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 FOR THE RESPONDENT

4 October 2022

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May it please the Court

INTRODUCTION AND SUMMARY

1. The Court below declared that the Public Safety (Public Protection Orders) Act 2014 (**Public Safety Act**) and Part 1A of the Parole Act 2002, which provides for extended supervision orders, (**ESO regime**) amount to unjustified breaches of the right against the imposition of a second penalty affirmed by s 26(2) of the New Zealand Bill of Rights Act 1990:

> "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."

2. The two Acts are an affront to the rule of law.

3. As was said by Kirby J in dissent in *Fardon*, a challenge under the Australian Constitution to Queensland legislation that also permitted post-sentence detention of prisoners for "control, care or treatment" on public safety grounds:[1]

> "[W]hat is attempted involves the second court [responsible under the relevant legislation for making any post-sentence order] in reviewing, and increasing, the punishment previously imposed by the first court for precisely the same past conduct.
>
> Alternatively, it involves the second court in superimposing additional punishment on the basis that the original maximum punishment provided by law, as imposed, has later proved inadequate and that a new foundation for additional punishment, in effect retrospective, may be discovered in order to increase it.
>
> Retrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law. It is also contrary to the obligations assumed by Australia under the ICCPR. It is contrary to truth and transparency in sentencing. It is destructive of the human capacity for redemption. It debases the judiciary that is required to play a part in it."

4. The United Nations Human Rights Committee, in turn, upheld Mr Fardon's case (and a case from a Mr Tillman, in respect of similar New South Wales

[1] *Fardon v Attorney-General (Qld)* [2004] HCA 46, (2004) 223 CLR 575, [185]. The constitutional challenge turned on the narrow question of whether the making of such orders fell beyond the constitutional authority of a court, the majority holding that it did not: see for example [19] per Gleeson CJ.
As reflected by the dicta of Kirby J, the s 26(2) right against double jeopardy is closely connected to the rights against retrospective offences and/or changes in punishment and arbitrary detention in s 22 – see for example *Fardon v Australia*, below n 3, and further below and in the cross-appeal – and is regarded as a fundamental component of the rule of law: see n 19 below.

legislation)[2] in line with Justice Kirby's dissent, finding that such detention amounted to a second punishment imposed without trial and, as such, was arbitrary and retrospective in character.[3]

5. The two Acts in issue here are to the same effect, and are repugnant for the same simple reasons: they each add further detention or other restrictions to an offender's determinate sentence, notwithstanding that that sentence had been duly imposed by a sentencing court and fully served.

6. The gravity of that breach is patent: the resulting penalty is not only an addition to that duly determined by the sentencing court but, in some instances, is far heavier than any that that Court could have imposed:

    6.1. The two Acts apply only to offenders who were not sentenced to preventive detention at trial – whether because the case for it was not made out, and in others because by law they could not have been – and who have served a determinate sentence;[4] but

    6.2. As acknowledged in the explanatory note to the Public Safety (Public Protection Orders) Bill, the result of orders under the Public Safety Act

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[2] *Fardon v Australia*, CCPR 1629/2007 (12 April 2010). *Tillman v Australia* CCPR/C/98/D/1635/2007 (10 May 2010).

[3] *Fardon v Australia* above n 2, finding Queensland legislation that permitted further post-sentence detention for "control, care or treatment" of "a prisoner who is proven to be a serious danger to the community" (see [2.2]) to give rise to arbitrary detention under art 9 of the International Covenant on Civil and Political Rights, including in light of the prohibition against retrospective penalty in art 15(1). See, in particular, [7.4](2) and (4)):

> Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. 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.
>
> ... To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention"

The Committee considered that it was not necessary to consider the claim separately under the right against second penalty affirmed in art 14(7): see [7.5].

[4] See, particularly, **Case at 301.0101** and **Case 301.0049** (the two Acts capture, and are intended to capture, a significant proportion of offenders who could not have received preventive detention at trial, including because they were not 18 at the time of the requisite offence), despite this Court's decision in *R v Mist* [2006] 3 NZLR 14, [2005] NZSC 77, discussed further below at [25], holding that retrospective application of the preventive detention sentence to young offenders amounted to an impermissible retrospective penalty.

can be life-long imprisonment.[5] Restrictive orders under the ESO regime – with the exception of intensive monitoring detention – can also extend indefinitely, backed by further imprisonment as sanctions for any breach of conditions.[6]

7. The fundamental character of the s 26(2) right, and the gross affront to the rule of law of a second penalty, should be so patent as not to require repetition. The need to do so arises here, however, because it is the cause of the basic difference in the parties' positions on this appeal.

8. The appellants' position in this Court is that they no longer dispute that measures imposed under the two Acts amount to second penalties for the requisite offence. Instead, it is said that those second penalties are in every individual case justified under s 5 of the Bill of Rights Act for reasons of public safety because the two Acts, interpreted under s 6, permit a court to impose such penalties only if justifiable.

9. The respondent's position is that the inconsistency with s 26(2) cannot be justified under s 5 or avoided through interpretation under s 6:

    9.1. On the question of justification, the simple and unanswered point is that public safety would be equally (if not more) protected by a non-punitive statute that provides for clinically-directed care and treatment. Such schemes exist in New Zealand but at present extend only to those with diagnosed mental health conditions or intellectual disability. The creation of a third such scheme was in fact raised (but was not pursued) in the policy history of the two Acts, the same approach can be and is taken in other jurisdictions for those subject to behavioural disorders. Given the availability and efficacy of measures

[5] Public Safety (Public Protection Orders) Bill (68-1, 2012), 1, **Case 303.0572**.

[6] Under the Public Safety Act:

- A person detained in a Corrections Department "residence" is subject to the offence of escape from lawful custody under s 120 of the Crimes Act 1961: see subs (1)(bb);
- In addition to a sentence of imprisonment, the Public Safety Act also provides for "prison detention orders" – that is, detention in a prison rather than in a residence: see ss 85ff; and
- Non-compliance with a protective supervision order under the Act is also an offence (see s 103) and may, of course, result in a return to an order for detention in a residence or prison.

Under the ESO regime, breach of orders is an offence punishable by imprisonment for up to two years – see s 107T – and could also result in more restrictive conditions under either Act.

that do not infringe s 26(2), and for that matter the other rights raised in the cross-appeal, the punitive regime of the two Acts and the particular punitive measures available under those Acts cannot be justified.

9.2. On the question of interpretation, the appellants do not explain how a court can effect only justifiable orders under either Act. The simple point is that the punitive character and effect found by the Court below and now not disputed by the appellants are intrinsic to the two Acts. It is therefore not possible, whether in terms of interpretation under s 6 or by reason of s 4 of the Bill of Rights Act, to exclude those aspects or – for that reason and also for the reasons given above – to limit their impact to some sort of justifiable second penalty.

10. There are also other reasons to emphasise the fundamental character of the s 26(2) right in this appeal:

10.1. First, the approach suggested by the appellants – that the Court ought not undertake an assessment of consistency in terms of *Hansen* and *Oakes*, but rather a "simpler proportionality balancing exercise" – is not only contrary to authority but seeks to curtail the declaratory jurisdiction as found by this Court in *Taylor*.[7]

10.2. Second, it is necessary to the operation of the *Taylor* jurisdiction and more broadly to the application of the Bill of Rights Act that claims to justification are grounded in evidence.[8]

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[7] *Attorney-General v Taylor* [2018] NZSC 104; [2019] 1 NZLR 21, [64] per Glazebrook and Ellen France JJ (propriety of scrutiny of legislative measures) and [115] per Elias CJ, citing *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 for, for example, the "duty" of the courts under the Human Rights Act "to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected".

[8] See, for example, the leading decision of the Supreme Court of Canada in *Mackay v Manitoba* [1989] 2 SCR 357, 361:

> "Charter decisions will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. … In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. … Often

10.3. Here, however, the appellants advanced no evidence to justify the punitive effect of the two Acts: to the contrary, the policy record – which formed the bulk of the evidence adduced for the appellants – recorded repeated efforts by successive Attorneys-General and others to raise non-punitive alternatives and the repeated failure of the responsible government and the Parliament to do so, without any reason being given.[9]

10.4. Moreover, in this Court, the appellants' claim that orders under the two Acts are inherently justifiable under s 5 is not explained or substantiated by any evidence.

10.5. The simple point is that, both as a general proposition under the Bill of Rights Act and as a response to the fundamental importance of the s 26(2) right, mere assertion does not suffice.

10.6. Last and most bluntly, the two Acts deal with people who have committed serious violent or sexual offences – though have also received determinate sentences – and who are subject to behavioural disorders. As such and as borne out by the two Acts – directed only at these people, despite acknowledgements in the policy record and the evidence given by the Department of Corrections in this proceeding that many such people pose a low risk of recidivism and that others outside the scope of the Acts pose no less risk, but are left unaddressed – it is simple populism to impose ever harsher responses,

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expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not … a mere technicality".

[9] 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; 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]; 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; 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.

The Public Safety Act was the subject of a "non-report" – that is, and unlike the usual published advice of the Crown Law Office and/or the Ministry of Justice as to compliant legislation, an opinion by the Attorney-General individually: see Hon Christopher Finlayson MP "Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990", 14 October 2012.

rather than take up the less dramatic option of attempting to care for and treat such people. The s 26(2) right and the declaratory jurisdiction of this Court provide the necessary, even though limited, counter-majoritarian check.

ISSUE ON APPEAL

11. The appellants now no longer dispute that the two Acts give rise to second penalties, as found by the Court below.[10]

12. Note, however, the misstatement made in the Solicitor-General's submissions that the Court below found that the limit imposed by the two Acts "is capable of justification"[11] and later, that "the Acts may be able to be applied in a rights-compliant way...".[12]

13. The Court made no such finding.[13] In particular, the passage cited by the appellants[14] from the Court below reads in full:[15]

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

14. Instead, it is said for the appellants that the two Acts provide for judicial determination of applications for orders and so:[16]

    14.1. The two Acts must be interpreted and applied consistently with the Bill of Rights Act, as required by s 6 of that Act;

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[10] See leave judgment p 2, [1] **Case 05.0016** and also appellant's submissions (**AS**) at [6] ("the appellants agree that the ESO and PPO regimes limit the right against second penalty").
[11] AS, [6].
[12] AS, [108].
[13] See discussion below at [35].
[14] AS [108].
[15] **Case101.0169** [220].
[16] AS, [49]ff.

14.2. Notwithstanding that the measures imposed under both Acts are accepted to constitute second penalties, those second penalties – and consequent inconsistency of those measures with s 26(2) – are justified limitations in each case, as permitted by s 5, in particular on grounds of public safety; and

14.3. In particular, it is said that the Court below should not have considered the two Acts in terms of the decision of this Court in *Hansen* and the well-established test for justified limits given by the Supreme Court of Canada in *Oakes*, as followed in that decision. Instead, it is said that a "simpler proportionality balancing exercise" should be followed.

15. Beyond these broad assertions, it is not, however, explained how the Acts can be read to that effect. In particular:

15.1. It is not explained why admittedly punitive orders under either Act can be justified when – as observed by the Court below and further addressed here – the cited public safety objective would be equally, if not better, served by a clinically-directed regime that involves no second penalty at all. The one brief explanation that is given is that such a regime would also apply to other people who pose such grave risks to public safety, and that would "limit the freedoms of many more people";[17] but

15.2. It is then said, at some length, that the one aspect of the two Acts that cannot be read down under s 6 is that both are to apply to offenders who committed the requisite offence *before* the enactment of the relevant provisions. As such, the Acts are – in the appellants' submission, which the respondent accepts – inconsistent with the parallel right against retrospective increases in penalty affirmed by s 26(1) of the Bill of Rights Act. This, however, is said to be justified because retrospective measures were needed urgently to protect against the risk of such offenders.[18]

16. The respondent's answer is simple.

[17] AS, [95].
[18] AS, [75]-[106].

17. First, the necessary starting point in approaching the two Acts is that breach of the right against double jeopardy through the imposition of further and increased penalties is an affront to the rule of law. The Court below held that while the s 26(2) right is not, unlike s 26(1), non-derogable, the right "is clearly of fundamental importance" such that any inconsistency "will require strong justification."[19]

18. Second, and as raised in adverse reports of successive Attorneys-General in respect of the two Acts prior to their adoption and extensively in the present proceedings, but not addressed in the appellant's submissions – there are well-settled standards for human rights compliant protections against such risk. Under those standards, detention or other restriction of those assessed

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[19] CA [190], **Case 101.0160**:

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

The finding by the Court below of the fundamental importance of the double jeopardy right is reflected in the observation of Kirby J in *Fardon*, above n 1, and for example in the statement of the Supreme Court of Ireland in *DPP v Quilligan (No 2)* [1989] IR 46, 57:

> "This rule (or principle), which is sometimes referred to as the rule against double jeopardy, **is but an aspect of the canon of fundamental fairness of legal procedures**, inherent in our Constitution, which is expressed in the maxim *nemo debet bis vexari pro eadem causa*." [No person should be punished twice for the same offence]

citing G Coffey "The Constitutional Status of the Double Jeopardy Principle" (2008) 30 Dublin U L J 138 and see further at 139 (fundamental character of right across most legal systems) and see also Carl-Friedrich Stuckenberg "Double Jeopardy and *Ne Bis in Idem* in Common Law and Civil Law Jurisdictions" in Brown, Turner & Weisser (Eds) *The Oxford Handbook of Criminal Process* (2019) 457, 458 (double jeopardy "a fundamental freedom of constitutional rank in many nations from the late eighteenth century on").

It is at least arguable that, with the exception of criminal proceedings reopened where compelling new evidence or similar exceptional cause is disclosed, the s 26(2) right against second penalty does not admit of justified exceptions:

- The exceptions to the right raised in commentary and, particularly, by states parties through reservations are related to such reopening and to separate civil sanctions, such as the civil pursuit of unlawfully avoided tax. There is no suggestion of justifiable second penalties: see, particularly, W Schabas *Nowak's CCPR* Commentary (3rd rev ed: 2019) 425-427 and 433-434;
- More specifically, when the right against double jeopardy was incorporated into the European Convention on Human Rights by Protocol No 7 to that Convention, it was expressed not to prevent reopening of criminal cases over new evidence or where there has been a fundamental defect in the proceedings, but otherwise to permit no derogation: see art 4(2)-(3); and
- Noting, as above at n 3, the close connection between the right against second penalties and the right against retrospective imposition of new or increased penalties and also, as for example in the excerpt from *Quilligan* above, the simple point may be that the right is not open to any other limitation either because to do so infringes the non-derogable art 15 right against retrospective penalties, as suggested in *Fardon v Australia* above n 3, or the broad art 14 right to a fair trial, which is also not subject to reasonable limitations.

to pose a risk to themselves or others through mental illness, disability and/or disorder is permissible if:[20]

18.1. Those measures are clinically driven;

18.2. In particular, those measures are distinct from the criminal law and penal systems; and

18.3. Consistent with the first two requirements, those measures must so far as possible be directed towards treatment, rehabilitation and, if at all possible, withdrawal of restrictions and release.

19. Those basic standards are borne out in the practice of other states parties to the International Covenant on Civil and Political Rights. In New Zealand – and, in respect of mental health and intellectual disability – they have been applied to institute civil and clinically-driven regimes that are no less effective in protecting against that risk. Other jurisdictions have extended such schemes to those subject to personality disorders.[21] Leaving aside Australia, where state legislation similar to the Public Safety Act has been held repeatedly to breach the Covenant,[22] the record identifies no other state party that has seen fit to adopt repugnant legislation of this kind.

20. The framing of the two Acts as applying only to certain offenders who have served their sentences is not only a second penalty but – and noting strident references to the imperative of public safety made in the appellants' submissions here – leaves other persons who pose the same or greater risk unaddressed. The result, as found by the House of Lords in *A (No 1)*,[23] is that these are inherently disproportionate schemes.

UNNECESSARILY PUNITIVE CHARACTER OF THE TWO ACTS

21. The substantive basis for the Mr Chisnall's response to the appeal is straightforward.

22. First, as previously found by a full court of the Court of Appeal in respect of the comparatively less draconian ESO regime in *Belcher* and confirmed by a full

[20] See further below nn 25-31.
[21] See below n 63.
[22] Above n 3 and also, for example, *Tillman v Australia* CCPR/C/98/D/1635/2007.
[23] Above n 7 and see further below n 40.

court in this case in respect of both the updated ESO regime and the Public Safety Act, the measures imposed by the two Acts amount to second criminal penalties, inflicted and served in addition to the duly imposed sentence for the requisite offence.[24]

23. Second, it is well-settled in international and comparative human rights law and in state practice that detention or other restrictions of persons who pose a risk to themselves or others is permissible. The requirements for such permissible detention are again straightforward:

    23.1. The basis for further detention must arise from a "new precondition", quite apart from the offender's sentence, such that "its nature and purpose [has] changed to such an extent that it [is] no longer to be classified as a penalty";[25]

    23.2. Where the offender's mental health or other behavioural condition is advanced as that "new precondition", such detention "must be applied as a measure of last resort and for the shortest appropriate period of time";[26]

    23.3. Further, in cases involving such conditions:[27]

> "… 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"

[24] *Belcher v Chief Executive, Department of Corrections* [2007] 1 NZLR 507 (CA); see also *R v Peta* [2007] 2 NZLR 627 (CA) and, here, CA [122]-[138] **Case 101.0137ff** (ESO regime remains punitive, in accordance with *Belcher* including in light of various amendments) and CA [147]-[176] **Case 101.0145ff** (Public Safety Act also punitive).

[25] See, particularly, the leading decision of the Grand Chamber (full court) of the ECtHR in *Ilnseher*, [2018] ECHR 991, [213]; and also General comment No. 35: Article 9 (Liberty and security of person) CCPR/C/GC/35, [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".
Also see 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]

[26] *General Comment No. 35*, above n 25, [19]; also for example, *Ilnseher* above n 25 at [169] and earlier cases cited at [137] & [138].

[27] *Ilnseher*, above n 25, [227].

By contrast, "preventive detention which is not executed with a view to treating the detainee's mental disorder … still constitutes a penalty".[28]

23.4. Consistent with that therapeutic purpose and environment, detention requires "an appropriate institution for mental health patients"[29] and detainees "must" be offered "programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention" or, as described by the ECtHR:[30]

> "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."

23.5. Where – as under the Public Safety Act here – there is the potential for indefinite detention, those measures need not necessarily be made available immediately but must be greater than "those available to ordinary long-term prisoners" serving finite sentences.[31]

24. As evidenced by the policy record and observed by the court below,[32] the two Acts are not clinically led but instead expressly connected to the penal system; they provide fewer and in fact expressly limited rights and obligations of review; and, perhaps most objectionably, they not only afford fewer rights to treatment and rehabilitation than clinically led regimes such as the MHCAT but in fact expressly more limited than those afforded to prisoners serving determinate sentences.

25. The two Acts engage s 26(2) as they apply only to certain prisoners who have received and completed determinate sentences, the two Acts circumvent the protections of the Bill of Rights Act as found by both this Court and the Court of Appeal in *Mist*:[33]

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[28] *Ilnseher*, above n 25, [228].
[29] See, for example, *Ilnseher* above n 25 and *Mist* at [164] and earlier cases cited at [138].
[30] *General Comment No. 35*, above n 25, [19]; see also and for example *Ilnseher* at [165]; [221] & [222] (acceptance of "comprehensive therapeutic provision"; satisfaction as to "adequate, sufficient and available" treatment offered).
[31] See, for example, *James & ors v United Kingdom* (2013) 56 EHRR 12, [194].
[32] See, for example, CA at [218]-[226], **Case 101.0169ff**.
[33] Above n 4.

25.1. First, the terms of the two Acts and an express purpose reflected in the policy record is to capture those people whom a sentencing court declined to sentence to preventive detention. That includes, contrary to this Court's decision in *Mist*, the making of orders – which can be life-long and, under the Public Safety Act, result in life-long detention, including in a prison[34] – against people who committed the requisite offence before the age of 18;[35] and

25.2. Second, while the Court of Appeal in *Mist* had found that the potential future availability of an ESO might be relevant to a decision not to impose preventive detention, the Public Safety Act expressly prohibits a sentencing court from considering measures under that Act in that way:[36]

and so give rise to further objections of the kinds described by Kirby J in *Fardon*.[37]

26. Finally, whether or not it is ever justifiable to inflict a second penalty to follow a duly determined and served sentence, it is the respondent's position that it is not possible to justify a second criminal penalty when a less restrictive alternative human rights-compliant mechanism would afford no less public protection:

26.1. As found by the court below, the appellants adduced no evidence to justify the breach;[38] and

26.2. The limitation of the two Acts to certain prisoners means that other people who pose no less a risk to public safety are left unaffected.[39]

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[34] Public Safety Act, s 85 (also in limited circumstances, s 76).
[35] Above n 4.
[36] *R v Mist* [2005] 2 NZLR 791 (CA), [100] ("no doubt that the possibility of an extended supervision order must be taken into account when assessing the extent to which a lengthy determinate term will provide adequate protection for the public" and cf Public Safety Act, s 138: "in considering whether to impose such a sentence [of preventive detention], the court must not take into account the jurisdiction conferred by this Act to impose orders on offenders who have served determinate sentences."
[37] Above n 1.
[38] CA [226] **Case 101.0171**.
[39] Department of Corrections "Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence" (March 2012) **Case 304.0833**, [9]:

The result, following the decision of the House of Lords in *A v Home Secretary (No 1)*,[40] is that the appeal to public safety as a reason for potentially life-long detention and other restrictions – as much relied upon here by the appellants – can be rejected as incoherent and inherently disproportionate.

26.3. The appellants' submission that such a general provision would "limit the freedoms of many more people" ignores the point that, on the appellants' argument, the omission fails to address the grave risk relied upon.[41] The further claim, not previously made, that the omission is justifiable because the Acts apply to conduct "proven beyond reasonable doubt" is also not tenable:[42] the only proper consideration is whether an individual poses a present risk and, if so, whether that risk can be addressed in a human rights-compliant way.

INTERPRETATIVE CLAIM MADE IN THIS COURT

The appellants' proposed "simpler" approach to inconsistency of statutes containing discretionary powers

27. The appellants further submit that the court below was wrong to undertake an assessment of the rights-consistency of the two Acts, asserting that the court ought not to have applied the *Oakes* test but rather a "simpler proportionality balancing exercise" where the exercise of statutory discretions is concerned. This is said to distinguish between what appellant counsel seek

"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."

[40] [2005] 2 AC 68, holding that the extraordinary detention of non-citizen residents of the United Kingdom suspected of posing national security risks while citizens were not detained and non-residents were permitted to leave the country was unjustifiable (at [43]):

"… the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that the Order and section 23 are, in Convention terms, disproportionate is in my opinion irresistible."

[41] AS [95].

[42] AS [95].

to describe as "self-executing" inconsistent legislation – as for example in the voting ban in *Taylor* – and legislation that involves discretionary powers. [43]

28. It is, in turn, asserted that the courts administering the two Acts have "discretion to ensure rights-consistent outcomes" and, further, that:[44]

> "The Court [below] accepted all the while that the powers to make ESOs and PPOs could be made consistently with BORA."

29. These submissions are incorrect.

30. On the question of discretionary powers, this Court in *D v Police* held that a simpler rights analysis than the applies to the exercise of powers in an individual case:[45]

> "… we see the task to be undertaken by the court under s 9 of the Registration Act as follows. Section 9 should be interpreted in accordance with the direction in s 6 of the Bill of Rights. That requires the power to make a registration order conferred by that section to be exercised consistently with the Bill of Rights to the extent possible … We do not consider any more complex an analysis is required …"

31. Similar approaches can be found, for example in the *Doré* and *Denbigh High School* lines of authority before the Supreme Court of Canada and the United Kingdom Supreme Court respectively.[46]

32. But, and as reflected in the passage from *D* above, the question for the court below and for this Court is not the interpretation of the two Acts "to the extent possible" with the Bill of Rights Act or scrutiny of the exercise of discretion. In *Taylor*, the Court of Appeal noted:[47]

> "[T]he court is undertaking its own analysis, not reviewing that of Parliament. Of course the legislation is the subject of the court's analysis and the legislative process and antecedents supply context, but in assessing questions of rights consistency and justification the court must follow its own processes and form its own opinion."

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[43] AS, [62]-[64].
[44] AS, [68].
[45] *D (SC 31/2019) v New Zealand Police* [2021] 1 NZLR 213,[2021] NZSC 2, [101] per Winkelmann CJ and O'Regan J and [156]ff per Ellen France J and see also Glazebrook J at [249]ff.
[46] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and, particularly, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293 and *R (SB) v Governors of Denbigh School* [2006] UKHL 15; [2007] 1 AC 100 and, more recently, Brewster, Re Application for Judicial Review (Northern Ireland) [2017] UKSC 8, [2017] 1 WLR 519, [49].
[47] *Attorney-General v Taylor* [2017] 3 NZLR 24 (CA), [131].

33. That basic point is also made in the *Hutterite* decision of the Supreme Court of Canada cited for the appellants:[48]

> "A law's constitutionality under s. 1 of the Charter is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of Charter rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the Charter infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned."

34. The principles expressed by the majority in *D* and in the other caselaw concerning discretionary powers have no relevance to the question of consistency.

35. The second and related difficulty in the appellants' submission is that the Court of Appeal did not, as asserted, "[accept] all the while that the powers to make ESOs and PPOs could be made [*sic*] consistently with BORA".

36. For the reasons already given, and as held by this Court in *Chisnall* in 2018, the two Acts must be interpreted consistently with the Bill of Rights Act *so far as it is possible to do that*; but that is quite separate from the issue of whether the powers can be exercised not only "consistently … to the extent possible" but in fact consistently with the Bill of Rights Act. The simple point is that the Act can never be applied in a manner which involves only justified limitation of s 26(2).

37. The Court of Appeal found specifically that, for instance, while "aspects of the PPO regime may be ameliorated" in that way, that did not alter the rights-inconsistency of that legislation.[49] The Court went on to observe that, for instance:

    37.1. The Public Safety Act specifically constrains the right to rehabilitative treatment relative to other, rights-compliant, regimes; and

[48] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, cited AS [62], at [69].
[49] [163], **Case 101.0151**.

37.2. The fact that an individual's case might be dealt with more favourably at the level of practice did not assist:[50]

> "We reiterate that our task is to decide whether the PPO regime complies with the Bill of Rights Act. We do not think it would be right to avoid dealing with that issue on the basis that a PPO might in a particular case be administered in a way more favourable to a detained person than might otherwise be the case."

38. The Court of Appeal's approach is consistent with that set out in the *Hutterite* excerpt above, and should not be disturbed.

39. Its approach is also consistent with the requirements of s 4 of the Bill of Rights Act and with the interpretative approach under s 6, as most recently addressed by this Court in *Fitzgerald* and as put, for example, by the Chief Justice:[51]

> "… a rights-infringing interpretation is to be avoided where possible. This construction of s 6 is consistent with the rights-affirming and promoting

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[50] [176], **Case 101.0155**. See also the appendix to cross-appeal submissions. Further and while other aspects of the two Acts are little different from the regime for sentenced prisoners under the Corrections Act 2009 (see for example s 114 of the Public Safety Act), the provision for rehabilitation under that Act is greater than under the two Acts in issue here: see 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).

[51] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, [48]-[50] and also [56] (potential for strained interpretations) and see also and [208]ff per O'Regan and Arnold JJ and [250]ff per Glazebrook J. See also and for example the observation of Glazebrook J in *D*, above n 45, (dissenting as to result) (at [241]:

> "Parliament was clearly aware that passing the Amendment Act without amendment would, at least in the view of the Attorney-General, unjustifiably limit both the s 26(2) and the s 25(g) rights. In passing the Amendment Act without making the changes suggested by the Attorney-General, Parliament again either disagreed with the Attorney-General and reached a different conclusion as to whether the Amendment was rights-compliant or it accepted the Amendment Act was inconsistent in this regard with the Bill of Rights and passed it anyway (again as it is entitled to do)."

and, further, at [255]:

> "To make the legislation Bill of Rights-compliant, therefore, would require the Court to read in such qualifications. This is something that not even the United Kingdom courts, with a generally more far-reaching approach, would do."

> purpose of the Bill of Rights, placing Bill of Rights-consistency at the heart of the statutory interpretation process …
>
> … where the language is clear enough to exclude the possibility of a rights-consistent purpose and effect, s 5 of the Interpretation Act applies to give effect to the remaining (rights-inconsistent) text and purpose.
>
> The latter proposition also flows out of and is consistent with the s 4 direction that the courts cannot decline to apply any provision or enactment and cannot hold any provision to be impliedly repealed, revoked, invalid or ineffective, by reason only that the provision is inconsistent with any provision in the Bill of Rights."

40. The point in the present case is that this is not an instance, as for example in *Drew*, of a widely worded statutory power that can be interpreted effectually but without unjustifiably infringing rights or even, as in *Fitzgerald*, a power that can be curtailed short of infringing rights in an extreme and/or unintended case. Instead, the two Acts provide a penal regime and, plainly and unavoidably, reject a rights-compliant response to the risk relied upon. That purpose, and the terms and procedures of the two Acts, are clear: quite apart from the point that the appellants have not at all explained their claim that the Acts will necessarily be applied consistently with the Bill of Rights Act, the simple point under s 4 is that the Acts cannot be curtailed in that way.

Interpretative argument not explained and unavailable

41. The further argument made for the appellants is that the two Acts are not inconsistent with the Bill of Rights Act because, it is said:[52]

> "The power to make orders have [sic] been delegated to the Court, with discretion to ensure rights-consistent outcomes. …
>
> … 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 … Further safeguards against BORA breach are found in the fact the power is exercised by a judge …"

42. The submission faces several basic difficulties.

43. The simplest point is that it is no answer to the inconsistency with s 26(2) that the two Acts are administered by the courts, without explaining how the courts may – under the terms of the two Acts – resolve the inconsistency that each poses. There is a basic constitutional objection.

[52] AS, [65] & [67].

44. Noting the observations of Glazebrook J in dissent in *D*, the simple point here is that the responsible governments and the Parliament have seen fit to enact both Acts in the face of extensive cautions that they are inconsistent with basic human rights obligations, including s 26(2), and repeated suggestions that non-punitive regimes be considered instead. This is not a question of legislative disregard or inadvertence or even, as found in *R v Pora*, of "misfire" or unintended extreme consequences, as in *Fitzgerald*: the two Acts constitute deliberately framed and – in the case of the ESO regime – restated and expanded regimes incorporating punitive measures against former offenders.

45. The respondent relies by analogy on *Kable v DPP of NSW*, where Toohey J stated:[53]

> 30. The Act answers that aspect of incompatibility which was identified in *Grollo v Palmer* as "the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution ... is diminished" . The function exercised by the Supreme Court under the Act offends Ch III which, as I said in *Harris v Caladine*, **reflects an aspect of the doctrine of separation of powers, serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive**. The function offends that aspect because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt. On that ground I would hold the Act invalid. It is not possible to sever s 5 from the rest of the Act which exists only to give effect to that section.

46. And Gaudron J recorded:[54]

> 32. Apart from similar legislation passed by the Parliament of Victoria providing for the protective sentencing or the preventive detention of Garry Ian David in 1990 (221), no Parliament in the Commonwealth of Australia has ever given a court a jurisdiction that is remotely similar to that which the Act gives to the Supreme Court of New South Wales. **It is not merely that the Act involves the Supreme Court in the exercise of non-judicial functions or that it provides for punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done**. The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. **It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person**.

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[53] (1996) 189 CLR 51 [**emphasis** added].
[54] Above n 53 [**emphasis** added].

47. It is also not explained how the two Acts can be interpreted to ensure only justified breaches of s 26(2), even if such justification were possible. To the contrary:

    47.1. As will be apparent from the terms of the Acts, the decision of the court below, and from the submissions on cross-appeal, the penal character of the two Acts is inherent and pervasive. It cannot be avoided, both because of that inherent character and because of s 4 NZBORA.

    47.2. In particular, it is not possible, as this Court was for example able to do in *Fitzgerald*, to interpret the two Acts so as to avoid the inconsistency and/or some exceptional category of case: the double punishment, and the departure from basic standards for detention and restriction, are intrinsic to their terms.

48. The third difficulty is that it is again not explained how orders under the two Acts could be justified when, as above, those Acts reflect express departures from the basic requirements of human rights-compliant regimes for the detention or other restriction on (and corresponding care for and treatment of), persons assessed to pose a risk to themselves of others. The simple point is that it is not sufficient to point to whatever risk is posed by Mr Chisnall or anyone else as justifying measures under either Act when that risk could be addressed through human rights-compliant measures.[55]

[55] The two Acts make qualified provision to exclude people who can be subject to orders under the MHCAT: see, particularly, s 12 of the Public Safety Act, under which a court may direct the Chief Executive of the Corrections Department "to consider the appropriateness of an application" under that Act or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (**IDCCR**).
Aside from the qualified character of that provision, the broader difficulty is that: the MHCAT and the IDCCR are both directed only to particular categories of impairment:
The policy record indicates that the ESO regime and the Public Safety Act were both directed to capture people who fell outside these Acts: see for example the rationale for the Public Safety Act at **Case 301.0092** (MH(CAT) and IDCCR "already used to the maximum extent permitted") and **301.0113** ("public protection detainees, while often suffering some degree of mental and personality abnormality, are likely to fall outside current clinical criteria for psychiatric care and intellectual disability".
It was suggested for the appellants in the courts below that this reflected the untreatability of certain behavioural disorders but that is not correct: see, for example**, Case 301.0099** (concern over "more expensive rehabilitative treatment" and, particularly, the Corrections Department's

49. The final difficulty is that, notwithstanding the well-settled need for robust evidence of justification in inconsistency proceedings,[56] the appellants simply did not adduce such evidence.[57]

50. To the contrary, the evidence that the appellants did put forward – essentially, and leaving aside large excerpts from *Hansard* that the appellants disclaimed to use at hearing following objections under the Parliamentary Privilege Act 2014,[58] the policy record of the two Acts showed only successive concerns over human rights compliance and successive decisions not to pursue a human rights-compliant scheme.

51. In particular, no step was taken in response to the repeated references to such schemes by successive Attorneys-General;[59] nor to even so much as acknowledge other potentially ameliorative recommendations, such as the

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own psychologists 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."

and that is also borne out by the experience of other jurisdictions, as for example with the clinical programme upheld in *Ilnseher* above n 25.

[56] Above n 8.

[57] Leaving aside the policy record, the only evidence adduced for the appellants was a careful affidavit of the Corrections Department National Commissioner, Ms Rachel Leota. Ms Leota explained that:

- recidivism rates for those subject to the ESO regime are low (**Case 201.0005**), though it is necessary to read that with the Corrections Department reporting that (**Case 301.0069**):
  > "the low rate of re-offending by sex offenders against children generally and the relatively small numbers of offenders on extended supervision orders make it difficult to draw definitive conclusions about the extent of the impact of any changes to the management of this group of offenders on re-offending outcomes. There is also little research evidence from other jurisdictions on best practice in relation to long term monitoring of high risk offenders in the community after their release from prison."
- data concerning the Public Safety is not available, despite the passage of seven years since its enactment, because of the small number of orders made; the low level of recidivism; and what is described as the "recency of [those] orders": **Case 201.0007**.

Ms Leota's evidence was given in March 2019. Counsel have not been able to identify any more recent publicly available statistics and no updated evidence has been sought to be adduced by the appellants.

[58] CA [215] **Case 101.0168**.

[59] Finlayson (2009) above n 9, 5 at [17], contrasting the expansion of the ESO regime with the "careful limits and rights of review" of the MH(CAT), leading to his view that the amendments were inconsistent with the Bill of Rights Act and Wilson (2003), above n 9, 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").

recommendation of the Legislation Advisory Committee to include rehabilitation in the objects of the Public Safety Act.[60]

52. The evidence also never explains why penal measures were believed necessary. For example, during the 2014 select committee consideration of the concurrent bill the ESO regime, in response to a question from the committee, it is simply stated that a civil scheme would require substantial policy work, and so the ESO regime should simply be continued and expanded.[61] That work had not been done, and has not been done since.

53. In terms of the appellants' present argument, counsel for the respondent note the appellants' decision to include documents from Mr Chisnall's own case history – not previously before the Court – in the case on appeal and the submission that:[62]

> "Mr Chisnall has only been subject to orders that have limited his rights in demonstrably justified ways."

54. This assertion is not ever explained, let alone substantiated by evidence. And it could not be explained. Had Mr Chisnall been subject to a human rights-compliant clinically led regime:

    54.1. Such a regime would have avoided any inconsistency with s 26(2) because it would have complied with the basic and well-settled requirements for care and treatment under such regimes; and

    54.2. Further, and noting as above the experience of other countries in dealing with behaviourally disordered people, including former prisoners, as well as – in New Zealand – the operation of such compliant schemes for others who pose risks and the absence of provision for behaviourally disordered people who do not fall under

[60] **Case 303.0678** and see **Case 303.0893-4**.
[61] **Case 303.0570** (departmental responses to select committee considering the 2014 extension to the ESO regime, recording the department's view that a civil committal regime required "a substantial piece of work requiring a wide range of issues to be identified and resolved" – that is, eleven years after the introduction of the ESO regime and then seven years after the findings of the Court of Appeal in *Belcher*, there had still not ever been (and still has not been, on the evidence and submissions put by the appellants) any work towards a non-penal, rights-compliant regime.
[62] AS, [60].

the two Acts, such a regime would be at least no less protective against risk and likely more protective.[63]

55. Further and more broadly, the approach now sought by the appellants seeks to rely upon the decision of the Supreme Court of Canada in *Nur*, which found mandatory minimum sentences to be grossly disproportionate, but upheld the actual sentences imposed on two offenders as justified in their individual cases.[64] The appellants could, similarly, rely on the decision of the Court of Appeal in *Poumako*, in which a challenge to a controversial mandatory non-parole period was unsuccessful because the appellant warranted such a non-parole period in any case.[65]

56. That further argument also faces basic obstacles:

    56.1. The first is that, as very recently confirmed by the Supreme Court of Canada in *Bissonnette*, *Nur* is not concerned with statutory discretions but rather on its facts with the question of whether, within the rights-compliant context of criminal sentencing, a particular mandatory length of imprisonment is warranted;[66] and

    56.2. There is no parallel here: the two Acts deliberately depart from therapeutically driven regimes and specifically exclude the application of other statutory regimes to persons such as Mr Chisnall. The extent to which the two Acts are, or are not, applied to particular individuals does not alter that basic deficiency.

[63] See, for example, above n 25 and also the decision of the French Décision Conseil constitutionnel in *Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pour cause de trouble mental* no 2008-562 DC, *JORF* n°0048 du 26 février 2008, [22] (scheme for detention (official translation) "for persons who are particularly dangerous because they suffer from serious personality disorders") and, for practice, n 55 above.

[64] *R v Nur* [2015] 1 SCR 773, [4] applying s 12 of the Canadian Charter, which parallels the right against cruel, inhumane or disproportionately severe punishment in s 9 of the Bill of Rights Act, cited for the Attorney-General at [17].

[65] *R v Poumako* [2000] 2 NZLR 695.

[66] *R v Bissonnette* 2022 SCC 23, [63]: "The *Nur* framework **does not apply to discretionary sentences**. Where there is no mandatory minimum sentence, the imposition of a sentence that is acceptable by its nature but that proves to be disproportionate in a particular case can be rectified by way of an appeal against sentence rather than a declaration of unconstitutionality." (**Emphasis** added).

Least restrictive alternative and the exercise of discretion in individual cases

57. It is also not possible to ground justification in Mr Chisnall's own case, as the appellants seek to do.[67]

58. The simple point is that the public safety imperative could be met without raising any issue under s 26(2) if clinically directed and non-punitive measures had been adopted, rather than the punitive measures under the two Acts. Notwithstanding the strenuous efforts of this Court and others in attempting to interpret and apply the two Acts in a rigorous, and so far as possible, humane and rights-compliant way, it remains that the two Acts breach his right under s 26(2) and that breach cannot be justified.

59. That said, we can learn something from the experience of Mr Chisnall and others under the two Acts, which give something of a reality check to the appellants' claim upon the interpretative scope afforded by each. Notably:

    59.1. At the first instance hearing of the application under the Public Safety Act, a major concern of the High Court was the limited availability of intensive monitoring under an ESO, which allows for a maximum of one year of intensive monitoring under a final order.[68]

    59.2. The result is to bring into stark relief the limited scope under the Acts for least restrictive means and corresponding lack of justification for the specific measures available. The Public Safety Act was adopted concurrently with 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.[69] Some of the early applications for PPOs were in respect 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.[70] The Chief Executive knew that these

[67] AS, [60]: "The appellants submit that Mr Chisnall has only been subject to orders that have limited his rights in demonstrably justified ways."
[68] Chief Executive of the Department of *Corrections v Chisnall* [2017] NZHC 3120, [119]-[120] **Case 101.0213**.
[69] Parole Act s 107IAC(3).
[70] See for example: *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.

individuals could be safely managed under a regime less restrictive than a public protection order, because he had safely managed them under one for a decade, but that law change just meant that this less restrictive option had been removed.

60. That can be seen in other specific aspects of the two Acts. The broad respects in which the two Acts impose greater restrictions, and afford fewer protections including rights of treatment, review and release, than the non-punitive regimes under the MHCAT and IDCCR are set out in detail in the appendix to the cross-appeal submissions.

61. The Court below has also addressed aspects of these, observing for example that the Public Safety Act confers only a limited right to rehabilitation and contrasting that with the provision for rehabilitation under a non-punitive regime such as that upheld by the ECtHR in *Ilnseher*, leading to the conclusion that:[71]

> "The treatment of persons subject to a PPO cannot be presented as the central focus of a scheme that makes no reference to a rehabilitative purpose in the statement of principles set out in s 5, contemplates rehabilitative treatment only if it offers a reasonable prospect of reducing the risk to public safety posed by the respondent, and otherwise emphasises the procedural arrangements necessary for the orderly functioning of the residence while contemplating transfer to a prison should that be considered necessary."

62. These examples show the further flaw in the appellants' argument that judicial discretion will ensure only justified limits: in addition to the impossibility of justifying punitive measures, the simple point is that the two Acts afford – and are expressed to afford – only limited flexibility. The framing of the qualified provision for rehabilitation, for example, is an express legislative choice: it cannot now be argued away by the appellants.

RESULT

63. The appellants have sought two outcomes in this Court.

64. First, it is said that the Court should find that:[72]

[71] CA [170]-[175].
[72] AS [107]-[109].

64.1. The two Acts "are capable of BORA-consistent application by the Court";[73]

64.2. The Court below approached the question of whether the two Acts in the wrong way and should, it is inferred, instead have applied the "simpler proportionality balancing exercise" applicable to instances of statutory discretion; and

64.3. On that basis, the declarations that the two Acts are unjustifiably inconsistent with s 26(2) should be set aside.

65. Second, it is said that if the Court nonetheless finds the two Acts to be inconsistent with the Bill of Rights Act, the Court should make clear that:[74]

65.1. The only aspect of the two Acts that are inconsistent is that both apply, and cannot be interpreted other than to apply, to people who committed offences prior to their enactments; and

65.2. The Court ought find that "[n]on-retrospectivity is not an inherent element of s 26(2) or any other affirmed right except ss 25(g) and 26(1)", but rather a factor that "increases the severity" of the breach.

66. For the reasons given, it is submitted for Mr Chisnall that the appeal should be declined.

67. Most simply, the two Acts cannot be interpreted so that what are conceded to be second penalties are nonetheless justified:

67.1. There is no justification given – and it is difficult if not impossible to conceive of any justification – for a punitive regime: the public safety objective relied upon by the appellants could be met at least as well and likely better by a non-punitive regime, but the two Acts and their policy history reflect a choice to pursue punitive "law and order" regimes; and

67.2. It is also not explained how the two Acts can be read down to effect only justified orders. Such an interpretation is not feasible, given that the

[73] As noted, the appellants' submissions assert that the Court below found that the two Acts can be interpreted consistently with the Bill of Rights Act, but that is not correct: see n 10 above.
[74] AS [110].

punitive characteristics are inherent to the two Acts and, in any case, the constraint of s 4.

68. Further, the "simpler proportionality balancing exercise" sought by the appellants should be declined. As has been seen, the authority relied upon by the appellants relates to exercises of administrative discretions: it is not consistent with the function of this Court in its declaratory jurisdiction; it has not been applied in other countries' legal systems; and would, if accepted, undermine the rigorous inquiry required by this Court in *Taylor* and in those other jurisdictions.

69. The appellants' insistence that the declarations of inconsistency, if made, should be limited to those parts of the two Acts that require retrospective penalties raises a more complex question:

    69.1. As noted in opening, there is a significant connection – and even overlap – between the right against a second penalty affirmed in s 26(2) and the right against a retrospective penalty in s 26(1).

    69.2. The appellants have accepted that the two Acts give rise to a second penalty. As such, it appears irresistible that – for those offenders whose offending predates the relevant provisions of the two Acts, adopted between 2003 and 2014 – the Acts are inconsistent with s 26(1). Further, and while the appellants seek to justify that retrospective effect, the simple point is that that effect is not and cannot be justified.

70. It might be held, following the logic of the appellants' submission, that the breach of s 26(2) is particularly egregious in respect of those people, in line with the longstanding repugnance of retrospective law. The more straightforward and proper response, however – consistent with the function of the Court following *Taylor* – is that the Court ought to find breaches of both the s 26(1) and (2) rights.

71. Mr Chisnall is not legally aided and accordingly seeks costs.

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Dr Tony Ellis, Ben Keith and Graeme Edgeler
Counsel for Mr Chisnall

To: The Registrar of the Supreme Court
And to: U Jagose KC, and M McKillop, counsel for appellants

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