**IN THE SUPREME COURT OF NEW ZEALAND**

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

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

# CROSS-RESPONDENTS' SUBMISSIONS ON CROSS-APPEAL

**30 September 2022**

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**Summary of argument on cross-appeal**

1. The approved cross-appeal question is:

> Whether the Court of Appeal was correct not to make declarations that extended supervision orders and public safety orders are inconsistent with ss 9, 22, 23(5), 25(a), (c) and (d), and 26(1) of the Bill of Rights.

2. The cross-respondents begin as in their appeal submissions: there is nothing in the relevant enactments that make up the ESO and PPO regimes that require the Courts to impose orders that breach protected rights listed in the approved cross-appeal.[1] To the contrary, ESOs and PPOs may only be made by the Courts where any limit on protected rights is demonstrably justified. The cross-respondents submit the Court below was right not to make any DOI in respect of any of the affirmed rights noted above.

3. Section 9 is not amenable to demonstrably justified limits. There is nothing in the relevant enactments to indicate that Parliament intended the regimes to authorise disproportionately severe treatment or punishment that would "shock the national conscience". Limits on s 9 are not authorised by either regime and no DOI can issue.

4. Section 23(5) ensures that any detention under either regime must be administered with humanity and respect for the detainee's inherent dignity. Detention under a PPO or ESO must therefore be administered in a similar way to comparable forms of detention for public safety purposes. There is nothing in the relevant enactments to indicate that Parliament intended PPOs or ESOs to be administered in a way that breaches s 23(5), and no DOI can issue.

5. Section 22 is not engaged by either regime as any detention authorised is not arbitrary. Detention under either a PPO or ESO is commenced through the application of clearly defined statutory criteria, applied by a judicial officer. Orders are either time-limited and/or subject to mandated regular reviews by the Court, and both regimes provide mechanisms for securing timely release from detention.

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[1] As is detailed in these submissions, some of the protected rights listed in the approved cross-appeal are not engaged by the regimes at all.

6. Sections 25(a), (c) and (d) are not engaged. Mr Chisnall has not been charged with any fresh offence and ESOs and PPOs do not determine any charge. Section 26(1) is also not engaged as a PPO or ESO is not a conviction.

7. The grounds of the cross-appeal, and the way those grounds have been argued, demonstrate a fundamental misunderstanding of the DOI jurisdiction.

**Part one: The cross-appeal misunderstands the DOI jurisdiction**

***The DOI jurisdiction promotes rights-consistent interpretation***

8. As submitted in the appeal submissions, a DOI may be made where a reasonably tenable rights-consistent interpretation of an enactment is not available. Mr Chisnall has not advanced an interpretive basis to support his proposition that the regimes are inconsistent with a number of guaranteed rights.

9. By seeking a DOI divorced from his particular situation, or any other feasible factual matrix, Mr Chisnall has not engaged in the necessary interpretative approach which should precede a DOI.[2] Rather he seeks to skip right over a direct interpretive rights-consistent approach of any ambiguous or discretionary statutory provision to seeking a remedy in the form of a DOI.

10. This, Mr Chisnall says, is because the DOI jurisdiction gives the Court a broader role than determining lawfulness and invites the Court to engage in "a more comprehensive scrutiny" of a legislative regime, with a view to making an "effective contribution to the constitutional dialogue upon which [the DOI] jurisdiction is premised."[3]

11. The cross-respondents submit this is wrong: the Court's role is to determine the meaning of the law. If the result of that determination is that the enactments cannot be given a reasonably tenable rights consistent meaning and that there is no demonstrable justification for that

[2] Except where meaning of a law and its necessary impact is not disputed, as in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, for example.

[3] Cross-appellant's submissions at [24].

inconsistency a DOI might be made.

12. Mr Chisnall confuses the Court's function with the effect of a DOI. Under ss 7A-7B NZBORA a DOI made by the Court will be brought to Parliament's attention, but that effect does not modify the Court's adjudicative function of determining the meaning of the law and applying that law to the circumstances before it. "Dialogue" is something of a misnomer, as Courts are not merely "speaking" to Parliament. Rather, DOIs are statements of how the law impacts upon a claimant's circumstances. They are a remedy. The fact that DOIs also trigger a Parliamentary process does not alter the Court's function.

13. The peculiarity of this approach is stark; Mr Chisnall argues for a DOI but not for a direct remedy of releasing him from orders and/or seeking *Baigent* damages in respect of an alleged unlawful breach of his rights.[4]

***Cross-appellant's arguments for a "treatment" regime***

14. A significant part of Mr Chisnall's submission that a more rights consistent regime is available rests on his assertion that the imprisonment regime under the Corrections Act is more therapeutic than the PPO regime.[5] That is wrong. Both ESO and PPO regimes involve rehabilitation as a central component, as detailed further below.[6]

15. The broad-reaching submission also appears to be contrary to Mr Chisnall's actual situation in that he was provided with tailored psychological treatment as a PPO resident, and is now detained pursuant to an interim supervision order with intensive monitoring and residential restrictions.[7] He has indicated he will consent to an ESO. And should an ESO prove insufficient to address his risk of further offending, a further PPO could be sought from the Court.[8]

16. The cross-appellant seeks to enlarge the DOI jurisdiction into something

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4 See by contrast *Gordon v Attorney-General* [2022] NZHC 2143 at [1], where the claimants seek declarations that the MHCAT Act can be interpreted in accordance with s 11 NZBORA and seek a DOI only as a back-up remedy in the event the Court concludes a rights-consistent interpretation is unavailable.

5 Cross-appellant's submissions at [23].

6 See para 35 below.

7 *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402, at [63].

8 PPO Act, s 7(1)(b)(i).

akin to an inquiry into the best way for a government to grapple with the problem of community protection from serious violent or sexual reoffending.

17. The extent to which the two regimes are therapeutic in nature lay at the core of the inquiry in the lower Courts into whether they were to be regarded as penalties under s 26(2). Now that this question has been settled, it is difficult to understand the purpose of Mr Chisnall's submission that the ESO and PPO regimes ought to instead be "clinically driven" "treatment" regimes. It ought not form part of a "minimal impairment" analysis, because that analysis is grounded in the measure that Parliament has actually adopted (as already explained in the appeal submissions). Instead the purpose seems to be to generally cast doubt upon the project of restraining reoffending *per se*, by tilting at a proposed "better way" for offenders like Mr Chisnall. The Crown submission is that these are matters of high policy that question core assumptions of New Zealand's criminal justice system, and any reform in the direction Mr Chisnall suggests is not a matter for the Court.

18. There is an express link required between the application of the ESO and PPO regimes and an underlying conviction for serious sexual or violent offending. This link reflects the fact that the population of people captured by these regimes have already been treated as rational and morally autonomous by the criminal law. The link with prior offending also serves a critical "but for" function in determining whether s 26(2) is actually engaged.

19. Restraints on liberties based on a person's dangerousness have traditionally been premised on either criminal culpability (e.g., conviction and incapacitation through sentencing) or a lack of responsibility (e.g., an insanity verdict followed by reliance on the compulsory mental health or intellectual disability regimes). Moral autonomy – the capability to guide one's response to circumstances through reason – is widely seen as a

requirement of criminal responsibility.[9] Not all mental illnesses or intellectual limitations bear on someone's moral autonomy – for example, someone can be mentally disordered but nonetheless have a sufficient appreciation of right and wrong such that they are unable to take advantage of the insanity defence. While the criminal justice system will take primacy, this lack of equivalence between mental disorder and impaired moral autonomy leaves the door open for a criminal penalty to be applied alongside mental health treatment.[10]

20. Mr Chisnall's submissions focus on a suggestion the offenders affected by the PPO and ESO regimes are "behaviourally disordered", and suggest the lack of a treatment orientation to the regimes is repugnant. It is undoubtedly right to suggest that the behavioural criteria defined by the regimes[11] will often overlap with a range of clinically recognised behavioural and personality issues. These criteria reflect emotional and volitional deficits that may influence offending but are not captured by existing defences like the insanity defence in the same way that cognitive deficits can be.[12] But the primary purpose of the regimes is not to treat an uncontrollable urge to offend – it is instead to provide an appropriate level of limitation on the liberties of some serious offenders who have received finite sentences, to ensure that they exercise self-control. Treatment to support the development or exercise of self-control forms an important part of both the ESO and PPO regimes, but it is not their primary purpose.

21. ESO offenders may be subject to a range of special conditions, and are sometimes detained due to the effect of their special conditions (in particular residential restriction conditions). But they are never physically held "in custody" by the Department of Corrections. ESO conditions are at most a coercive limitation to act on a desire or proclivity for offending – that is, the offender's knowledge that reoffending will be difficult and is likely to be detected will serve as a deterrent. ESOs do not eliminate all risk

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9 See e.g. R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (London, Bloomsbury, 2009) at 39; J Horder, *Ashworth's Principles of Criminal Law* (8th ed., Oxford, OUP, 2016) at parts 4.3 and 6.2; H L A Hart, *Punishment and responsibility: essays in the philosophy of law* (2nd ed., Oxford, OUP, 2008) at 152.

10 See Criminal Procedure (Mentally Impaired Persons) Act 2003, s 34.

11 PPO Act, s 13(2); Parole Act, s 107IAA.

12 Simester and Brookbanks *Principles of Criminal Law* (5th ed., Thomson Reuters, Wellington, 2019) at 10.3.

and a number of ESO offenders have been made subject to preventive detention as a result of further offending.[13] But a far larger number of ESO offenders whose orders have run their course actually reduced their risk over the course of the order to such an extent such that a further ESO was thought to be unnecessary by the Department.[14]

22. Only PPOs actually require an offender to be placed in custody, when their risk of reoffending is so severe and imminent that no lesser restriction is judged likely to work. The imminent risk test suggests that such offenders will find it almost impossible to resist acting on the drive or urge to reoffend required by s 13(2) of the PPO Act. PPO residents are subject to greater restrictions than ESO offenders, but have a commensurately strong statutory entitlement to receive treatment which will assist to reduce that risk and instead allow for the person's needs to be met in a community setting.

23. All of these complex policy issues highlight the problem of comparing the PPO and ESO regimes against the "clinically-driven" scheme favoured by Mr Chisnall in pursuit of a DOI. The *Oakes* inquiry does not require resort to such reasoning, and should be applied here as the appellants have proposed.

**Part two: Consideration of specific rights on which leave to cross-appeal granted**

***Sections 9 and 23(5)***

24. These submissions engage only with the lowest end of s 9 breach – that is, disproportionately severe treatment or punishment such that it would "shock the national conscience". This idea is sometimes expressed as "gross disproportionality" in Canadian constitutional challenges to mandatory sentencing regimes,[15] which is also convenient nomenclature in this case since the Crown has conceded that PPOs and ESOs are a penalty. This is also the way the idea was expressed by the majority in *Fitzgerald*.[16]

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13 **201.0006** (para 18.2).

14 **201.0006** (para 18.1).

15 As in *R v Nur* [2015] 1 SCR 773.

16 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, at [167] per O'Regan and Arnold JJ, at [239] per Glazebrook J (concurring); quoting from the similar formulation of Clifford and Goddard JJ in *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 at [43].

25. Just as this Court reasoned in *Fitzgerald*, there is no tenable interpretation of the PPO and ESO regimes that authorises or requires grossly disproportionate orders. Mr Chisnall points to no statutory language that could possibly sustain such an argument. No DOI can be made.

26. Instead, Mr Chisnall focuses on the alleged lack of a "treatment" orientation to the PPO and ESO regimes. He says that detention for public safety purposes "other than under a clinically directed scheme" is inherently inhumane and thus breaches both ss 9 and 23(5).

27. This attack on risk-based, open-ended criminal detention must fail. First, risk-based penalties are a legitimate limitation on rights and freedoms in a democratic society. Indeterminate penalties with a minimum tariff followed by the application of risk-based release criteria are a very common form of punishment which accords with community expectations of public safety.

28. Second, despite being penalties, the PPO and ESO regimes both have an evident rehabilitative and reintegrative orientation.

29. Finally, the cross-respondents repeat that the application of the discretion to impose an ESO or PPO requires the Court to determine the least rights infringing, effective post-sentence order – if any – to impose on eligible offenders.

30. The appellants have not sought leave to appeal the Court of Appeal's conclusion that the PPO and ESO regimes amount to criminal penalty regimes, and thus inherently involve the imposition of a second penalty on offenders. This Crown concession is made for two reasons.

31. First, the regimes authorise the imposition of substantial limitations on a person's liberties, including full- or part-time confinement or curfews as well as electronic monitoring and other special conditions, which are akin to the sentencing options available under the Sentencing Act.

32. Second, and critically, a specified prior conviction and sentence is a *precondition* of a PPO or ESO (satisfying the requirement in s 26(2) that a

person finally convicted of an offence is punished "again").

33. The "second penalty" conclusion is supported by the fact that the procedure for imposing the most restrictive of these orders, a PPO, is functionally equivalent to a reconsideration of whether preventive detention should be imposed, but at the *end* of a determinate sentence rather than prior to one being imposed.

*Treatment under the PPO and ESO regimes*

34. It is clear that the primary purpose of the PPO and ESO regimes is the containment of severe risk of reoffending for the purpose of community protection. This is a well-accepted and unremarkable aspect of a penalty regime.[17] But treatment and rehabilitation opportunities are routinely provided to people in the course of serving a penalty. Rehabilitation and reintegration is a purpose of sentencing[18] and an aspect of imprisonment,[19] and a requirement to attend a rehabilitative or reintegrative programme can be imposed by a sentencing court[20] or the Parole Board.[21] The sorts of rehabilitative interventions that can be given to change offending behaviour are not things that can be compulsorily delivered – while attendance might be mandated, *effective* psychological therapy (for instance) clearly relies on an offender's consent and motivation to participate. This can be contrasted to a scheme such as the MHCAT Act which authorises compulsory medical treatment relating to the risk arising from a mental disorder.[22]

35. Rehabilitation is evidently a central purpose of the PPO regime:

    35.1 PPO residents have an *entitlement* to receive rehabilitative treatment, which is qualified only by a requirement that the treatment have a "reasonable prospect of reducing the risk to public safety".[23] This is a more exacting duty on the Crown than

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17 As reflected in the Sentencing Act 2002, s 7(1)(g).
18 Sentencing Act 2002, s 7(1)(h).
19 Corrections Act 2004, s 52.
20 Sentencing Act 2002, ss 50, 54G, 80D(4)(c).
21 Parole Act 2002, s 15(3)(b).
22 An offender's refusal to consent to take medication cannot be overridden as an aspect of a penalty: Sentencing Act, ss 52(4), 54I(5), 78(4), 80D(7); Parole Act, s 15(4).
23 PPO Act, s 36.

that arising under the Corrections Act, which does not create any rehabilitative entitlement and makes provision of rehabilitative programmes subject to "the resources available".[24]

35.2 Every PPO resident *must* have an individual "management plan" developed as the result of a needs assessment encompassing medical, cultural, education, rehabilitative and reintegrative needs.[25]

36. Rehabilitation is also a central purpose of the ESO regime:

36.1 One of the purposes of special conditions, alongside risk management, is to facilitate or promote rehabilitation and reintegration.[26]

36.2 ESOs are designed to have a tapering impact on the riskiest offenders, as evidenced by the limits on intensive monitoring and 24-hour residential restrictions.[27]

36.3 Early authority suggesting that treatment prospects were not relevant to determining the length of an ESO[28] is now no longer good law. This is evident from the Court of Appeal judgment in *Alinizi,* from which Courts have been more willing to impose shorter ESOs for the period of time necessary to address risk through the impact of treatment and rehabilitation.[29] Treatment prospects are now routinely taken into account when setting the duration of an ESO, resulting in orders much shorter than the maximum.[30] The ability to extend an order if risk nonetheless persists is also taken into account.[31]

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24 Corrections Act 2004, s 52.
25 PPO Act, ss 41-42.
26 Parole Act 2002, s 15(2)(b).
27 Parole Act 2002, ss 107IAC(3)
28 *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [27].
29 *Chief Executive of the Department of Corrections v Alinizi* [2016] NZCA 468, at [39]-[40].
30 See, eg, *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171, where the Court of Appeal noted the reasons for a ten-year ESO "did not reflect potential gains from treatment" and that a five-year term would suffice (at [40]–[41]); *Chief Executive of the Department of Corrections v Hawkins* [2019] NZHC 482 at [83]–[86]; *Chief Executive of the Department of Corrections v SRA* [2017] NZHC 1088, where the High Court noted that 30 months (rather than the ten-year order sought) was sufficient time to see if the respondent would respond to further treatment (at [86]); *Chief Executive of the Department of Corrections v Thompson* [2018] NZHC 1821 at [93]; *Chief Executive of the Department of Corrections v Thorpe* [2017] NZHC 2559 at [60].
31 See, eg, *Chief Executive of the Department of Corrections v T* [2017] NZHC 2179, at [38]; *Chief Executive of the Department*

37. The appellants have submitted that the Court ought to identify the rights-inconsistent impacts required by the regimes before embarking on the question of whether those limitations are justified ones, and, if not, whether a DOI ought to be made.

38. Mr Chisnall suggests that the PPO regime is little more than a "dumping ground" for the most difficult offenders.[32] Such claims are wrong: nothing about the PPO regime requires such an outcome.

39. Treatment-related claims of NZBORA breach will be intensely fact-specific. For example, if a particular form of treatment has been declined, the PPO Act test of whether that treatment would have a reasonable prospect of reducing the person's risk[33] is plainly relevant to whether any affirmed right is breached. And, if the examination of those facts reveals a breach of s 9 or 23(5) the resulting remedy is not a DOI but is more likely a declaration and *Baigent* damages.

*Additional submissions on s 23(5)*

40. Section 23(5) is only engaged when someone is "deprived of liberty". It is not immediately clear whether the concept of deprivation of liberty is equivalent to that of detention, and it is notable that British courts, interpreting the boundaries of a "deprivation of liberty" for the purposes of applying art 5 ECHR, have regarded this as a more severe limitation on freedoms than detention simpliciter.[34] The section title of s 23 ("Rights of persons arrested or detained") suggests a broader approach to those words was intended in New Zealand – the s 23(5) right appears to arise in relation to any detention occasioned by a person covered by s 3.

41. Assuming then that detention is a necessary precondition to s 23(5) being engaged, it is clear that the state's positive duty of humane treatment is always operative in relation to PPO residents, but will only sometimes apply to ESO offenders depending on their special conditions. No declaration of inconsistency could therefore be made in relation to the ESO

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*of Corrections v Hawkins* [2019] NZHC 482 at [86].

32 Cross-appeal submissions at para 37.

33 PPO Act, s 36.

34 "…generally speaking, one may well be imprisoned without being deprived of one's liberty, but the other way round is

regime. Detention is not a necessary element of an ESO.

42. But more fundamentally, s 23(5) calls for an examination of the circumstances of a particular detention and does not lend itself to sweeping declarations as to the humanity of a particular regime. PPO detention is no more severe than imprisonment, and ESO detention is reasonably equivalent to electronically monitored bail – both of which are not inherently inhumane forms of detention. As submitted above in relation to Mr Chisnall's "treatment" claims, he has failed to plead any particular circumstance that could be examined for NZBORA consistency.

***Section 22***

43. Section 22 is not engaged by either regime as detention is not arbitrary. Detention under either a PPO or ESO can only be commenced through the application of clearly defined statutory criteria by a judicial officer. Such orders are appealable as of right. Mr Chisnall has now secured his release from a PPO by taking advantage of his appeal rights.

44. ESOs do not inherently involve detention, but a detention might be created through the imposition of special conditions by the Court (as an interim measure)[35] or the Parole Board.[36] Arbitrary detention can be avoided due to the Board's independent decision-making processes and internal review procedures, and the availability of judicial review.[37]

45. PPOs are reviewed yearly by the Review Panel constituted by the PPO Act, which can direct the Chief Executive of the Department of Corrections to make an application to the High Court to review the order.[38] Such High Court reviews must in any event occur at least once every five years.[39]

46. The offending underlying eligibility for an ESO or PPO is subject to a

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harder to envisage": *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, at [23].

35 Parole Act, s 107FA(3).

36 Parole Act, s 107K.

37 See *Miller v New Zealand Parole Board* [2010] NZCA 600, at [49]-[65]. Judicial review is available to secure release from arbitrary detention where the Board's procedure has miscarried: *Vincent v New Zealand Parole Board* [2020] NZHC 3316. Even though decision-making of the Parole Board occurs outside of the hierarchy of courts, the availability of judicial review is sufficient to avoid arbitrary detention: *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1.

38 PPO Act, s 15.

39 PPO Act, s 16(1).

maximum penalty of preventive detention.[40] The indeterminate nature of a PPO therefore does not give rise to any inherent arbitrariness. It is no more impactful than the maximum sentence for the offending, a sentence which was in fact in prospect at Mr Chisnall's sentencing in 2006.[41]

***Criminal procedure rights not engaged***

47. Mr Chisnall claims ss 25(a), (c) and (d), and 26(1) of NZBORA are all engaged by the ESO and PPO regimes to the extent that the regimes are unjustifiably inconsistent with those rights and a DOI ought to issue.

48. These claims are answered by the fact that s 26(2) is engaged by both the ESO and PPO regimes, and therefore the penalising impact of the regimes relates to a pre-existing conviction (and is not a penalty imposed in respect of a supposed crime yet-to-be committed). As the Court of Appeal noted in *McDonnell* in relation to the ESO regime, the imposition of an ESO is not akin to the determination of a criminal charge but rather criminal sentencing:[42]

> We see the ESO process as analogous with the sentencing process which follows conviction, so that the rights guaranteed by ss 24 and 25 which apply in relation to sentencing apply equally to the ESO process. However, rights which are applicable to persons facing charges who have not yet been convicted, but which cease to be of relevance once a finding of guilt has been made according to law and a conviction has been entered, are not re-ignited when an ESO application is made.

49. Two courts have recently suggested the "presumption of innocence" is "clearly engaged" by the ESO process.[43] The cross-respondents submit this is wrong, and relies on the Court of Appeal in *McDonnell* which found that s 25(c) was "inapplicable to the ESO process."[44] But, also, given the wording of s 25(c), which affirms minimum procedural rights "in relation to the determination of [a criminal] charge" it is difficult to understand the

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[40] There is a narrow set of circumstances in which a person might not have been eligible for preventive detention but might be eligible for an ESO, which we draw to the Court's attention for completeness. Under s 107B(2) of the Parole Act, the offences of an indecent act with consent induced by threats (Crimes Act s 129A(2)) and an indecent act with a dependent family member (Crimes Act s 131(3)) are both listed qualifying offences, but only if the victim was aged under 16 at the time of the offence. This reflects the history of the ESO regime as a regime that first targeted sexual reoffending against children, before being expanded to be concerned with all serious sexual or violent reoffending. These offences are not qualifying offences for preventive detention: Sentencing Act 2002, s 87(5).

[41] **401.0001**.

[42] *McDonnell v Chief Executive of the Department of Corrections* (2009) 8 HRNZ 770 (CA), at [39].

[43] *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289, at [17]; *Department of Corrections v Gray* [2021] NZHC 3558, at [21].

relevance of the presumption of innocence to the ESO process. The purpose of that presumption is not to assume offending will not or has not happened, but rather to assign responsibilities in an adversarial criminal proceeding by giving the Crown the burden of proof for every element of an offence. A PPO is made on the balance of probabilities.[45] An ESO is made only if the Court is "satisfied" the relevant test is met.[46]

50. What is more relevant to those processes than the "presumption of innocence" is the nature of the risk assessment evidence before the Court, and whether the evidence is such that the Court can safely conclude it is satisfied of the relevant test. But that is a question of sufficiency in a particular case, not a trigger to import notions of the burdens applying in a criminal trial.

**Conclusion**

51. The cross-appeal ought to be dismissed.

30 September 2022

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

**AND TO**: The cross-appellant.

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44 Ibid at [40].
45 PPO Act, s 13(1).
46 Parole Act, s 107I; *McDonnell* at [69]-[75] affirming *R v Leitch* [1998] 1 NZLR 420; (1997) 15 CRNZ 321 (CA).

**List of additional authorities to be cited by cross-respondent**

**Statutes**

1. Corrections Act 2004, s 52
2. Criminal Procedure (Mentally Impaired Persons) Act 2003, s 34
3. Parole Act 2002, s 15
4. Sentencing Act 2002, ss 7, 50, 52, 54G, 54I, 78, 80D

**Cases**

5. *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1.
6. *Chief Executive of the Department of Corrections v Alinizi* [2016] NZCA 468
7. *Chief Executive of the Department of Corrections v Hawkins* [2019] NZHC 482
8. *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004
9. *Chief Executive of the Department of Corrections v SRA* [2017] NZHC 1088
10. *Chief Executive of the Department of Corrections v T* [2017] NZHC 2179
11. *Chief Executive of the Department of Corrections v Thompson* [2018] NZHC 1821
12. *Chief Executive of the Department of Corrections v Thorpe* [2017] NZHC 2559
13. *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402
14. *Gordon v Attorney-General* [2022] NZHC 2143
15. *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171
16. *McDonnell v Chief Executive of the Department of Corrections* (2009) 8 HRNZ 770 (CA).
17. *Miller v New Zealand Parole Board* [2010] NZCA 600

18. *R v Leitch* [1998] 1 NZLR 420; (1997) 15 CRNZ 321 (CA)

19. *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4

20. *Vincent v New Zealand Parole Board* [2020] NZHC 3316

21. *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289

**Texts**

22. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (London, Bloomsbury, 2009)

23. Hart, *Punishment and responsibility: essays in the philosophy of law* (2nd ed., Oxford, OUP, 2008)

24. Horder, *Ashworth's Principles of Criminal Law* (8th ed., Oxford, OUP, 2016)

25. Simester and Brookbanks *Principles of Criminal Law* (5th ed., Thomson Reuters, Wellington, 2019)