivity is important to the rule of law, but the Court's overriding concern when determining a DOI application must be the real impact of the limits on BORA rights. Accordingly, the question is whether the benefits of achieving Parliament's objective can outweigh the detriment of exposing Mr Chisnall and similar offenders to second penalties and other rights limitations contingent upon a historic conviction.

98. Anchoring the analysis too deeply in an abstracted opposition to retrospectivity risks missing that the PPO and ESO regimes certainly did not act retroactively to criminalise otherwise lawful conduct (which would breach s 26(1)); nor did they purport to increase the maximum available penalty for that conduct, breaching s 25(g).

Retrospectivity only relevant to determine eligibility

99. Mr Chisnall has received determinate sentences for three instances of serious sexual offending. The ESO regime that was in place when Mr Chisnall last offended in 2005 was focused only on preventing recidivist child sex offending[121] and so was inapplicable to Mr Chisnall's offending at that time .

100. Thus Mr Chisnall is eligible to be subject to ESOs or PPOs only by

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118 Ibid at [75].
119 Ibid at [79].
120 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729; citing *Canada (Attorney-General) v JTI-MacDonald Corp* [2007] 2 SCR 610.
121 Parole Act, s 107B (as enacted).

retrospective application of the present regimes.

101. However, while the retrospective linking of Mr Chisnall's offending and his eligibility for the PPO and ESO regime gives rise to a second penalty, the past offending is not determinative of his liability to be subjected to such an order. The decisive factor under both regimes is forward looking; Mr Chisnall's continued high risk of serious sexual reoffending.[122]

102. The PPO and ESO tests of risk are somewhat different from each other. To qualify for an ESO, an offender must both present a high or very high risk of future serious sexual or violent offending (respectively),[123] as well as demonstrating a "pervasive pattern" of serious sexual or violent offending.[124] The "pervasive pattern" requirement has been interpreted as requiring an evaluation of prior convictions and including a minimum of at least two convictions for relevantly similar offending.[125] There is some parallel between these tests and the criteria for preventive detention.[126]

103. A PPO does not have a backwards-looking requirement of multiple convictions. Instead it features a more exacting future-focused test of risk, requiring a "very high risk of imminent serious sexual or violent offending".[127] This very high bar means that realistically only the highest risk offenders will be eligible for such an order.

Benefits of retrospectivity

104. The benefits of retrospective application of the post-2014 regime to Mr Chisnall and other people in a similar position are clear: the immediate achievement of the public safety goals underpinning the PPO and ESO regimes. Mr Chisnall and other offenders who pose an imminent risk of serious reoffending can be made subject to a PPO, thereby permitting the effective management of that risk and the avoidance of such offending.

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[122] See for example the Court of Appeal's recent analysis of the issue, where it held that Mr Chisnall met the threshold provided by the PPO Act but that Mr Chisnall disputed the conclusion that his risk was an "imminent" one, while acknowledging that his risk of serious sexual reoffending was relevantly high: *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402, at [24]-[25] (**401.0028**).

[123] Parole Act, s 107I(2)(b).

[124] Parole Act, s 107I(2)(a).

[125] See for example *Shortcliffe v Chief Executive of the Department of Corrections* [2016] NZCA 597; *Chief Executive of the Department of Corrections v Ihimaera* [2019] NZHC 19.

[126] Sentencing Act, s 87(2)(c) and (4)(a).

[127] PPO Act, s 13(1)(b).

The PPO regime captures the very highest risk offenders who would previously have only been eligible for a time-limited ESO.

105. The Legislation Design and Advisory Committee notes that retrospective legislation can be appropriate if it is "intended to…address a matter that is essential to public safety."[128] In its 2013 submission to the Justice and Electoral Committee, the then-Legislation Advisory Committee noted that a "wholly prospective" approach would "defeat the purpose" of the PPO regime.[129]

106. As detailed above,[130] retrospectivity was considered an essential element of the regimes both when ESOs were first introduced, and later when ESOs were reformed and PPOs introduced. Over time, the retrospective impact of the regimes will diminish as convictions of those eligible for the regimes begin to post-date the 2014 reforms. The public safety benefits of the retrospectivity clauses in the meantime were clear and, in the appellants' submission, outweigh the detriments of retrospectivity in a way that is demonstrably justified in a free and democratic society.

Conclusion

107. The ESO and PPO regimes are capable of BORA-consistent application by the Court on application.

108. The Court below erred in its approach to how it framed the "central question" in the DOI proceeding and was wrong to grant a DOI, despite holding that "the Acts may be able to be applied in a rights-compliant way…"[131]

109. The appellants submit that the appeal should be allowed, and the Court's declaration set aside.

If a DOI is made, the Court should be clear as to its scope

110. If despite the submissions above the Court concludes that a DOI ought to be made, the appellants submit the Court should make clear in its

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128 LDAC *Legislation Guidelines: 2021 Edition*, at section 12.1.
129 **303.0677** at para 7.
130 See paras 12-14.
131 Court of Appeal judgment at [220].

judgment that:

110.1 The provisions of the PPO and ESO regimes that provide for blanket retrospectivity are the only provisions that give rise to unjustifiable limitations on right(s); and

110.2 Non-retrospectivity is not an inherent element of s 26(2) or any other affirmed right except ss 25(g) and 26(1). Rather it is a factor that increases the severity of rights limitation in light of non-retrospectivity being a core tenet of our common law tradition.

2 September 2022

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Una Jagose QC / Matt McKillop
Counsel for the appellants

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The respondent/cross-appellant

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8. Parole Act 2002, Pt 1A (107A-107Z)
9. Parole Act 2002, ss 107B, 107C, 107I, 107F (as first enacted)
10. Public Safety (Public Protection Orders) Act 2014
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28. *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83

29. *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774

30. *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213

31. *Daniels v Thompson* [1998] 3 NZLR 22 (CA)

32. *Department of Corrections v Gray* [2021] NZHC 3558

33. *Do v Police* [2017] NZSC 7, [2017] NZAR 284

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35. *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65

36. *Ministry for Primary Industries v Sajo Oyang Corp* [2014] NZCA 46, [2014] 2 NZLR 673

37. *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948

38. *R v Casey* [1931] NZLR 594 (CA)

39. *R v Chaulk* [1990] 3 SCR 1303

40. *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1

41. *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602

42. *R v KRJ* [2016] 1 SCR 906

43. *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145

44. *R v Nur* [2015] 1 SCR 773

45. *R v Oakes* [1986] 1 SCR 103

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

47. *R v Pora* [2001] 2 NZLR 37 (CA)

48. *R v Poumako* [2000] 2 NZLR 695 (CA)

49. *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 (HL)

50. *R v Ward* [1976] 1 NZLR 588 (CA)

51. *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199

52. *Shortcliffe v Chief Executive of the Department of Corrections* [2016] NZCA 597

53. *Solicitor-General v C (CA126/2017)* [2017] NZCA 380

54. *Tapsell v R* [2014] NZCA 122

55. *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104

56. *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289

Texts

57. Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.11.6]

58. Peter Hogg *Constitutional Law of Canada* (looseleaf ed, Thomson Reuters) at [38.12]

Other

59. International Covenant on Civil and Political Rights, arts 14 & 15

60. Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at [12.1]

CHRONOLOGY

Date	Event (PPO/ESO application)	Event (DOI application)	Document Reference
01 Jan 2001 or thereabouts	Offence of rape of female under 12 (**first conviction**)		
02 Mar 2002	Offence of unlawful sexual connection against a male under 12 (**second conviction**)		
10 Oct 2002	Sentenced to 1 year 4 months imprisonment for first conviction		Criminal history (**401.0027**)
29 Apr 2005	Offence of rape of female over 16 (**third conviction**)		
29 Mar 2006	Sentenced to 8 years' imprisonment for third conviction		*R v Chisnall* HC Whanganui CRI-2005-083-806, 26 March 2006 (**401.0001**)
31 Jul 2009	Sentenced to 3 years' imprisonment (cumulative) for second conviction		*R v Chisnall* DC New Plymouth CRI-2008-021-527, 31 July 2009 (**401.0021**)
12 Dec 2014		Public Safety (Public Protection Orders) Act 2014 and Parole (Extended Supervision Orders) Amendment Act 2014 commencement date	
15 Apr 2016	Application for a PPO (or an ESO in the alternative) filed by Chief Executive of the Department of Corrections.		**101.0001**
22 Apr 2016	High Court makes interim detention order under s 107 PPO Act		*Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 784
19 Dec 2016	Court of Appeal confirms interim detention order		*Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620
17 Mar 2017		Mr Chisnall files cross-application seeking declaration of inconsistency	**101.0007**
01 Aug 2017	Supreme Court confirms interim detention order		*Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114
14 Dec 2017	High Court makes first PPO		*Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 3120 (**101.0175**)

Date	Event (PPO/ESO application)	Event (DOI application)	Document Reference
23 Oct 2019	Court of Appeal quashes first PPO and remits application to High Court for rehearing		*Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 (**101.0217**)
28 Nov 2019		High Court issues reasons judgment for DOI in respect of s 107I(2) of the Parole Act 2002; terms of declaration forthcoming	*Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 (**101.0021**)
17 Mar 2020		High Court issues DOI in accordance with reasons judgment	*Chief Executive of the Department of Corrections v Chisnall (No. 2)* [2020] NZHC 243 (**101.0089**)
27 Jan 2021	High Court makes second PPO		*Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32 (**101.0241**)
22 Nov 2021		Court of Appeal issues reasons judgment for allowing Mr Chisnall's appeal. High Court declaration confirmed; terms of further declarations forthcoming	*Chisnall v Attorney-General* [2021] NZCA 616 (**101.0093**)
22 Feb 2022		Court of Appeal issues DOIs in accordance with reasons judgment	*Chisnall v Attorney-General (No. 2)* [2022] NZCA 24 (**101.0173**)
07 Apr 2022	Court of Appeal quashes second PPO and remits ESO application to the High Court for determination		*Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402 (**401.0028**)