IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 64/2022**

BETWEEN	**R (SC 64/2022)**
	Appellant
AND	**CHIEF EXECUTIVE OF ARA POUTAMA AOTEAROA DEPARTMENT OF CORRECTIONS**
	Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

28 June 2023

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

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Issue

1. Mr R is an intellectually impaired man who poses a high risk of sexual offending if unsupervised. He is currently supervised under two regimes, a compulsory care order (**CCO**) made and administered under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2004 (**IDCCR**), and an extended supervision order (**ESO**) under the Parole Act 2002. His second ESO was reviewed in 2021 by the High Court, which confirmed it to continue for the remaining five years of its term.[1] The Court of Appeal dismissed Mr R's first appeal.[2] That decision is under appeal.

2. The question upon which leave was granted is how the New Zealand Bill of Rights Act 1990 (**BORA**) affects the exercise of the Court's discretion to renew an ESO where a person is also subject to a CCO.

3. To assist and update the Court, the respondent has filed evidence from those involved in the administration of both Mr R's ESO and CCO.

Summary of Argument

4. It is trite that, as with all judicial exercises of discretion, the confirmation of an ESO must be consistent with BORA to the extent possible.[3] It will likely be a rare case where the ESO threshold is met but BORA considerations preclude making (or confirming) the Order. However, the existence of a CCO may change the exercise of the discretion.

5. There is a critical additional factor for the Court to consider in exercising the ESO discretion when a CCO exists. The main question will be whether the CCO alone offers a sufficient basis to achieve the public safety objectives of the ESO. That is, is the CCO a lesser rights-infringing option available to achieve the same objective? If it is, then making or continuing an ESO may

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1 *Chief Executive of the Department of Corrections v R (CRI-2021-409-11)* [2021] NZHC 2276 ("ESO Review Decision") (Supreme Court Case on Appeal ("SC CoA") at 28).

2 *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 ("CA Decision") (SC CoA at 10).

3 New Zealand Bill of Rights Act 1990, s 3; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26]–[27]; *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [37] (per Elias CJ) and [83] (per Ellen France J for the majority) (Respondent's Bundle of Authorities at 17); *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101] (Respondent's Bundle of Authorities at 64).

not be justified.

6. But there is nothing inherently objectionable in co-existing CCOs and ESOs; the Parole Act anticipates as much. For the Court, the liberty interests in not being subjected to a second penalty, nor having rights of freedom of movement, association, and other rights limited unless justified, will require examination of the CCO and its administration and effect.

7. The Courts below were right to find that confirming Mr R's ESO, in light of the (unchallenged) CCO, was "strongly justified".[4] That is so because the ESO permits a more liberty enhancing administration of the CCO, allowing Mr R greater personal freedom and autonomy and broader reintegrative options.

8. It was because of the ESO (in particular the conditions activated relating to his whereabouts and GPS monitoring) that Mr R was moved from secure care at Hillmorton Hospital to secure care and then supervised care in the community.[5] Being subject to an ESO in addition to the CCO has permitted greater liberty in the administration of the CCO. That is because Mr R's risk of absconding and reoffending is managed by the ESO conditions as to whereabouts, rather than the stricter detention under the CCO that would otherwise be required.

9. The two regimes, in tandem, permit a more liberty-enhancing regime for Mr R, maximising his personal autonomy and dignity to the extent possible given the range of rights limited under both Orders.

10. Thus Mr R's conditions of care under both regimes in combination do not constitute disproportionately severe treatment (s 9 of BORA), his detention is not arbitrary (s 22 of BORA) as it has been properly ordered by fair decision-makers (ss 25 and 27), and it is not discriminatory on any prohibited ground (s 19).

11. Although ESOs inherently limit the rights protected by s 26(2) of BORA, in

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4 CA Decision at [53] (SC CoA at 25), citing *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190] (Respondent's Bundle of Authorities at 166).

5 Affidavit of Sean Berrill, dated 27 June 2023, at [15] and [16]; Minute of Judge Hambleton FAM-2019-009-1614, 8 July 2022 (SC CoA at 85).

Mr R's circumstances the actual benefits to his liberty interests, care, and rehabilitation through the interaction of the two compulsory regimes (and the public safety benefits of his continuing supervision) mean that the limit on s 26(2) is justified.

Suppression orders

12. Ever since Mr R was referred for consideration of a CCO, his name has been suppressed.[6]

Appeal jurisdiction

13. A decision under s 107RA of the Parole Act may be appealed.[7] Such an appeal is treated as an appeal against sentence under Part 6 of the Criminal Procedure Act 2011 (the CPA) (with necessary modifications and subject to s 107H of the Parole Act, which relates to ESO hearings).[8] This Court has granted leave to Mr R's second appeal under s 253 of the CPA.

14. This Court must allow the appeal only if satisfied that, for any reason, there was an error in the decision below and the order confirming the ESO should not have been made.[9]

Factual and procedural history

15. A chronology of key events is annexed to these submissions.

16. Mr R, now 68 years old, has exhibited a pervasive pattern of serious sexual offending since he was a teenager. He also has a mild intellectual disability.[10] Since the age of 14, he has lived in either psychiatric care institutions or prisons (interrupted only by brief periods of release or absconding, during which he almost invariably committed some sexual misconduct). He was first made subject to an ESO at the age of 50, in 2005 (**the first ESO**).[11]

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6 *Chief Executive of the Department of Corrections v R* [2018] NZHC 3455 at [55] ("Second Judgment of Whata J") (Court of Appeal Additional Materials (**Add Mat**) at 38).

7 Parole Act 2002, s 107R(1) (Appellant's Bundle of Documents at 118).

8 Parole Act 2002, s 107R(2) (Appellant's Bundle of Documents at 118).

9 Criminal Procedure Act 2011, s 256(2) (with appropriate modifications).

10 With a permanent impairment that became apparent during his developmental period, including an IQ below 70 and significant deficits in adaptive functioning (see Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ("IDCCR"), s 7).

11 *Chief Executive of the Department of Corrections v R* HC Auckland CRI-2005-404-125, 24 November 2005 ("First ESO decision") (Court of Appeal Case on Appeal ("CA CoA") at 21).

A second ESO was made when he was 60,[12] and that second ESO was confirmed upon review five years later.[13] The Court of Appeal's dismissal of Mr R's appeal against that review is the decision under appeal.

17. Proceedings to make Mr R subject to a CCO were in train at the time of the first ESO.[14] Mr R's primary challenge to the first ESO being made was that it was unnecessary in light of the impending controls of the CCO; that application was to be heard five days after the ESO hearing.[15] Justice Rodney Hansen noted the lack of assurance that Mr R would be cared for in secure conditions under the CCO, and because of the strict time limit on applying for an ESO no future application could be made if Mr R's CCO status changed.[16] Because the ESO would serve a community protection purpose, separate from the treatment purpose of the CCO,[17] there was no reason the two should not co-exist.

18. That first CCO was discontinued in August 2011: no rehabilitation progress was expected for Mr R and his ESO provided external controls on his behaviour, so there was no rationale to extend it again.[18] Mr R remained at the same placement with Te Roopu Taurima O Manukau as a "civil" client,[19] with near-constant supervision, as a condition of his ESO.[20]

19. Mr R still lived at the supported accommodation facility as a "civil" client when interim supervision orders (with intensive monitoring) and then the second ESO were made in late 2015 and early 2016. Several incidents of

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12 *Chief Executive, New Zealand Department of Corrections v R* [2017] NZHC 559 ("Second ESO decision") (CA CoA at 75).

13 ESO Review Decision (CA CoA at 102).

14 After the application for the first ESO was made, Mr R was convicted of burglary (committed during his release on parole when he was permitted to go to the shops unsupervised). Instead of being sentenced to imprisonment, he was ordered (under s 34(1)(b)(ii) of the Criminal Procedure (Mentally Impaired Persons) Act 2002) to be detained in a secure facility as a special care recipient under the IDCCR (Criminal History, CA CoA at 100).

15 First ESO Decision at [2] (CA CoA at 22).

16 First ESO Decision at [33]–[34] (CA CoA at 31–32).

17 First ESO Decision at [29] (CA CoA at 30).

18 See the Specialist Assessor report of Natasha Moltzen, dated 18 February 2011 at [10.1] (Affidavit of Christina Wilson, dated 26 June 2023, Annexure B); and Health Assessment Report of Sonja Bakker, dated 14 October 2016, at [2] (CA CoA at 39).

19 That is, a Regional Intellectual Disability Community Care Agency (**RIDCA**) client not subject to a CCO, but residing in supported accommodation pursuant to an Individual Residential Reintegration Programme arrangement.

20 See New Zealand Parole Board decision, dated 13 October 2011 (Affidavit of Christina Wilson, dated 26 June 2023, Annexure C).

Mr R exposing himself or watching other people (including children, in one instance) while masturbating had been documented during the course of his first ESO.[21] Evidence given at the second ESO hearing was that even if Mr R were not subject to an ESO, his intellectual disability would require 24-hour supervision to support him and mitigate his risk to others.[22] Having found his risk profile met the ESO threshold, Edwards J concluded an ESO's terms (including intensive monitoring) would be proportionate to the high risk Mr R posed to members of the public.[23]

20. In July 2018, after the ESO intensive monitoring condition reached its statutory maximum of 12 months, Ara Poutama Aotearoa applied for a public protection order. Mr R was found to present a very high risk of imminent serious sexual offending if left unsupervised.[24] However, his opportunity to seriously offend had been significantly curtailed by the ESO conditions and supervision by Te Roopu Taurima for over a decade.[25] Eventually, the High Court directed that the Chief Executive was to consider referring Mr R for assessment under s 29 of the IDCCR.[26] During this period, Mr R was detained at Matawhāiti under an interim detention order.[27]

21. While at Matawhāiti, Mr R threatened to kill a staff member and other residents while brandishing bottles and a knife. Because he was found unfit to stand trial, on 22 March 2019 he was remanded in custody to Hillmorton Hospital pursuant to s 23(2)(b) of CPMIP.[28] A CCO that he be detained as a secure care recipient was then made under s 25(1)(b) of CPMIP.[29]

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21 Including a prison officer (2001), school children (2003), two women in a park (2008), four female staff at Te Roopu Taurima (2009), a meter reader who visited his home (2009), and other Te Roopu Taurima staff (2011, 2012, and 2015). He was also convicted of an indecent act in 2007 (masturbating in front of a woman he encountered on a work placement) (Criminal History, CA CoA at 100).

22 Second ESO Decision at [65] (CA CoA at 72).

23 Second ESO Decision at [75] (CA CoA at 74). An appeal against the second ESO was dismissed in 2020: *R v Chief Executive of the Department of Corrections* [2020] NZCA 126 (SC CoA at 54).

24 *Chief Executive of the Department of Corrections v R* [2018] NZHC 3106 ("First Judgment of Whata J") at [44] (CA Add Mat at 18); concurring with the earlier opinion of Wylie J on the same application: *Chief Executive of Department of Corrections v R* [2018] NZHC 1733 at [61].

25 First Judgment of Whata J at [45] (CA Add Mat at 19).

26 Second Judgment of Whata J at [52] (CA Add Mat at 38).

27 *Chief Executive of Department of Corrections v R* [2018] NZHC 1733; continued by *Chief Executive of the Department of Corrections v R* [2019] NZHC 536 ("Third Judgment of Whata J") at [6] (CA Add Mat at 41).

28 *Police v R* [2019] NZDC 5397 at [19] (SC CoA at 53).

29 Order for Detention in Secure Facility of Person Found Unfit to Stand Trial, 15 April 2019 (SC CoA at 84).

The Chief Executive's application for a public protection order was suspended.[30]

22. Because Mr R was now under supervision from both his CCO and ESO, his Corrections Service Manager and the Regional Manager of the High Risk Response Team met regularly with the clinical governance group in charge of administering his CCO.[31] They are closely consulted on all decisions relating to Mr R's placement and supervision conditions, and offer advice on how best to manage his risk.[32]

23. Mr R remained at Hillmorton until 10 June 2020, when he was moved to a secure facility in the community managed by Emerge Aotearoa (on M Avenue). On the same day, his probation officer reactivated the electronic monitoring and other special conditions of his ESO.[33] Those electronic monitoring conditions being available were crucial to the decision to allow him to leave Hillmorton Hospital.[34] While at Hillmorton (and, later, at M Avenue), Mr R continued to perform "voyeuristic and exhibitionistic acts", to the point where no female staff or residents were to be left alone with him.[35] Whenever he was in the community, he was actively supervised by staff.

24. In August 2020, the Parole Board reviewed Mr R's high-impact conditions (related to his GPS monitoring) as required by s 107RB of the Parole Act. Mr R's IDCCR care co-ordinator informed the Board that his community placement was "reliant upon the retention of the electronic monitoring" condition.[36] Without that extra assurance, he would not be in the community; the Emerge Aotearoa staff would not physically restrain him if

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30 *Chief Executive of the Department of Corrections v R* [2019] NZHC 3165 ("Fourth Judgment of Whata J") at [18] (CA Add Mat at 52).

31 Affidavit of Christina Wilson, dated 26 June 2023, at [3].

32 Affidavit of Christina Wilson, dated 26 June 2023, at [4], [6]–[7], [17]–[18] and Annexure D.

33 Letter to Mr R from Probation Officer Bonnie Sturgess, dated 10 June 2020 (SC CoA at 82).

34 See Affidavit of Sean Berrill, dated 27 June 2023, at [15] and Annexure F.

35 Report of Paul Carlyon, dated 29 June 2021, at [19] (CA CoA at 82). This "primary prevention" measure remains in place under Mr R's current CARP: Affidavit of Sean Berrill, dated 27 June 2023, Annexure B, pg. 26.

36 Affidavit of Sean Berrill, dated 27 June 2023, Annexure F.

he attempted to abscond.[37] The Parole Board confirmed Mr R's GPS monitoring would continue.[38]

25. In August 2021, while Mr R was still at the secure facility on M Avenue, the High Court reviewed his second ESO as required by s 107RA of the Parole Act.[39] Mr R refused to participate in an interview with the assessor nor release privileged psychological material to him. The expert report nevertheless concluded that Mr R's risk profile continued to meet the ESO threshold.[40] Mr R's counsel did not challenge the assessor in cross-examination on his conclusions about Mr R's risk profile.[41] Justice Osborne found an ESO remained necessary as a backstop, in case the CCO ended in April 2022.[42]

26. That review was upheld by the Court of Appeal on 3 June 2022 in the decision under appeal.[43] The Court concluded, as the Parole Board had, that the ESO GPS monitoring condition was "allowing access to a different type of facility", which the IDCCR care co-ordinator appeared to consider better implemented the IDCCR's purposes than the more restrictive options necessary if there were no ESO.[44]

27. Between the Court of Appeal hearing and its decision being released the renewal of Mr R's CCO was deferred; in July 2022 it was renewed for two years, but at the level of supervised care once a placement became available.[45] His care co-ordinator made the application on the basis of the extra monitoring of Mr R's whereabouts under the ESO.[46]

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37 Emerge Aotearoa has a "no restraint" policy for its clients: Affidavit of Sean Berrill, dated 27 June 2023, at [23].

38 New Zealand Parole Board decision, 10 August 2020 at [17] (SC CoA at 79).

39 ESO Review Decision (SC CoA at 28).

40 That is, he posed a high risk of engaging in further relevant sexual offending and exhibited the exhibit the s 107IAA characteristics: Report of Paul Carlyon, dated 29 June 2021, at [43]–[49] (CA CoA at 88–90).

41 ESO Review Decision at [71] (SC CoA at 45).

42 ESO Review Decision at [88] (SC CoA at 48). His Honour was operating under the misapprehension that Mr R's ESO conditions were suspended: see ESO Review Decision at [9] (SC CoA at 30).

43 CA Decision (SC CoA at 10).

44 CA Decision at [58] (SC CoA at 26). Justice Osborne's "future protection" rationale was rejected because a PPO had been approved and would take effect immediately after the CCO ended, if necessary: CA Decision at [57] (SC CoA at 25).

45 Minute of Judge Hambleton FAM-2019-009-1614, 8 July 2022 (SC CoA at 85).

46 Affidavit of Sean Berrill, dated 27 June 2023, at [16].

By the time of the Parole Board's next review of his high-impact conditions, in August 2022, Mr R was about to be transferred to N Drive, a supervised facility also run by Emerge Aotearoa. His care co-ordinator and care manager supported the continuation of his GPS monitoring condition to assist in their management of Mr R and support his transition to a supervised facility.[47] The Board noted that the Family Court would have decided supervised care was appropriate "in light of the current conditions that are in place which include the electronic monitoring".[48] It continued all his special conditions, including electronic monitoring of his whereabouts conditions.

28. Mr R's current ESO conditions are:[49]

(1) While you remain a care recipient, to reside at an address approved in writing by a Care Coordinator and not to move from that address without the prior written approval of a Care Coordinator.
(2) If no longer a care recipient, to reside at an address approved in writing by a Probation Officer and not to move from that address without the prior written approval of a Probation Officer.
(3) To submit to electronic monitoring in the form of Global Positioning System (GPS) technology as directed by the Probation Officer in order to monitor your compliance with any condition(s) relating to whereabouts.
(4) To comply with the requirements of electronic monitoring, and provide access to the approved residence to the Probation Officer and representatives of the monitoring company, for the purpose of maintaining the electronic monitoring equipment as directed by the Probation Officer.
(5) Not to enter or remain on the grounds of any park, school or recreational amenities such as playgrounds, skate parks, swimming pools, schools, Marae, beaches (unless as required or permitted to do so by a vocational care programme) or any other area where children under the age of 16 years are known to congregate without the prior written approval of the probation officer.
(6) Not to enter any licensed premises as identified by your Probation Officer, without the prior written approval of the Probation Officer.
(7) Not to use, possess or consume alcohol, controlled drugs or psychoactive substances.
(8) Not to undertake any form of employment (paid or unpaid), voluntary work or training without the prior written approval of a Probation Officer.
(9) Not to enter Dunedin without the prior written approval of your Probation Officer.
(10) To be placed in the care of an agency approved by the Chief Executive, and between the hours of 7.00am and 7.00pm daily whilst in the care of

47 Probation Officer Report to NZPB, 1 August 2022, at p 6 (Affidavit of Christina Wilson, dated 26 June 2023, Annexure I).
48 New Zealand Parole Board decision, 24 August 2022 (SC CoA at 75).
49 New Zealand Parole Board decision, 24 August 2022 (SC CoA at 80).

that agency, to be accompanied and monitored by an agency staff member at all times unless you have the prior written approval of a Probation Officer.

(11) To remain at your approved address between the hours of 7:00pm until 7:00am daily, and comply with the requirements of residential restrictions, unless your absence from that address has been approved in writing by a Probation Officer, or is permitted by section 33(4) of the Parole Act 2002.

29. Mr R's current care and rehabilitation plan (**CARP**), which outlines the conditions of his CCO, is Annexure B to the Affidavit of Sean Berrill, dated 27 June 2023.

Mr R's compulsory supervision regimes

Extended supervision orders: creation and extension

30. Mr R was eligible for an ESO because he was serving a sentence of imprisonment for child sexual offending at the time of the application.[50] At the time of his first ESO the court needed be satisfied only that he was "likely to commit" a relevant sexual offence "on ceasing to be an eligible offender".[51] By the time of his second ESO in 2017 the current test applied: the court was satisfied he had a pervasive pattern of serious sexual offending;[52] had the characteristics listed in s 107IAA;[53] and there was a high risk that he would in future commit a relevant sexual offence.[54]

31. Successive ESOs may be made for the same offender, as they have been for Mr R, so long as the statutory test remains met. After considering fresh expert evidence in 2017 the High Court made the second ESO, with the added consideration of the s 107IAA characteristics.[55]

32. However, once a person (like Mr R) has been subject to an ESO for 15 continuous years, the sentencing court is required by s 107RA of the Parole Act to review the ESO at that point and 5 years after the imposition of any and each new extended supervision order:

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50 Parole Act 2002, s 107C(1)(a)(i).
51 Parole Act 2002, s 107I(2) as at 24 November 2005.
52 Parole Act 2002, s 107I(2)(a).
53 Parole Act 2002, s 107IAA(1).
54 Parole Act 2002, s 107I(2)(b)(i).
55 Second ESO decision at [49]–[53] (CA CoA at 68–69).

> (1) A sentencing court must, on or before the review date specified in subsection (2), commence a review of an extended supervision order in order to ascertain whether there is—
>
> (a) a high risk that the offender will commit a relevant sexual offence within the remaining term of the order; or
>
> (b) a very high risk that the offender will commit a relevant violent offence within the remaining term of the order.
>
> (2) …
>
> (3) …
>
> (4) For the purpose of a review under this section, sections 107F (except subsection (1)), 107G, 107GA, and 107H apply (with any necessary modification) as if the review were an application for an extended supervision order.
>
> (5) Following the review, the court must either confirm the order or cancel it.
>
> (6) The court may only confirm the order if, on the basis of the matters set out in section 107IAA, it is satisfied that there is—
>
> (a) a high risk that the offender will commit a relevant sexual offence within the remaining term of the order; or
>
> (b) a very high risk that the offender will commit a relevant violent offence within the remaining term of the order.

33. After finding the relevant s 107IAA characteristics and high risk remains, the court *may* confirm the order. That is the discretion which is the focus of this appeal.

Extended supervision orders: available conditions

34. As part of their overall purpose "to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences",[56] ESOs are also aimed at rehabilitation. Protection of the community will usually be most effectively and efficiently achieved through long-lasting risk reduction. Hence the standard conditions include a requirement to undertake any required "rehabilitative and reintegrative needs assessment",[57] and special conditions may only be imposed for purposes which include reducing the risk of reoffending by the offender and facilitating or promoting their rehabilitation and reintegration.[58]

35. Someone on an ESO is subject to the standard conditions under s 107JA (which include reporting to their probation officer, obtaining consent before

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56 Parole Act 2002, s 107I(1).

57 Parole Act 2002, s 107JA(1)(h).

58 Parole Act 2002, ss 107K(4) and 15(2).

moving to a new home or changing job, and having only supervised contact with people under 16). They may also be subject to special conditions imposed by the Parole Board under s 107K. Just like special conditions available at release on parole,[59] the Parole Board may impose almost anything as a special condition. However, special conditions must be imposed for one of the statutory purposes and be consistent with BORA. That is, the special conditions must be justified by some nexus between the person's risk profile and the effectiveness of the proposed condition.[60]

36. However, there are limits to the Parole Board's powers to impose detention-like special conditions on an ESO offender. A residential restriction requiring the person to stay at a particular place "at all times" may only be imposed for the first 12 months of the ESO;[61] as may any intensive monitoring condition (that is, requiring the person to be accompanied at all times);[62] and requiring someone to be in the care of a programme provider must not result in their residing with that care provider.[63]

Compulsory care orders: creation and extension

37. The IDCCR's purpose is to provide a system for the compulsory care and rehabilitation of persons with an intellectual disability who have been charged with, or convicted of, offending. Parliament made a conscious decision to include only intellectually disabled people who had entered the criminal justice system (but not necessarily been convicted). Initially the IDCCR Bill would have encompassed both offending and non-offending populations with certain risk characteristics.[64] Non-offenders were removed

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59 Parole Act 2002, ss 107K(1) and 15.

60 *Chief Executive of the Department of Corrections v Martin* [2016] NZHC 275 at [49]. See also, in the context of release conditions upon a sentence of imprisonment, *Patterson v R* [2017] NZCA 66 at [18]: "any given condition must exhibit a rational nexus to the s 93(3) purposes, and that when considered with other conditions to be imposed it must be reasonably necessary and proportional".

61 Parole Act 2002, s 107K(3)(b). After the first 12 months, the Board may impose detention at a person's residence under a residential restriction condition for any lesser period than 24-hours a day; in practice such curfews vary between 8-12 hours overnight.

62 Parole Act 2002, s 107K(3)(ba).

63 Parole Act 2002, s 107K(3)(bb)(ii). After divergent High Court authorities on the proper interpretation of s 107K(3)(bb)(ii), the Parole Board sought a declaratory judgment on how to interpret the provision. The High Court recently ruled that s 107K(3)(bb)(ii) does prohibit any programme condition that require or result in an offender residing with their programme provider: *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 (Respondent's Bundle of Authorities at Tab 6).

64 Intellectual Disability (Compulsory Care) Bill (329 –1) (explanatory note).

from the Bill before its third reading.

38. Though its purpose is the "care and rehabilitation" of persons with an intellectual disability who have entered the criminal justice system, "rehabilitation" is used in the sense of improving skills and behaviours rather than curing the disability. No "cure" is available for this population.[65] Rather, the guiding principle of powers exercised under the IDCCR is to treat the care recipient so as to protect their health and safety and that of others, and to protect the care recipient's rights.[66]

39. A defendant charged with an imprisonable offence may become subject to a CCO through the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP**) because they are found unfit,[67] or not guilty by reason of insanity.[68] If necessary in the interests of the public, the defendant may be ordered to be a "special care recipient" under a secure order for up to 10 years or half the maximum penalty for their offence;[69] or otherwise ordered to be a care recipient no longer subject to the criminal justice system.[70]

40. Mr R was ordered to be a care recipient no longer subject to the criminal justice system under s 25(1)(b) of CPMIP.[71] His criminal proceedings were at an end on the date of that order, without the extra step of staying the proceeding under s 27(1).[72]

41. A compulsory care order's maximum term is three years.[73] However, it may

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65 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 at [74] (Respondent's Bundle of Authorities at 193). The population of people eligible for care under IDCCR are those with a *permanent* impairment that results in "significantly sub-average general intelligence" (that is, an I.Q. of less than 70) and significant deficits in adaptive functioning, and became apparent during the developmental period: IDCCR, s 7. As explained by Dr Lynda Scott at the third reading of the Bill, "We did have a debate before about whether "rehabilitation" is the right term, because rehabilitation means, to a lot of people, the individual changing behaviour, whereas, actually, rehabilitation plans are more about changing the behaviour of people around someone with an intellectual disability so that they do not get into a lose-lose situation, and so that they do not get into a corner where their only out is to hit somebody." (Intellectual Disability (Compulsory Care and Rehabilitation) Bill (third reading) 612 NZPD 9584) (Respondent's Bundle of Authorities at 548).

66 IDCCR, s 11 (Appellant's Bundle of Documents at 235).

67 Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP**), s 8A.

68 CPMIP, s 20. A prisoner may also be referred for assessment under the IDCCR by their prison manager: IDCCR, s 29(1).

69 CPMIP, s 24(2)(b).

70 CPMIP, s 25(1)(b). See also the definition of "care recipient" in s 4(1).

71 IDCCR, s 6(3)(b); District Court Order of 15 April 2019 (SC CoA at 84).

72 See *H (CA841/2012) v R* [2013] NZCA 628, (2013) 26 CRNZ 628 at [8] and [23].

73 IDCCR, s 46(2) (Appellant's Bundle of Documents at 248).

be extended by the Family Court a theoretically unlimited number of times.[74] No statutory test was set down for whether a CCO should be extended; unlike s 107RA of the Parole Act, s 85 of the IDCCR simply creates a discretion for the Family Court to grant an application from the care co-ordinator to extend it.[75] In *RIDCA v VM* the Crown argued that whether a care recipient posed an "undue risk" to themselves or the community should be the controlling factor.[76] The High Court and Court of Appeal disagreed, holding that:

> [91] … the longer a care recipient has been subject to a compulsory care order, extension orders will require ongoing and sometimes increasing justification, because the community protection interest will need to be greater to outweigh the increased weight given to the liberty interest of the care recipient.

42. In reaching this conclusion the Court took into account the guiding purposes and principles in ss 3 and 11 of the IDCCR; the weight that should be given to the care recipient's liberty interest; and the nature of the original offending. "Undue risk" alone was not an appropriate framework for the "nuanced evaluation of all the information available" necessary to balance the community protection interest against the care recipient's interest in liberty.[77] Only if the community protection interest cannot be met other than by a CCO, can the Court extend it. To do otherwise would risk using the IDCCR for "purely preventive purposes, regardless of its potential for therapeutic benefit".[78]

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74 IDCCR, s 46(3) (Appellant's Bundle of Documents at 248. Such an extension must be sought within strict timeframes, or risk the order coming to an irrevocable end with "potentially tragic consequences" for both the care recipient and the community: *Care Co-ordinator v R* [2020] NZCA 574 at [69].

75 IDCCR, s 85(1) (Appellant's Bundle of Documents at 269).

76 Following many appellate courts in comparable jurisdictions, which had held that the decision to continue detention must be proportionate to the risk posed by an intellectually disabled persons, not to the original offending: *Anderson v Scottish Ministers* [2003] 2 AC 602 (PC); *Winko v British Columbia* (1999) 175 DLR (4th) 193 (SCC); *Jones v United States* 463 US 354 (1983); *Allen v Illinois* 478 US 364 (1986); *Kansas v Hendricks* 521 US 346 (1997); *Hutchison Reid v United Kingdom* (2003) 37 EHRR 211.

77 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 at [93] (Respondent's Bundle of Authorities at 198).

78 Warren Brookbanks "New Zealand's Intellectual Disability (Compulsory Care) Legislation" in K Diesfeld and I Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Portmouth, 2003) at 533 (Respondent's Bundle of Authorities at 511).

43. However, the Court of Appeal agreed that the gravity (or lack thereof) of the care recipient's original offending cannot be controlling either, giving this hypothetical example with parallels to Mr R's own:[79]

> [82] … the possibility that a care recipient in respect of whom a compulsory care order was made in circumstances where the decision was finely balanced may find themselves subject to a series of similar finely balanced decisions extending the compulsory care order and, therefore, effectively subject to ongoing, long term preventive detention. This might occur where the basis of the original compulsory care order was a static risk which did not diminish during supervised care, but also did not become any more serious.

44. When it enacted the Public Safety Act, Parliament introduced a new factor to making or extending a CCO which was not present when *VM* was decided. One of that Act's four guiding principles is that a PPO ought not be imposed on a person who is eligible to be detained under the IDCCR.[80] An application for a PPO may, as was the case for Mr R, lead to the Court directing the Chief Executive to consider applying for a CCO.[81] If the Chief Executive makes such an application, and a CCO application results, the Family Court must take into account that a CCO is likely to be the least rights-restricting option available.[82]

Compulsory Care Orders: conditions

45. Compulsory care orders provide different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to the Act.[83] Every care recipient has a care and rehabilitation plan setting out the objectives of the care to be provided, the general nature of the care to be provided, and the degree of security necessary to avoid undue risk to the health or safety of the care recipient and others.[84]

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79 *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 (Respondent's Bundle of Authorities at 195). Following *VM* there has been a real example of this dynamic which closely reflected the hypothetical case proposed by the Court of Appeal: see *J v Attorney-General* [2018] NZHC 1209 at [247]–[258] (Respondent's Bundle of Authorities at 278).

80 Or under the Mental Health (Compulsory Assessment and Treatment) Act 1992: Public Safety (Public Protection Orders) Act 2014, s 5(c).

81 Public Safety (Public Protection Orders) Act 2014, s 12(2) (Appellant's Bundle of Documents at 155).

82 On the principle noted at para [4] above, that statutory discretions must be exercised consistently with BORA.

83 IDCCR, s 3 (Appellant's Bundle of Documents at 227).

84 IDCCR, s 26 (Appellant's Bundle of Documents at 241).

46. The CCO itself will determine part of the level of security necessary. A "secure care order" requires the care recipient to stay in a "secure facility".[85] A secure facility is designed and operated to prevent persons required to stay there from leaving without authority.[86] In practice these are divided into "hospital secure" and "community secure" settings; both keep care recipients within locked doors and fenced perimeters.[87] A person ordered into supervised care may be cared for wherever their care manager thinks appropriate (but not in a secure facility unless they require emergency care).[88] The Service Security Matrix, Annexure A to the Affidavit of Sean Berrill, dated 27 June 2023, sets out the different characteristics of each level of facility.

47. As set out in the Table at para [51] below, a person subject to a CCO may be subject to a very similar list of limits on their freedoms as a person subject to a PPO:[89] they must remain at a designated residence, locked and supervised; comply with lawful directions given by their care manager and staff members; their written communications may be checked and withheld; items sent to the person may be inspected; telephone calls may be monitored; they may be restrained if necessary; and residents in secure care may be placed in seclusion. A CCO does not necessarily result in such strict detention to manage the person's risk, but it may.

48. After the determination of secure or supervised care is made, the care recipient's care is entrusted to their care manager.[90] The care manager is responsible for implementing their care and rehabilitation plan and updating it in consultation with the care co-ordinator.[91] The care recipient must comply with every lawful direction of the care manager.[92]

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85 IDCCR, s 3 (Appellant's Bundle of Documents at 227).
86 IDCCR, s 9(2) (Appellant's Bundle of Documents at 235). A prison may not be used as a facility: s 9(4).
87 See Service Security Matrix, Annexure A to the Affidavit of Sean Berrill, dated 27 June 2023.
88 IDCCR, s 64(3) (Appellant's Bundle of Documents at 256).
89 Cf. the summary of PPO conditions in *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [5]–[6] (Respondent's Bundle of Authorities at 119).
90 IDCCR, s 47 (Appellant's Bundle of Documents at 249).
91 IDCCR, s 28 (Appellant's Bundle of Documents at 241).
92 IDCCR, s 47(3) (Appellant's Bundle of Documents at 249).

Interaction of the ESO and CCO regimes

49. Parliament foresaw that the same person could simultaneously be subject to an ESO and a CCO.[93] Under s 107P(3) of the Parole Act, all conditions of the ESO are automatically suspended if the person is detained in secure care (though time continues to run on the ESO). However, a probation officer may reactivate any conditions required to ensure the offender does not pose an "undue risk" to the community or any person or class of persons.[94] If the CCO is for supervised care, the ESO is not suspended by s 107P(3) and all ESO conditions will apply.

50. Both regimes limit, to some extent, the bundle of rights which may be described as the person's "liberty interest": BORA rights ensuring basic freedoms such as the rights to freedom of expression (s 14) and movement (s 18), and the right not to be arbitrarily arrested or detained (s 22).[95]

51. However, despite its belonging in the sphere of criminal law and carrying the threat of criminal charges for a breach, the conditions of an ESO are largely less liberty-infringing than those of a CCO:

Impact on Mr R	**Available under ESO & Parole Act**	**Available under CCO & IDCCR**
24-hour detention	No, because Mr R is no longer in the first 12 months of his ESO (ss 33(2)(c)(ii), 107K(3)(b))	Yes. All CCOs involve 24-hour detention, unless leave is granted by the care manager (ss 63, 64)[96]
Intensive monitoring (person-to-person supervision, up to 24/7)	No, because Mr R is no longer in the first 12 months of his ESO (ss 107K(ba), 107IAC(5))	Yes, as required by CARP (s 47)[97]

93 Unlike the situation in *Togia v The General Manager, Rimutaka Prison* HC Wellington CIV-2007-485-358, 28 February 2007 (Appellant's Bundle of Documents at 488), cited in the Appellant's Submissions at [71]–[73], where the Parole Board's jurisdiction to recall a sentenced prisoner was unclear on the face of the legislation.

94 Parole Act 2002, s 107P(3)(a) (Appellant's Bundle of Documents at 116).

95 *Pinet v St Thomas Psychiatric Hospital* 2004 SCC 21, [2004] 1 SCR 528 at [19], cited with approval in *RIDCA (Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012]1 NZLR 641 at [35] (Respondent's Bundle of Authorities at 184).

96 Mr R is currently required by his CARP to reside at the approved facility 24 hours a day under s 47 of the IDCCR (except for outings approved by his care manager): Affidavit of Sean Berrill, dated 27 June 2023, Annexure B, at 19.

97 Mr R must be kept in line-of-sight supervision at all times, unless in his (alarmed) bedroom): Affidavit of Sean Berrill, dated 27 June 2023, Annexure B, at 19.

Electronic monitoring	Yes, but only to enforce and monitor compliance with a whereabouts condition or curfew (ss 15(3)(f), 15A(1), 107K(1))	No
Curfew (or other requirement to remain in a place at specified times)	Yes (ss 15(3)(ab), 33(2)(c), 107K(1))	Yes. All secure care and most supervised care orders involve 24-hour detention, unless leave granted the care manager (ss 63, 64)
Whereabouts (exclusion from certain places)	Yes (ss 15(3)(e))	Yes. Leave into the community is only possible as permitted by the care manager and CARP (ss 63, 64)
Seclusion	No	No, if in a supervised facility Yes, if in secure care, and only if necessary to prevent care recipient endangering health and safety or seriously compromising care and well-being of other persons (s 60)
Restraint	No (except when arrested for breach)	No, unless necessary to prevent care recipient endangering health and safety, seriously damaging property, or seriously compromising care and well-being of other care recipients (s 61)
Required to take prescribed medication	Yes, but only with the person's consent (ss 15(3)(d), 15(4), 107K(5))	Yes, if required by CARP (ss 62(3), 148)

Participate in programme	Yes, if intended to reduce the risk of further offending (but may not be required to be there longer each day than necessary to ensure attendance nor to reside with programme provider under an "in the care of" condition (ss 15(3)(b), 107K(3)(bb))[98]	Yes, if required by CARP
Employment	Yes, if permitted by probation officer (s 107JA(1)(f) and (g))	Yes, if permitted by CARP
Visitors	Yes, subject to any non-association condition	Yes, if approved by care manager as not detrimental to care recipient's interests or care (s 56)
Correspondence	Yes, subject to any non-association condition	Yes, if approved by care manager (ss 57–59)
Not to consume drugs or alcohol	Yes (ss 15(3)(ba), 107K(1))	Yes, if required by CARP
Consequences of breach	Criminal offence with two-year maximum penalty, warrantless arrest power (Parole Act s 107T; Crimes Act 1961, s 315(2)(b))	Care co-ordinator and care manager may retake a care recipient who has escaped (s 111); power to arrest with warrant (s 112), unless imminent risk of endangering health or safety (s 113)

Mr R's present situation and future pathways

52. The respondent has filed updating evidence from the officials in charge of administering Mr R's ESO and CCO: his Ara Poutama Aotearoa service manager, and his care co-ordinator. Their evidence shows:

    52.1 Ara Poutama Aotearoa and health officials consult closely on decisions affecting Mr R, though because the CCO determines his care conditions and placement and his care co-ordinator has the final

[98] In light of the recent declaratory judgment of Isac J in *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 (Respondent's Bundle at 391), that programme condition may not result in Mr R residing with his programme provider.

say on decisions about his day-to-day life.[99]

52.2 That consultation process meant Mr R's ESO special conditions were reactivated on the day he left Hillmorton Hospital;[100] in particular, his whereabouts and GPS monitoring conditions were crucial to the decision to release him from Hillmorton Hospital.[101]

52.3 Mr R's transition from Hillmorton Hospital to secure care in the community, and again from secure to supervised care, was made possible (or at least happened sooner) because of the extra security provided by the ESO GPS monitoring condition.[102]

52.4 Though the ESO conditions all returned in force once Mr R was transferred from secure care to supervised care,[103] in effect the only ESO conditions being enforced are those related to his residence, his whereabouts, and electronic monitoring.

52.5 Mr R is currently living in a supervised facility in the community. Its doors are lockable (and alarmed), but not locked. Emerge Aotearoa has a "no restraint" policy and will not physically prevent Mr R from leaving the facility.[104] Mr R has walked off the premises on more than one occasion earlier this year, and staff persuaded him to return voluntarily.[105]

52.6 Mr R's current behaviour, current low level of environmental restraint, lack of engagement in treatment, and the low gravity of his offending which led to the CCO, make it unlikely his care co-ordinator will seek a further extension of the CCO (given the continuing risk-management provided by the ESO).[106]

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99 Affidavit of Christina Wilson, dated 26 June 2023, at [3]–[4]; Affidavit of Sean Berrill, dated 27 June 2023, at [11].

100 Letter from Bonnie Sturgess to Mr R, dated 10 June 2002 (SC CoA 83).

101 Affidavit of Sean Berrill, dated 27 June 2023, at [15].

102 Affidavit of Sean Berrill, dated 27 June 2023, at [15]–[16], [22]–[23].

103 An ESO is no longer suspended when a person subject to a CCO leaves secure care: Parole Act, s 107P(3) (Appellant's Bundle of Documents at 116).

104 Affidavit of Sean Berrill, dated 27 June 2023, at [23].

105 Affidavit of Christina Wilson, dated 26 June 2023, at [19]; Affidavit of Sean Berrill, dated 27 June 2023, at [19].

106 See Affidavit of Sean Berrill, dated 27 June 2023, at [25]–[26].

53. Three future scenarios may be envisaged:

53.1 **ESO continues but CCO is not extended:** Mr R will be in the same position he was in at the end of his earlier CCO in 2011. He is likely to remain at the same community residence as a voluntary, "civil" RIDCA client.[107] Depending on the combination of conditions imposed by the Board, he may have more freedom to leave the facility than he currently does. A curfew condition would likely continue to ensure that he remains at the residence at night, and electronic monitoring would be available to monitor his curfew and other whereabouts conditions.

The Chief Executive's PPO application would no longer be suspended when Mr R is no longer detained under the CCO.[108] A decision would need to be made as to whether the PPO application would be pursued, when the most likely outcome would be another CCO.

53.2 **ESO is quashed but CCO continues:** Mr R would no longer wear a GPS ankle bracelet, but otherwise his day-to-day life will not change. His CCO may be lawfully extended as long as the risk he poses to others is greater than his liberty interest.[109] However, he will no longer have GPS monitoring of his whereabouts. If he persists in walking off the property there is a risk his care co-ordinator could apply to the Family Court to return him to secure care, detained behind locked doors.[110]

53.3 **ESO is quashed and CCO is not extended:** this would be an undesirable situation for both public safety and Mr R, who has not

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107 Mr R's combination of residence and programme conditions may need to be reconsidered in light of the recent High Court decision *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 (Respondent's Bundle at 391). On its face, it may prevent any programme condition for Mr R (since Emerge Aotearoa would then be his programme provider and the agency with which he resides).

108 Because s 111 of the Public Safety Act 2014 would no longer apply: see Fourth Judgment of Whata J at [11] (CA Add Mat at 50).

109 As Mr Carlyon said at the High Court hearing, hypothetically thinking about Mr R's case as an IDCCR specialist assessor rather than a Parole Act health assessor, "there's obvious convergence here in terms of risk, so I do think the need for ongoing compulsory care is present" (Evidence Volume at 19).

110 He could be returned to a secure care order if his behaviour posed "a serious danger to the health or safety" of himself or others: IDCCR, s 85(3). It was in the context of Mr R being under a secure care order that Mr Carlyon suggested that the compulsory care framework "would provide an adequate level of external control" (Evidence Volume at 18–19; see Appellant's Submissions at [42]).

lived independently for any length of time.[111] Again, the PPO application would no longer be suspended and the Chief Executive would need to decide whether to pursue that application.

Rights potentially affected by the discretion to renew an ESO

54. After being satisfied the threshold risk for an ESO still persists, the Court has a discretion under s 107RA(6) to confirm or cancel the ESO.[112] If the threshold is met – which is not at issue on this appeal – the question remains whether the discretion to make or renew the ESO is a justified limit. That is, whether the limit of the person's BORA rights by confirming the ESO can be demonstrably justified in a free and democratic society: is the level of risk the person poses of "sufficient gravity to warrant the consequent impact" upon their rights?[113] Is there "strong justification" for the ESO to continue?[114]

55. For example, someone might have a pervasive pattern of serious sexual offending, satisfy the s 107IAA characteristics, and pose a high risk of committing a relevant sexual offence in future: but that relevant sexual offence might be on the lower end of the scale of the relevant offence, such as indecent assault by pinching someone's bottom or kissing them on the cheek. In such a situation, the Court may well consider there is no strong justification for an ESO.

56. Another situation could be where the person is already subject to a CCO, and living under conditions in fact capable of adequately managing their risk of re-offending. Although they satisfy the test of being likely to commit a relevant sexual offence in future, in fact that risk is far less while they are subject to a CCO. In that case the Court would have to weigh carefully whether there is strong justification for an ESO (considering, for example, whether the CCO conditions actually address the risk of re-offending rather

111 Evidence Volume at 12.

112 *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [42].

113 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101] (Respondent's Bundle of Authorities at 64).

114 CA Decision at [48] (SC CoA at 23); *Wilson v Department of Corrections* [2022] NZCA 289*; Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507.

than other risk, and whether the person is likely to remain subject to the CCO for the time period an ESO would cover).

Liberty interest rights are justifiably limited if the risk threshold is met

57. Contrary to the Appellant's Submissions at [6], the respondent proposes that these are the key rights limited by the CCO and ESO. Everyone lawfully in New Zealand has the right to freedom of association, movement, and residence in New Zealand. Yet both regimes limit Mr R's freedoms by requiring him to live at N Drive. The ESO conditions also prevent him leaving that address during curfew, entering Dunedin, and associating with people under the age of 16 (without prior approval). The CCO conditions prevent him leaving the premises of N Drive at all without his care manager's approval. That type of restriction on his freedom of movement would be unlawful if imposed now through an ESO (because it amounts to a residential condition to remain in a place at all times, and Mr R is no longer in the first 12 months of his ESO).

58. However, those limits are (under the ESO and CCO individually) justified because Mr R's history and risk profile meets the statutory test for each Order separately. His ESO is "strongly justified".[115] His CCO has been reviewed and found necessary by the Family Court,[116] and has never been challenged.

The combination of ESO and CCO conditions enhances Mr R's liberty interests

59. Looking at the combination of ESO and CCO conditions in the table above, the ESO restrictions add little to the restrictions under which a person subject to a CCO lives. In practice, Mr R's care co-ordinator and care manager are the officials imposing the most restrictions on his daily life. His ESO requires him to wear an electronic monitoring bracelet, but nothing else that his CARP does not already require; while the CARP makes a number of demands, particularly on his freedom of movement and association. No challenge has been made to Mr R's CCO conditions.

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115 CA Decision at [48] (SC CoA at 23). Mr R's risk of re-offending cannot sensibly be ignored: *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

60. As Mr R's current ESO and CCO conditions illustrate, the two regimes may operate together to enhance or maximise the person's liberty interests. Without the GPS monitoring of Mr R's whereabouts conditions, his care co-ordinator would not have recommended his transition from Hillmorton Hospital to secure community care in 2020; nor would he likely have applied to reduce the CCO to supervised care in 2022. Mr R's liberty interests are promoted rather than impaired by the multidisciplinary approach to his care prompted by the two overlapping regimes.

61. As noted above, Parliament anticipated the two regimes would overlap for certain individuals. Again, the combination of these two regimes in fact allows Mr R more freedom and support than he would have under a CCO alone. Care and protection under a single regime should not be preferred over a combination of conditions under two applicable regimes if the single regime will not deliver a more liberty-friendly outcome. It is not disproportionately severe treatment to subject Mr R to both an ESO and CCO.

The duration of the confirmed ESO while also subject to a CCO is a justified restriction of Mr R's liberty interest

62. Both an ESO and CCO are subject to regular reviews. Though an ESO is reviewed less frequently than the six-monthly assessment of a CCO,[117] a review of an ESO may be initiated by the person subject to it at any time.[118] If Mr R's risk profile in fact no longer justifies an ESO, and he satisfies the court of that, his ESO would be cancelled.[119] He has never brought such an application.

63. Both regimes therefore have escape valves which ensure a court has oversight of the ongoing proportionality of the rights-limiting order to the public interest in managing the person's risk.

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116 Minute of Judge Hambleton FAM-2019-009-1614, 8 July 2022 (SC CoA at 85); Affidavit of Sean Berrill, dated 27 June 2023 at [16].

117 IDCCR, s 77(2)(b) (Appellant's Bundle at 267).

118 Parole Act 2002, s 107M(1) (Appellant's Bundle at 115). A CCO for a care recipient no longer subject to the criminal justice system may only be cancelled upon the application of the care co-ordinator: IDCCR, s 84 (Appellant's Bundle at 269).

119 Parole Act 2002, s 107M(4) ((Appellant's Bundle at 115).

Other potentially impacted rights: ss 9, 19 22, 25(a), 26(2), and 27

Sections 9, 22, 25, 26(1), and 27 do not appear to have any role

64. To breach s 9 requires mistreatment "so out of proportion to the particular circumstances as to cause shock and revulsion" to the community.[120] Such treatment must not just be disproportionate, but "grossly" so.[121] There is no detailed submission, let alone evidence, to establish this threshold is met.

65. Mr R's submissions suggest that the situation in which he finds himself is a matter of arbitrary happenstance in the order in which the ESO, PPO, and CCO applications occurred.[122] But those applications were not driven by the Chief Executive's whim. They were driven by the statutory processes begun by Mr R's offending: the ESO application by his sentence expiry for sexually assaulting his nieces; the PPO application by the end of the ability to have him supervised one-on-one under his ESO while his risk profile required that; his CCO application by the charges filed for his threats and assault at Matawhāiti. Any lack of predictability is due to Mr R's own behaviour rather than the Chief Executive's.

66. Mr R's submissions suggest that it is "a constitutional affront to judicial independence" that the Court has found Mr R's risk of reoffending to be high,[123] which is suggested to be a breach of ss 25(a) and 27 of BORA. That is not so. At each stage of his ESOs' imposition, review, and associated appeals, Mr R has had the benefit of a "fair and public hearing by an independent and impartial court" (though the respondent notes that s 25(a) cannot apply directly to any of those processes because Mr R was not "charged with an offence" at the time of his ESO hearings). Natural justice has been observed at each hearing determining his rights and interests under the ESO, as required by s 27.

67. Mr R's submissions also suggest that s 26(1) is infringed because the ESO is

120 *Taunoa v Attorney-General* [2007] NZSC 70, [2007] NZSC 70 [2008] 1 NZLR 429 at [172] per Blanchard J.

121 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [167].

122 Appellant's Submissions at [56]–[58].

123 Appellant's Submissions at [81].

imposed as a punishment for acts not yet committed.[124] Again, that is not so. Section 26(1) prevents anyone being "liable to conviction" for doing something which did not constitute an offence at the time it was done. An ESO is not a conviction. In any event, to the extent it constitutes a double punishment, it is prompted by the person's earlier convictions.

Section 26(2) is necessarily limited by the nature of the ESO

68. The Crown accepts an ESO by its very nature limits the right against double punishment in s 26(2) of BORA. Because of that limit a "strong justification" is required to make or continue an ESO.

69. However, the breach of s 26(2) exists for every person subject to an ESO. It is not affected by the overlay of Mr R's CCO restrictions. A CCO is not a second penalty.

70. An ESO will justifiably limit s 26(2) when it is proportionate and tailored to a person's risk and needs, and avoids punitive impact to the greatest extent possible. That is so in this case. The combination of an ESO with a CCO has ensured that Mr R's risk can be effectively managed in a low security, unlocked community facility. His management turns on persuasion rather than physical or environmental restraint. The result is that his rights and freedoms are limited less than they would be by both alternatives (likely detention under a secure CCO).

There is no discrimination on a prohibited ground under s 19

71. Section 19 affirms the right to freedom from discrimination on any of the grounds of discrimination listed at s 21 of the Human Rights Act 1993. Those prohibited grounds include "intellectual or psychological disability or impairment".[125] Unlawful discrimination is made up of three parts: (a) differential treatment or effects for a person or group because of a prohibited ground, (b) resulting in material disadvantage, (c) that cannot be justified under s 5 of BORA.[126]

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124 Appellant's Submissions at [86] and [90].

125 Human Rights Act 1993, s 21(1)(h)(iv).

126 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55], [136], and [143] (Respondent's Submissions at 480, 497, 498).

72. Mr R is subject to two regimes at present, which is only possible because he is intellectually disabled. He is treated differently to an offender with a similar risk profile but no intellectual disability. Nevertheless, the respondent submits he is not subject to discrimination in breach of s 19.

73. That is because, as the Appellant's Submissions at [62] illustrate, this argument relies upon a comparator group of intellectually disabled people, with a similar risk profile to Mr R, who have not offended. But offending behaviour is not a prohibited ground of discrimination. Mr R's differential treatment is not due to his intellectual disability: it is due to his offending behaviour, which led to certain consequences through the criminal justice system. Contrary to Mr R's submissions, it is not "pure chance" which determined the type of order available.[127]

Summary

74. The respondent submits that the discretion to confirm an ESO under s 107RA is affected by BORA in the same way the discretion to create an ESO is affected: strong justification is necessary to warrant the limitation of rights inherent in an ESO. If the person is also subject to a CCO, the discretion should be exercised to uphold their liberty interest as much as possible. That is, the least rights-limiting option to achieve the legislative objective of public safety should be taken. A civil regime which does not constitute a double punishment may be preferred in some cases. But that will not inevitably be the case: as the unusual circumstances of Mr R's case show, dual Orders in combination may provide the most rights-enhancing option.

28 June 2023

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UR Jagose KC|RK Thomson
Counsel for the respondent

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

[127] Appellant's Submissions at [69].

Appendix A: Chronology of events related to Mr R's CCO and ESO

Date	Event	Decision citation (where available)	Case on Appeal reference (where available)
1969 – 1973 (approx.)	Reportedly sexually assaulted his younger sister, admitted to Cherry Farm Psychiatric Hospital. After discharge, re-admitted one year later after another alleged sexual assault. At the age of 18, charged with raping a fellow psychiatric care patient, became a special patient at the Lake Alice Hospital National Secure Unit.		
1985 – 1986	Discharged from Lake Alice in 1985. Convicted on two charges of indecent assault, committed for care pursuant to s 118 of the CJA and returned to Lake Alice. Absconded and committed further indecent assaults and attempted sexual violation. Transferred to Porirua Hospital.		
1994	Absconded from Porirua Hospital twice, committing further offences each time. Convicted of three indecent assaults (ordered to come up if called upon on two charges; and 9 months' imprisonment on the third).		
28 June 1995	Indecently assaulted three women on the day of his release from prison. Sentenced to a further 15 months' imprisonment.		
21 June 1996	Sentenced to 9 years' imprisonment for historic rapes and attempted rapes committed in 1985–1986 (his eight- and five-year-old nieces).	*R v R* HC Wellington T137/95, 21 June 1996	CA CoA at 15
March 2003	Diagnosed with an intellectual disability and confirmed to meet the eligibility criteria for RIDCA services.		
21 October 2003	Released on parole to RIDCA supported accommodation.		CA CoA 22
13 – 14	Supervision at RIDCA supported	Resulted in	CA CoA at

January 2005	accommodation decreased; offended the next day, attempted burglary and breach of parole charges.	conviction and application for a CCO	100
24 November 2005	First ten-year ESO imposed by Rodney Hansen J, placed at Te Roopu Taurima O Manukau (a RIDCA supported living residence).	*Corrections v R* HC Auckland CRI-2005-404-125, 24 November 2005	CA CoA at 21
29 November 2005	CCO imposed under s 34 of CPMIP for attempted burglary; extended twice.		See CA CoA at 21
12 June 2007	Committed an indecent act (masturbating at a woman while he was on work experience), ordered to come up for sentence if called upon.		CA CoA at 100
August 2011	CCO discontinued because "no identified rationale for a further extension in his compulsory care order, with little scope for rehabilitation and with the external controls required to manage his risk of re-offending to continue at the end of his order under his Extended Supervision Order." Remains resident at Te Roopu Taurima O Manukau residence as a "civil client".	Specialist Assessor's Review, dated 18 February 2011, at [10.1]	Affidavit of Christina Wilson, Annexure B
13 October 2011	NZPB imposes special conditions, including to comply with the rules of Te Roopu Taurima O Manukau residence Programme.	NZPB Decision Report	Affidavit of Christina Wilson, Annexure C
15 March, 20 May 2015	Breached ESO.		
24 June 2015	Health Assessor Report by Louise Webster.		Not in CoA (referred to in Bakker report, CA CoA at 40)
11 November 2015	Interim ESO imposed by Lang J, including intensive monitoring.		Order itself: CA CoA at 35
14 October 2016	Health Assessor Report by Sonja Bakker.		CA CoA at 38
15 December 2016	Charged with behaving threateningly ($75 reparation ordered at sentencing).		
27 March 2017	**Second 10-year ESO imposed by Edwards J.**	***Corrections v R* [2017] NZHC 559**	**CA CoA at 57**

26 March 2018	Intensive monitoring expires, 7am-7pm EM curfew imposed by Parole Board.		
11 April 2018	IDO and PPO application.		
13 July 2018	IDO imposed by Wylie J, detained at Matawhāiti.	*Corrections v [R]* [2018] NZHC 1733	Not in COA
28 November 2018 and 21 December 2018	First PPO decision finds very high risk of imminent sexual offending. Second PPO decision instructs Corrections to consider seeking an IDCCR Act assessment under s 12 of the Public Safety Act.	*Corrections v R* [2018] NZHC 3106; *Corrections v R (No 2)* [2018] NZHC 3455	CA Add Mat at 3 and 21
1 January 2019	Charged with threats to kill and possession of a weapon, remanded in custody.		
20 March 2019 (hearing 22 November 2018)	Successful appeal against the IDO (because of a 16-day hiatus between the end of intensive monitoring and the application for an IDO).	*R (CA464/2018) v Corrections* [2019] NZCA 60	SC CoA at 63
22 March 2019	IPO under ss 12(2) and 107 of the PSA, to be detained at Matawhāiti (on the papers).	*Corrections v R* [2019] NZHC 536	CA Add Mat at 39
22 March 2019	Found unfit to stand trial, transferred to Hillmorton under s 23(2)(b) of CPMIP until 15 April 2019.	*Police v R* [2019] NZDC 5397	SC CoA at 49; CA Add Mat at 42
15 April 2019	3-year secure care order (the CCO) pursuant to s 25(1)(B) of CPMIP.	No written reasons for decision available	SC CoA at 84
4 December 2019	Judgment confirming PPO application is suspended by the IDCCR s 12(2) detention order.	*Corrections v R* [2019] NZHC 3165	CA Add Mat at 46
30 April 2020	Appeal against second ESO dismissed.	*R v Corrections* [2020] NZCA 126	SC CoA at 54
10 June 2020	Transferred to secure facility in the community [redacted] managed by Emerge Aotearoa. Probation Officer reactivates some ESO conditions, including GPS monitoring of whereabouts condition.	Letter from Probation Officer	SC CoA at 82
10 August 2020	NZPB Decision approving high impact conditions.	NZPB decision	SC CoA at 75
23 February 2021	5-year application to review ESO.		CA CoA at 10
17 May	Health Assessor Report by Paul		CA CoA at 77

2021	Carlyon.		
31 August 2021	**ESO confirmed by Osborne J.**	***Corrections v R (CRI-2021-409-11)* [2021] NZHC 2276**	**SC CoA at 27; CA CoA at 102 (XXM of Paul Carlyon in CA Evidence)**
3 June 2022	CA decision dismisses appeal against ESO review.	*R (CA586/2021) v Corrections* [2022] NZCA 225	SC CoA at 9
5 July 2022	Application for leave to appeal filed.		SC CoA at 2
8 July 2022	CCO extended for two years, Mr R to be in supervised care.	Minute of Judge Hambleton, FAM-2019-009-001614	SC CoA at 85
11 August 2022	NZPB Decision approving high impact conditions.	NZPB decision	Affidavit of Christina Wilson, Annexure L
Late 2022	Mr R moves into supervised care facility.		
11 April 2023	Leave to appeal granted.	*R (SC 64/2022) v Corrections* [2023] NZSC 31	SC CoA at 8
8 July 2024	Mr R's CCO is due to expire.		
27 March 2027	Mr R's ESO is due to expire.		

List of authorities to be cited by Respondent

Statutes

1. Criminal Procedure Act 2011, s 256
2. Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 8A, 20, 23, 24, 25
3. Human Rights Act 1993, s 21
4. Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 6, 7, 9, 26, 28, 29, 46, 47, 56, 57, 58, 59, 60, 61, 62, 63, 64, 77, 84, 85, 111, 112, 113, 148
5. Mental Health (Compulsory Assessment and Treatment) Act 1992
6. Parole Act 2002, ss 15, 15A 16, 33, 107C, 107I, 107IAA, 107JA, 107K, 107M, 107P, 107R, 107RA
7. Public Safety (Public Protection Orders) Act 2014, ss 5, 12, 107, 111

Cases

New Zealand cases

75. *Togia v The General Manager, Rimutaka Prison* HC Wellington CIV-2007-485-358, 28 February 2007
76. *Taunoa v Attorney-General* [2007] NZSC 70, [2007] NZSC 70 [2008] 1 NZLR 429
77. *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA)
78. *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774
79. *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641
80. *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456
81. *H (CA841/2012) v R* [2013] NZCA 628, (2013) 26 CRNZ 628
82. *Chief Executive of the Department of Corrections v Martin* [2016] NZHC 275

83. *Patterson v R* [2017] NZCA 66

84. *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83

85. *J v Attorney-General* [2018] NZHC 1209

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

87. *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218

88. *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551

89. *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484

90. *Care Co-ordinator v R* [2020] NZCA 574

91. *Wilson v Department of Corrections* [2022] NZCA 289

92. *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507

93. *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611

International cases

94. *Jones v United States* 463 US 354 (1983)

95. *Allen v Illinois* 478 US 364 (1986)

96. *Kansas v Hendricks* 521 US 346 (1997)

97. *Winko v British Columbia* (1999) 175 DLR (4th) 193 (SCC)

98. *Anderson v Scottish Ministers* [2003] 2 AC 602 (PC)

99. *Hutchison Reid v United Kingdom* (2003) 37 EHRR 211

100. *Pinet v St Thomas Psychiatric Hospital* 2004 SCC 21, [2004] 1 SCR 528

Texts

101. Warren Brookbanks "New Zealand's Intellectual Disability (Compulsory Care) Legislation" in K Diesfeld and I Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment*

(Ashgate, Portmouth, 2003)

Other

102. Intellectual Disability (Compulsory Care) Bill (329 –1) (explanatory note)

103. Intellectual Disability (Compulsory Care and Rehabilitation) Bill (third reading) 612 NZPD 9583)