`IN THE SUPREME COURT OF NEW ZEALAND **SC 26/2022**

I TE KŌTI MANA NUI Ō AOTEAROA

BETWEEN	**ATTORNEY-GENERAL**
	First appellant/cross-respondent
AND	**THE CHIEF EXECUTIVE, ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS**
	Second appellant/cross-respondent
AND	**MARK DAVID CHISNALL**
	Respondent/cross-appellant

SUBMISSIONS ON CROSS APPEAL

9 September 2022

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MAY IT PLEASE THE COURT

1. This proceeding concerns two exceptional and repugnant statutory regimes – the Extended Supervision Order provisions of the Parole Act 2002 ("the ESO regime") and the Public Safety (Public Protection Orders) Act 2014 ("the Public Safety Act") – that impose further and potentially lifetime detention of, and other substantial restrictions upon, offenders beyond the sentences already served, relying upon risks arising from behavioural disorders.

2. The Court of Appeal found, correctly, that the measures provided by the two Acts constitute penalties and that both regimes are inconsistent with the right against second penalty under s 26(2) of the New Zealand Bill of Rights Act, but declined to consider the further breaches of fundamental rights that follow from the two Acts.

3. The basic point in the cross appeal grounds is that, having found – as now not disputed[1] – that the two regimes amount to penalties, the regimes further constitute (i) cruel and disproportionate punishment, contrary to s 9;[2] (ii) arbitrary detention, contrary to s 22; (iii) imprisonment contrary to dignity and humanity, contrary to s 23(5);[3] (iv) a further conviction and sentence, without attendant protections, contrary to ss 25 and 27(2);[4] and (v) for those whose requisite offences preceded the relevant provisions of the two Acts, amount to retrospective conviction, contrary to s 26(1).

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[1] Leave judgment at [1] **Case 05.0016**.

[2] See, particularly, *Vinter v United Kingdom* (2016) 63 EHRR 1, [2013] ECHR 645 (indefinite detention breaches the equivalent provision to s 9 in art 3 ECHR if no legal entitlement to/adequate provision of rehabilitation towards prospect of release); and see also *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429, [67]-[68]; [133] (mental health condition meant that detention conditions breached s 9).

[3] See, for example, *Fardon* CCPR 1629/2007 (2010), [7] (retrospectively imposed additional detention arbitrary as well as in breach of prohibition against retrospective penalties); James, Wells and Lee v United Kingdom (2013) 56 EHRR 12; [2012] ECHR 2021, [209] (where detention for reasons of public protection, failure to provide courses and other means for "real opportunity for rehabilitation" gives rise to arbitrary detention); United Nations Human Rights Committee *General Comment No. 35*: Article 9 (Liberty and security of person) CCPR/C/GC/35, ; and Taunoa above n 2 at [209]ff (unwarranted restrictive conditions, as elements of breach of s 23(5)).

[4] See UNHRC *General Comment No. 35* above n 3, [14] "The [detention] regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections" and United Nations Committee on the Rights of Persons with Disabilities *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities* (2015) (consent as elementary requirement); also the dissent by four of the nine members of the Supreme Court of Canada in *R v Jones* [1994] 2 SCR 229; and *cf S v Director of Area Mental Health Services* [2007] 1 NZLR 767, [68]-[69] (related s 23(3) right to silence on arrest not engaged by mental health examination under MHCAT because civil, not criminal proceedings).

4. The reason for those further breaches is that the penal regimes under the two Acts constitute on their terms (and can be shown by their policy history to have intended tob be) a deliberate rejection of clinically-driven management and treatment of persons such as Mr Chisnall, in contrast to Mental Health (Compulsory Assessment and Treatment) Act 1992 (**MH(CAT)**) and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (**IDCCR**) – which do not extend to behaviourally disordered individuals[5] – and to human rights-compliant regimes for such persons such as that upheld in the leading decision of the European Court of Human Rights (**ECtHR**) in *Ilnseher*.[6] The result is a scheme that not only, as found by the court below, violates the basic principle that an offender is sentenced and punished once, but also violates basic precepts of liberty, fairness and humanity.

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[5] The definitions under the MH(CAT) and IDCCR do not encompass behavioural disorders. It may be suggested that this reflects the belief that certain offenders with personality disorders might be untreatable, but that is not consistent with the record: see, for example, Minister of Corrections Management of High Risk Sexual and Violent Offenders at End of Sentence 10 August 2011 **Case 301.0099** (civil detention option may entail "[m]ore expensive specialised rehabilitative treatment" in order "to mitigate [rights] issues) and see also and for example Nick Wilson & Armon Tamatea "Challenging the 'urban myth' of psychopathy untreatability: the High-Risk Personality Programme" (2013) 19 Psych, Crim & L 493, 495:

> In summary, the treatment or management of psychopathic behaviour is one that is yet to receive rigorous study. While it is important to recognise and plan to overcome the barriers that psychopathy (and other severe personality disorder [PD]) presents to treatment, the focus on criminogenic factors appears to be a promising direction for psychopathy 'treatment' and the development of innovative programmes."

The authors were Department of Corrections psychologists.

[6] *Ilnseher v Germany* [2018] ECHR 991 (GC).). See also also the decision of the German Bundesverfassungsgericht (final constitutional court) in Judgment of the Second Senate of 04 May 2011 2 BvR 2365/09/[1]-[178] and of the United Nations Human Rights Committee in *Fardon v Australia* above n 3 at [7.4](2):

> "The author's further term of imprisonment was the result of Court orders made, some 14 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. This new sentence was the result of fresh proceedings, though nominally characterised as 'civil proceedings', and fall within the prohibition of Article 15 paragraph 1 of the Covenant. the Committee further observes that, since the DPSOA [Qld] was enacted in 2003 shortly before the expiry of the author's sentence for an offence for which he had been convicted in 1989 and which became an essential element in the Court orders for his continued incarceration, the DPSOA was being retroactively applied to the author. This also falls within the prohibition of Article 15 paragraph 1 of the Covenant "

See also, for the status of the ECtHR and the UNHRC: *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1 (SC), [9], [19], [25] and [59] and *Taunoa* above n 2, [75] and [235] and *Diallo (Guinea v Dem Rep Congo)* 2010 ICJ Rep 639, [66], ascribing great weight to UNHRC interpretations of the ICCPR.

5. Several of these breaches – for example, the objection that the two Acts result in detention and other restrictions upon certain offenders while others who pose no lesser risk are not detained or restricted, such that that detention is arbitrary and discriminatory – were identified in advice to the successive responsible governments and to the legislature,[7] but ignored.[8] Similar concerns – notably, criticisms of both Acts made by the United Nations Working Group on Arbitrary Detention in its 2014 country visit to New Zealand[9] – have similarly been disregarded by successive governments.

PSYCHOSOCIAL DISABILITIES

6. The starting point is that the two Acts target and sanction persons such as Mr Chisnall not only because they have served sentences for a wide range of violent and sexual

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[7] See, for example:
Department of Corrections Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence (March 2012) **Case 304.0852**:

> "Limiting the orders solely to offender risks the detention being found arbitrary … in breach of s 22 of NZBORA and article 9 of the ICCPR. It is difficult to argue that, as a matter of principle, it is necessary to detain offenders who pose this level of risk when those who have not offended but who pose the same risk cannot be detained."

This further reflects the basic principle, as for example held in the leading decision of the House of Lords *in A v Home Secretary (No 1)* [2004] UKHL 56; [2005] 2 AC 68, [43], that such incoherence voids any claim to justification; and
Also see, for example, Finlayson (2009) in respect of the ESO regime, at 5, [19] [**Case 302.0307**]:

> "Even if the regime is not regarded as penal (and so the double jeopardy principle does not apply), to impose a further detention where the sentencing court has already declined to do so is inherently disproportionate and so arbitrary."

[8] See, for example, Minister of Justice/Minister of Corrections Public Protection Orders: Establishing a Civil Detention Regime (legislative paper to Cabinet Social Policy Committee preceding the Public Safety Act 21 March 2012, **Case 301.0130** (noting numerous reasons why aspects of the proposals – which were as later enacted – increase risk that regime not civil).
[9] A/HRC/30/36/Add.2, pp 10-11.

offences, but also because of their behavioural disorders.[10] Eaton et al make the uncontroversial, but critical, point:[11]

> Around the world, people with mental conditions and associated psychosocial disabilities are among the most marginalized groups in society.

7. This application for a declaration of inconsistency is ultimately about how those with psychosocial disabilities are to be treated. As put by the European Commissioner on Human Rights in a recent intervention in pending proceedings before the ECtHR:[12]

> When it comes to persons with psychosocial disabilities (i.e. disabilities arising from the interaction between a person with mental health problems and their environment), successive Commissioners have consistently pointed to institutionalisation and coercion in mental health services as a persistent source of human rights violations and urged member states to eliminate these practices in favour of community-based mental health services based on consent.

8. The particular consequence of that right, here, is that – as held by the ECtHR:[13]

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[10] Before a court may make an ESO, it must be satisfied in particular that the offender has, or has had a pervasive pattern of serious sexual or violent offending; and either there is a high risk that the offender will in future commit a relevant sexual offence or there is a very high risk that the offender will in future commit a relevant violent offence: see Parole Act, ss 107IAA(1) and 107I(2):
The requirement is much the same for a public protection order (s 13(1)-(2) of the Public Safety Act and), where the Court must be satisfied "there is a very high risk of imminent serious sexual or violent offending by the respondent.".

[11] Eaton, J., Carroll, A., Scherer, N., Daniel, L., Njenga, M., Sunkel, C., Dryer, S. (2021) "Accountability for the Rights of People with Psychosocial Disabilities" Health and Human Rights, 23(1), 175-190 and compare s 107IAA Parole Act and s 13(2) Public Safety Act, which set out criteria for ESOs and PPOs and which include "severe disturbance in behavioural functioning".

[12] "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No. 39468/17 Eugeniu CLIPEA and Virginia IAPARA v the Republic of Moldova", 17 June 2021.

[13] *Ilnseher*, above n 6, [227]-[228]. See also UNHRC *General Comment No 35* above n 3, [19] & [21]: where the offender's mental health or other behavioural condition is advanced as the "new precondition" for detention, such detention "must be applied as a measure of last resort and for the shortest appropriate period of time …

> "… the focus of the [detention] measure now lies on the medical and therapeutic treatment of the person concerned. … This fact [alters] the nature and purpose of the detention … and [transforms] it into a measure focused on the medical and therapeutic treatment of persons with a criminal history …
>
> Treatment aimed at reducing the threat these persons pose to the public to such an extent that the detention may be terminated as soon as possible is now at the heart of that form of detention, both in the interest of the detainee and that of the public."

DANGEROUSNESS AND THE NECESSITY OF CLINICALLY-DRIVEN TREATMENT AND CARE

9. The ESO regime and Public Safety Act, as now conceded by the Attorney-General, provide for the imposition of punitive detention and other restrictions upon prior offenders who have completed their sentences, citing "dangerous" behavioural disorders.

10. While New Zealand has provided therapeutic regimes for other persons, in some cases equally a danger, and other jurisdictions have worked to formulate human rights-compliant legal regimes,[14] the two Acts reflect a deliberate rejection of those approaches. They instead permit the imposition of further imprisonment and other sanctions upon former offenders who have completed their sentences, and without a charge, trial or other NZBORA protections, and with intentionally limited, and lesser therapeutic direction, and support.

States parties must offer to institutionalised persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention" but see, for example, under the Public Safety Act:
A detention order, once made, is to be reviewed by the statutory review panel only once each year and even that time is suspended while any application for review by the Court is pending. Further, the statutory review panel itself may not direct release, but only initiate review by the Court Public Safety Act, s 15(1) & (2).); and
The Court is only to review any detention order every five to ten years unless review is sought by the statutory review panel or the detainee himself or herself obtains leave. That time is, again, suspended while any application by the detainee is pending: Public Safety Act, ss 16-17.

[14] See particularly *Ilnseher*, above, the culmination of a series of challenges in the European Court of Human Rights and corresponding reforms towards a rights-compliant and therapeutically driven regime for extremely dangerous former prisoners.

BREACHES OF MORE RIGHTS THAN JUST S 26(2)

11. While Mr Chisnall was substantially successful in the Court below, it nevertheless considered it unnecessary, and artificial, to determine whether the Public Safety Act and ESO regimes are not only inconsistent with the right against double jeopardy in s 26(2), but also with ss 9, 22, 23(5), 25(a), (c) and (d) and 26(1) of the NZBORA.[15]

12. Mr Chisnall's position is simple, first, the policy record for example, in respect of the Public Safety Act, Corrections themselves realising a possible arbitrary detention:[16]

> Limiting the orders solely to offender risks the detention being found arbitrary ... in breach of s 22 of NZBORA and article 9 of the ICCPR. It is difficult to argue that, as a matter of principle, it is necessary to detain offenders who pose this level of risk when those who have not offended but who pose the same risk cannot be detained.

13. This, together with the next point, captures the European Commissioner's observation above:

> significant discrepancy between the vast scale of human rights violations suffered by persons with intellectual and psychosocial disabilities and the relatively low number of court cases tackling these violations, a situation contributing to the extreme vulnerability of this group.

14. This is all the more important here and explains why a wider DOI should issue.

15. Second, even if the Attorney-General could establish that there is such a category of former offender so dangerous that detention separating those individuals by force from the public could be justified despite the absence of a charge, criminal trial or further offending, that would still not justify the discriminatory punitive regimes under challenge. To the contrary, the policy and legislative history records a deliberate choice

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[15] **Case 101.0172-173** at [227], [228] & [230] and [2022] NZCA 24. Mr Chisnall also sought declarations of breach of ss 18, and 27(1), but does not do so in this Court.

[16] Department of Corrections "Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence" (March 2012) CA Case on Appeal **201.0358**, Case **304.852** [9].

not to pursue, or even consider any form of therapeutically directed detention for those with psychosocial disabilities.[17]

16. Third, there has been no attempt to explain, or justify, the deliberate departure in these "law and order" Acts from, for example, the therapeutically driven regimes under the MH(CAT) and IDCRR. To the contrary, the history of policy and human rights advice, including reports by successive Attorneys-General,[18] records that point and the decision not even to undertake policy work in that respect.[19]

17. Logically, those so detained for punitive purposes need to be rehabilitated in compliance with Article 10(3) of the ICCPR, as informed by s 23(5) NZBORA.[20] And clinically-driven

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[17] See, for example, **Case 101.0167** at [213].

[18] Hon Margaret Wilson MP Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill, AJHR E.63, 11 November 2003, **Case 301.0191**; Hon Christopher Finlayson MP Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill, AJHR J.4, 2 April 2009, 3, [14], **Case 302.0303**; Finlayson Report of the Attorney-General under the New Zealand Bill of Rights Act on the Parole (Extended Supervision Orders) Amendment Bill, AJHR J.4, 27 March 2014, **Case 302.0309**; and Finlayson Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electronic Monitoring of Offenders Legislation Bill, AJHR J.4, 4 May 2015 and also the "non-report" Hon Christopher Finlayson MP "Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990", 4 October 2012 **Case 304.0854**.

[19] See for example: Wilson (2003), above n 10, 3 at [5] (citing United Kingdom and Canadian legislation that "strikes a balance between this important social objective and civil liberties, while still facilitating the on-going monitoring and supervision of child sex offenders who demonstrate a substantial risk of reoffending". And also see the recommendation of the Legislation Advisory Committee, then chaired by the Hon Justice Hammond, during the preparation of the relevant Bill that the proposed Public Safety Act expressly include the objective of "… rehabilitative treatment for the purpose of facilitating the detainee's safe reintegration into society …"
Case 303.0678 but that recommendation was not even acknowledged in official advice, let alone addressed.
And also see the most recent policy papers concerning the ESO regime adduced – those dating from the 2014 amendments – record that the responsible policy department regarded a civil committal regime as "a substantial piece of work requiring a wide range of issues to be identified and resolved" **Case 303.0570**: that is, eleven years after the introduction of the ESO regime and then seven years after this Court's findings in Belcher, there had still not ever been any work towards a non-penal, rights-compliant regime. Additionally, the Crown has adduced no evidence of any subsequent such work.

[20] But see, for example, the Corrections Act which imposes far greater, more detailed and more prescriptive entitlements for prisoners and corresponding obligations on those administering the prison system, than the

care and treatment are also required by the ss 9 and 22 rights. As with the two Acts here in issue, both can be triggered by previous offending but they are – while imperfect,[21] nonetheless in stark contrast to the two Acts here—considered non-punitive and human rights-compliant therapeutic regimes.[22]

LEGISLATIVE AMENDMENTS AND CONTRASTS

18. In 2009, the then Attorney-General contrasted the expansion of the extended supervision order provisions of the Parole Act with the "careful limits and rights of review" of the MH(CAT), giving his view that the amendments were inconsistent with the NZBORA.[23]

19. In addition, the Public Safety Act was adopted concurrently with the Parole (Extended Supervision Orders) Amendment Act 2014, which added limits to the use of so-called programme conditions, creating formal intensive monitoring, but explicitly limiting it to one year.[24] Some of the early applications for public protection orders were in respect

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Public Safety Act. See Public Safety Act, s 36 and compare in particular Corrections Act at ss 5(1)(c) and 6(1)(g), which the purpose and guiding principle of that Act that:

> The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by- …
> (c) assisting in the rehabilitation of offenders and their reintegration into the community …"
> …
> [O]ffenders must, so far as reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community:"

And see also s 6(1)(c) (cultural and other background of prisoners to be taken into account in developing and providing rehabilitation and other interventions); and, further, ss 52 (duty of chief executive to ensure that rehabilitative programmes are, within available resources, provided to prisoners who will benefit from them); 54(4)(b) (transfer to facilitate rehabilitation/reintegration, including so as to access related services/programmes); 66(6)(a)/66A(3) (approval to work in order to assist rehabilitation/reintegration); 78(1)(c) (entitlement to further education to assist rehabilitation/reduction in reoffending/reintegration). The then Attorney-General's 2012 opinion, above n 18, **Case 304.0854** [27.3] asserts that s 36 is "broader" than s 52 of the Corrections Act, but does not address the numerous other limiting provisions.

[21] See, for example (and in contrast to the failure of the Department of Corrections to respond to criticisms such as those in Belcher, above n 1), Ministry of Health *The Mental Health Act and human rights: A discussion document* (2017), noting and seeking comment in response to criticism of the MH(CAT) as inconsistent with the Bill of Rights Act and also, for example, by the United Nations Committee on the Rights of Persons with Disabilities.

[22] Albeit that categorisation is under challenge in a pending Court of Appeal case to be heard in November 2022.

[23] Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill, AJHR J.4, 2 April 2009 5, **Case 302.0303** [17].

[24] Parole Act s 107IAC(3).

of people who has been managed safely in the community for over 10 years under extended supervision orders with restrictive programme conditions, but whose conditions could not be continued under the new regime.[25] The Chief Executive knew that these individuals could be safely managed under a regime less restrictive that a public protection order, because he had safely managed them under one for a decade, the law change just meant this less restrictive option was removed.

20. The attempted justification of the two Acts when those Acts' terms depart so markedly from those of human rights compliant regimes, and a legislative and policy history demonstrate that rights-compliant alternatives were deliberately not followed.

Necessity of a broad approach to declarations of inconsistency

21. In the court below, the finding it was unnecessary and "artificial" to address those further NZBORA rights,[26] cannot be correct. Detention under a public protection order is potentially life imprisonment without a trial, which needs the most serious consideration.

22. The importance of the cross-appeal arises both from the character of the Court's declaratory jurisdiction, and from the particular rights relied upon.

23. The terms of the two Acts represent deliberate decisions not to follow well-established therapeutically directed statutory schemes, but to afford lesser safeguards and support required under the statutory schemes for those subject to orders. For instance,[27] the

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[25] See, for example, those considered *in Deputy Chief Executive, Dept of Corrections v McCorkindale* [2017] NZHC 2536 and *Chief Executive of Dept of Corrections* v *R (Suppressed)* [2018] NZHC 3106 & [2018] NZHC 3455.
[26] **Case 101.0171** at [228].
[27] In respect of access to rehabilitation, for example: the ESO regime directed that it is at the direction and/or with permission of Parole Officer as directed by Parole Board (s 107K), under the Public Safety Act rehabilitation is instead only provided if the treatment has a reasonable prospect of reducing public safety risk (s 36), while under the MH(CAT) Rehabilitation a central purpose of the order (ss 16, 25 & 26), as it is under IDCCR (ss 28 & 66); and under the Corrections Act 2004 provides – for sentenced prisoners – the purpose of detention includes rehabilitation and requires rehabilitation wherever a prisoner will benefit from it: see ss 5 & 52.

provision for rehabilitation under the Public Safety Act is less than that for sentenced prisoners under the Corrections Act 2009, despite the fact that detainees under the former Act may be detained for the rest of their lives. That is simply repugnant.

24. In exercising its declaratory jurisdiction, the Court has a particular and broader role: rather than it does, for example, in judicial review proceedings, seeking to determine overall lawfulness, the Court is here engaged in more comprehensive scrutiny. The thoroughness of its approach, and the corresponding soundness of its reasons, are critical to any effective contribution to the constitutional dialogue upon which that jurisdiction is premised.

25. As the Court of Appeal observed:

> [18] In considering this appeal, we need to consider the significance of the declarations of inconsistency made by this Court. The submission made for Mr Chisnall was that the "rights" implications of those declarations called for a new approach. In making its declarations the Court in essence reasoned that the orders made under both the ESO and PPO regimes were penalties and therefore the regimes imposed limitations on the prescription on second penalties affirmed in s 26(2) of NZBORA. On the question of justification, the Court found:
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> [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 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.

26. Why do potential breaches of rights other than s 26(2) also not need "greater justification"?

Particular rights engaged

27. The rationale for the broad approach is the gravity of the particular rights in issue, as they apply to very vulnerable, and deeply reviled individuals.

28. The absolute right in s 9 of NZBORA against torture and ill- treatment, and the companion right to dignity and respect in s 23(5) were litigated, and recognised as fundamentally important, in this Court in *Taunoa v Attorney-General*.[28] That right was also invoked in *Nur*.[29]

29. The right not to be arbitrarily detained is particularly important, not only because it is again an absolute right, but also because such a finding would, though not binding on the Crown in this case, require the respondent's release under the under the International Covenant on Civil and Political Rights.[30] It also rates as a substantial miscarriage of justice. Noticeably in *R v McR* Kerr J (as he then was) when considering a buggery conviction, not only did His Lordship grant a DOI, but quashed the conviction as well.[31]

30. In *A v New Zealand*[32] the Working Group on Arbitrary Detention confirmed the preventive detention of A was discriminatory.

31. The WGAD decision includes a recital of the complainant's detention his intellectual disability (or learning disability or mild mental retardation) para 4, his 45 years in

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[28] [2007] NZSC 70, [2007] 5 LRC 680; [2008] 1 NZLR 429; (2007) 9 HRNZ 104.

[29] Writing for the majority, Chief Justice McLachlin held that section 95(1) casts its net over a wide range of potential conduct. Though in most cases the mandatory minimum does not constitute cruel and unusual punishment, in some reasonably foreseeable cases it may.

[30] UNHRC *General Comment No 35*, above n 4: Article 9 (Liberty and security of person) CCPR/C/GC/35 (2014):
"If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention."

[31] [2002] NIQB 58.

[32] WGAD Opinion No. 21/2015, Adopted Apr. 29, 2015, at 5-10

psychiatric and prison detention (para 5). Also see reference to General Comment 35, paragraphs 19 and 21 of the Committee at paragraphs 13 and 18.

32. With respect, the same logic applies to the current communication, detention after the expiry of the 10 year tariff periods where offenders are detained for protection of the public, is also arbitrary.

33. Whilst Mr Chisnall is not legally intellectually disabled according to the statutory definition in the IDCCRA, he was at one stage, and unusually because his adaptive skills increased ceased to fit the definition. He has nevertheless psychosocial disabilities, as any candidate for a PPO must have because of nature of the statutory scheme.

34. Further the WGAD comment, and conclude:

> 29. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:
>
> The deprivation of liberty of Mr. A is arbitrary and in contravention of articles 9 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It falls into categories I and V of the categories applicable to the consideration of the cases submitted to the Working Group. …
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> 31. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. A from prison and accord him an enforceable right to compensation in accordance with article 9(5) of the International Covenant on Civil and Political Rights.

35. The Court of Appeal, whilst correctly identifying, and deciding the main issue, confined the further breaches of the NZBORA sought to the too-hard basket.[33]

36. Genser, described the *A v New Zealand* case as the disability "demonstrative case":[34]

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[33] **Case 101.0171** at [227]-[230].
[34] Jared Genser, The UN Working Group on Arbitrary Detention, Cambridge University Press. Cambridge, (2019), p 438.

> X Disability
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> The arbitrariness of detention on the basis of disability is emphasized in multiple paragraphs of the WGAD's Basic Principles and Guidelines (and is the only Category V status to receive such attention).
>
> [Discrimination on the basis of Disability]
>
> …
>
> The WGAD follows the HR Committee approach to disability by including within the ambit of this listed ground mental or intellectual disabilities. The demonstrative case in this regard is A v. New Zealand, in which the applicant suffered from longstanding mental health issues, had been housed in preventive detention for a prolonged period and charged with sexual offenses after a change in criminal law amended culpability rules for persons with mental disability. The WGAD ruled that holding the detainee for too-prolonged time, after he had fulfilled his sentence, for fear he may reoffend, and without provision of rehabilitative services, was discriminatory and punitive practice based on the applicant's disability. Though governments may have justifiable reasons for detaining disabled persons, this must be based on a careful review and the detained cannot be treated as a convicted prisoner in punitive circumstances.

37. Viewed in that context, the simple point is that the two Acts are, at worst, a punitive response to identified disorders and at best, notwithstanding the diligent efforts of this and other courts to apply the Acts as carefully as possible, an inhumane dumping ground for those with psychosocial disabilities. It must also be borne in mind that these are not, as might be suggested, New Zealand's worst offenders, as that group receives preventive detention proper.[35] The dumping group proposition is evidenced in the multiple NZBORA breaches, and inadequate rehabilitation.

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[35] Note, in particular:

38. It is therefore not artificial to consider these rights. It is a constitutional necessity.[36]

39. The further lens to the present proceeding, which was not pleaded but which has been given prominence by this Court in *Fitzgerald* and which must inform the Court's approach, is that of non-discrimination. As such, following *R v Narayan*, the rights secured and guaranteed by NZBORA have a "special value" to those who are mentally impaired. The Courts will not simply turn a blind eye to treating people who are mentally unwell as if they are well.[37] There is a real risk that the administration of justice may be

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For the ESO regime: Ministry of Justice Parole (Extended Supervision) & Sentencing Amendment Bill - Departmental Report [to Justice and Electoral Select Committee] 10 May 2004, **Case 302.0494**:

> "[ESO legislation] specifically designed to catch those offenders who do not meet the criteria for preventive detention, but who nevertheless pose a high risk of continuing to commit child sex offences.");

See also **Case 201.0945**:

> "The Department of Corrections has advised that, except in the case of preventive detention, sentence length is not related to risk of re-offending"

which is contradicted by s 7 of the Sentencing Act 2002; and, from 2014, Department of Corrections Parole (Extended Supervision Orders) Amendment Bill – Initial Briefing [to Law and Order select committee] 24 October 2014, **Case 302.0532** (ESO regime directed to apply, for example, to offenders who were too young at trial to be sentenced to preventive detention (despite *Mist*, [2006] 3 NZLR 145 (SC), [13]) and to those for whom there was not evidence of risk).

And for the Public Safety Act, Ministry of Justice/Department of Corrections Public Safety (Public Protection Orders) Bill – Initial Briefing [to the Justice and Electoral Committee], 4 November 2013 **Case 304.0862** (regime similarly directed to address those too young to be sentenced to preventive detention and those for whom there was not evidence at risk)

And see, s 138 Public Safety Act:

> "This Act does not affect the imposition of any sentence of preventive detention under the Sentencing Act 2002, and, in considering whether to impose such a sentence, the court must not take into account the jurisdiction conferred by this Act to impose orders on offenders who have served determinate sentences."

[36] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [3] per Elias CJ and McGrath J: "The courts of higher jurisdiction ... have constitutional responsibility for upholding the values which is intended to permeate New Zealand law" and *Attorney-General v Chapman* [2012] 1 NZLR 462 (SC) at [224] per Anderson J: "the more the rule of law and the rights affirmed by the Bill of Rights Act are proclaimed, protected and vindicated, the lesser the risk of unconstitutional conduct by any branch of government".

[37] [1992] 3 NZLR 145, 149.

undermined if extra care is not taken in dealings with such people. These are in substance the criteria that trigger the two Acts.[38]

40. Mr Chisnall is a classic embodiment of a person with psychosocial disabilities: he is subject not to a therapeutically driven, and so rights-compliant regime, but to an intentionally punitive regime tied to prior offending, and the prison system. This is reprehensible.

41. In many (perhaps most) declaration cases, the point may be narrow as, for instance, in respect of voting rights in *Taylor*, but where repressive legislation unjustifiably limits multiple rights, it is necessary for the Court to engage with each such right. For example:

    41.1. In *M v Germany*, one of a series of decisions of the ECtHR to find similar post-imprisonment regimes inconsistent with the European Convention on Human Rights, that Court made findings both under art 7(1) of that Convention, – the equivalent of s 26(2) – and under the right against arbitrary detention in art 5(1).[39]

    41.2. Similarly, in the leading decision of the House of Lords in *A v Home Secretary (No 1)*, the judicial committee found provision for detention of certain suspected terrorists to breach both the art 5(1) right against arbitrary detention and because some no less dangerous persons, differentiated only by their nationality, were not detained, the right of non-discrimination under art 14.[40]

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[38] See particularly, s 13(2) of the Public Safety Act, requiring:
"... a severe disturbance in behavioural functioning established by evidence to a high level of each of the following 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):
(d) poor interpersonal relationships or social isolation or both."

[39] [2009] ECHR 2071, (2010) 51 EHRR 41 [86]-[105] & [107]-[137].

[40] [2005] 2 AC 68.

42. The Court should take a similarly broad approach here. The extreme removal of liberty for an offence that does not exist in law, and without trial, and being a breach of s 26(2). It must logically follow both the ECHR, and House of Lords, approach above. It is an arbitrary detention, and breaches of the other rights discussed.

43. It is also to be informed by the s 19 right against discrimination against persons with mental disabilities.

Breach of s 26(1) NZBORA, s25(a)(b) and (c) NZBORA

44. In respect of s 26(1) of the NZBORA:

> 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.

45. Mr Chisnall has committed no offence upon the penal measure that has been imposed could be based. It is impossible to do so, because the offence is beyond would be mere speculation, the life imprisonment or other punishment merely being for what he might do, or might not do. Any charge would be void for vagueness, as it would be incapable of specifying the *mens rea*, *actus reus*, date of offence, or victim.[41]

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[41] A common law wide reasoning. See *Philip Smith The Attorney General*, CIV 2005-485-1785, Miller J, High Court Wellington, 9 July 2008:

> "[73] Fourth, subsequent classification reviews made following the enactment of s 17A and s 17B and the introduction of OS-13 were said to be unlawful. OS-13 is said to be **void for vagueness**, relying on *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 at [76]. It did not include definitions of the security classifications. Nor did it define the concept of "approving officer". Under s 17B, reviews of classification were to be carried out by the Superintendent but were actually carried out at National Office. It is said that security classification decisions remained with the Superintendent, not National Office, and that subsequent decisions were unlawful because National Office made them.
>
> …
>
> [146] In oral argument, Mr Ellis modified his argument, emphasising that the declaration sought was not that the entire operational standard was void but that it was unlawful as applied to Mr Smith.

46. Accordingly, not having had a trial, or even a charge, there must be a breach of the fair trial right s 25(a), logically there is undue delay in breach of 25(b), and a breach of the presumption of innocence s 25(c) as well.

47. In *Matara*[42] the Court of Appeal noted the consideration of other breaches of the NZBORA given by two members of this Court in *Fitzgerald*. Is that not affirmation, protection and promotion of human rights in action? That needs repeating in this case:

> "… It is not necessary for us to consider, in this case, whether the unexpressed qualification that must be read into s 86C(4) extends to inconsistency with other provisions of NZBORA, as suggested by O'Regan and Arnold JJ, and whether other NZBORA provisions are engaged in this case. It might be arguable that the three strikes regime discriminates against Mr Matara on the basis of mental disability."

48. This point also follows from the HRC's General Comment: No 35: Article 9 (Liberty and security of person) CCPR/C/GC/35 (2014):

> "If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention."

49. Article 15 is in play, whether 14(7) is (as the respondent suggests) or not. The legislation purports to circumvent penal imprisonment, and all its protections, with a "civil label" to impose a civil detention for life.

> [147] The Court of Appeal in Bennett refrained from declaring that OS-13 was void, evidently taking the view that a technical breach of the legislation need not render the entire classification system unlawful."

And see *A.W.K. (Pakistan) v The Minister for Justice and Equality, Ireland and the Attorney General* [2018] IEHC 550:

> "The majority opinion relies heavily on *Johnson v. United States*, 576 U.S. (2015) but again, if I may very respectfully say so, the characteristically elegantly written dissent of Alito J. is considerably more powerful, particularly where he refers at slip op.p. 1 to "**the well-established rule that a statute is void for vagueness only if it is vague in all its applications**" (see also slip op. p. 14 citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates Inc*. 455 U.S. 489 (1982) at 494-495 and *Chapman v. United States 500 U.S. 453* (1991) at 467."

[42] *Matara v R* [2021] NZCA 692, [75] (citing this Court's decision in *Fitzgerald v R* [2021] 1 NZLR 551):

50. In *Rameka v New Zealand*,[43] Mr Lallah dissenting foresaw such a development:

51. All the grounds go to the treatment of the applicant, the methodology of the application, or non-application, of the provisions in issue allowing for potential life imprisonment.

52. The significance of the further rights relied upon for Mr Chisnall, but not determined by the Court of Appeal, include the fact that the provisions in issue are not directed to the therapeutic treatment of such persons as Mr Chisnall. That stands in contrast to the extensive provision in other statutory regimes in New Zealand,[44] and in other jurisdictions, which comply with relevant human rights obligations, and from which the provisions in issue constitute an express and intended departure.

53. These are, expressly and intentionally, inhumane statutory schemes that rather than directing treatment, provide for detention, and other sanctions. They therefore also breach ss 9 and 23(5). In providing for the penal confinement and other restriction of individuals assessed as having psychosocial conditions other than under a clinically directed scheme, they breach the prohibition against torture and inhumane punishment in the *jus cogens* rule under s 9 of the Act, international human rights law, and longstanding common law.

54. These additional NZBORA rights are important, and emphasise why the PPO is such an extreme penalty.

55. First, the jurisdiction upheld by this Court in *Taylor* to determine legislation to be in breach of the NZBORA, extends to each respect in which a given statute is inconsistent with that Act. Where legislation is inconsistent with a series of rights, the object of

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[43] *Rameka et al v New Zealand,* CCPR/C/79/D/1090/2002 (2003):

"… two important features, among others, characterise article 15, paragraph 1. Firstly, a criminal offence relates only to past acts. Secondly, the penalty for that offence can only relate to those past acts. It cannot extend to some future psychological condition which might or might not exist in the offender some ten years thereafter and which might or might not lead an offender who has already purged the punitive part of his sentence to be exposed to the risk of further detention. Further, the trial for such offences and the sanction to be imposed must also satisfy the requirements of a fair trial guaranteed under article 14 of the Covenant."

[44] See above, n 27.

"affirming protecting and promoting" requires a thorough approach. The Court's function in upholding rights in the face of contrary legislation is not met by finding only the most straightforward breach. Instead, it is for this Court to declare the full extent of the inconsistencies in such legislation.

56. Second, New Zealand courts have emphasised, since shortly after the enactment of the NZBORA, that judicial findings that legislation is inconsistent with the Act may also come to be scrutinised before the UNHRC and other United Nations forums. A comprehensive assessment in this Court is necessary for two reasons: it avoids any attempt by the executive government to decline to engage with particular rights on the pretext that domestic remedies have not been exhausted, and second, it ensures that those fora have the benefit of this Court's comprehensive consideration.

57. Mr Chisnall's detention was not a mere detention it is the—*extreme nature of the deprivation of personal liberty and autonomy presented by a PPO*, that engages ss 9 and the regime involves on a daily basis advising your very thoughts without being advised you do not have to, that together with the psychical restrictions on the "resident" means 23(5) engages with autonomy issues.

58. More practically, it would not be a fair trial (if there were any trial) to have had your full criminal rights apply to a nine-year sentence, but not to apply to potential life imprisonment under the Public Safety Act. That would be ludicrous. With respect, that part of the *McDonnell* judgment is no longer good law. Otherwise, it would be is reminiscent of the Humpty Dumpty approach to interpretation[45] or Lord Millet's "black" could mean "black and white".[46]

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[45] As noted by Glazebrook J in *Fitzgerald*, [290] referring to Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL), 245.
[46] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [70].

CONCLUSION

59. The more extensive DOI's sought by Mr Chisnall should issue.

60. Mr Chisnall seeks costs.

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Dr Tony Ellis / B J R Keith / G Edgeler
Counsel for Mr Chisnall

To: The Registrar of the Supreme Court
And to: Una Jagose KC, Solicitor-General, and Matt McKillop, counsel for the appellants/cross-respondents.

Counsel certify that these submissions are suitable for publication and contain no suppressed material.

APPENDIX: COMPARISON OF PUBLIC SAFETY ACT & ESO REGIME WITH SECURE CARE REGIMES

	ESO	**PPO**	**IDCCR**	**MHCAT**
Primary Purpose of the orders	Public safety and risk management (s 7, 107I)	Public safety (s 4(1))	Care and rehabilitation of the person (s 3(a))	Treatment and safety of person and others (s 2 (definition of mental disorder)
Basic jurisdictional requirement	Conviction for serious offence, imprisoned (s 107C)	Conviction for serious offence, imprisoned (s 7)	Convicted (or charged) with imprisonable offence (CPMIP s 5(1))	Multiple: convicted or charged with imprisonable offence or danger to self or others (s 2 (definition of mental disorder); CPMIP s 5(1)
Basis of Entry to Scheme	Risk assessment (s 107F(2A))	Risk assessment (s 9(b)	Clinical needs assessment (ss 15 – 17)	Clinical needs assessment (s9 – 15)
Expert evidence for application	Health Assessor who conducted risk assessment (s 107F (2))	Two Health Assessors who conduct risk assessment (s 9)	Reports from clinicians, specialist assessor who conducts needs assessment (ss 32 & 37)	Clinical experts and doctors, etc. (ss 7, 7A, & 9 – 15)
Underlying clinical basis for order	Severe disturbance in behavioural function (s 107IAA)	Severe disturbance in behavioural function (s 13)	Recognised psychological diagnosis (ss 29 – 31)	Recognised psychiatric diagnosis (ss 8 and 2 (definition of mental disorder))

	ESO	PPO	IDCCR care recipient	MHCAT
Persons involved in application process	Chief Executive of Corrections and intended respondent (ss 107F & 107G)	Chief Executive of Corrections and intended respondent (ss 8 & 105)	Care coordinator proposed care recipient, manager, welfare guardian, caregiver, support person, lawyer, care manager, district inspector (ss 21, 39 & 121)	Applicant, respondent, caregiver, welfare guardian, primary health team, Director of Area Mental Health Serviced, District Inspector, Official Visitor (s 14A)
Length of Order	Up to 10 years before renewal (s 107I(4))	Five years before renewal (s 16)	Up to three years before renewal (s 46(2))	Six months, followed by six months, then indefinite (ss 33 & 34)
Regularity of clinical review	No clinical review	No clinical review	Every six months (s 77)	At three months and then every six months (s 76)
Regularity of reviews undertaken by people entitled to direct release	After 15 years, and then every five years. May apply to have set aside. (ss 107RA and 107M)	Every five years, can be directed to be 10 years. May seek leave to apply to set aside. (ss 16 &17)	One review after six months, and then at end of order (maximum three years) (ss 72 & 74)	Responsible clinician may direct release from order at any time (s 35)

	ESO	PPO	IDCCR care recipient	MHCAT
Type and place of detention	Full-time detention with line of sight monitoring for up to a year, subsequent movement restrictions, but detention only part time (ss 107K(3)(b) and 107IAC(3)	Full-time detention in residence on prison grounds (ss 20 & 114)	Full-time detention possible, can include hospital detention or in community (ss 63 & 64)	Full-time detention possible, can include hospital detention or in community (ss 28 & 29)
Monitoring of Communications	Unusual. Would only be permitted by special conditions (ss 107K & 15)	Telephone calls and mail can be monitored (ss 45 & 52)	Telephone calls and mail can be monitored (s 57)	Mail can be monitored, telephone calls can be denied (ss 123, 124 & 72(1))
Allowed into the community	Yes, if consistent with special conditions, and not subject to intensive monitoring in first year (s 107K)	Only for defined purposed, with leave from the Chief Executive (s 26)	Permitted with clinical permission consistent with care plan (s 65)	Permitted with clinical permission consistent with care plan (s 31)
Right to rehabilitation	At direction and/or with permission of Parole Officer as directed by Parole Board (s 107K)	Only if the treatment has a reasonable prospect of reducing public safety risk (s 36)	Yes. Rehabilitation a central purpose of the order (ss 16, 25 & 26)	Yes. Treatment is a central purpose of the order (ss 28 & 66)

	ESO	PPO	IDCCR care recipient	MHCAT
Aim of Order	Manage in the community to protect the public (s 107I(1)	Detain to protect the public (s 4(1))	Rehabilitate and support to return to community (s 3)	Treat to return to community (s 35)