IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-756
[2019] NZHC 3126

IN THE MATTER OF	New Zealand Bill of Rights Act 1990, s 26
BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Applicant
AND	MARK DAVID CHISNALL Respondent
	ATTORNEY-GENERAL Respondent to Cross-Application

Hearing: 24 and 25 June 2019

Counsel: No appearance for Applicant
B Keith and G Edgeler for Respondent
A Todd and M McKillop for Respondent to Cross-Application

28 November 2019

JUDGMENT OF WHATA J

This judgment was delivered by me on 28 November 2019 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Crown Law, Wellington

[1] Mr Chisnall applies for declarations of inconsistency with various rights affirmed by the New Zealand Bill of Rights Act 1990 (BORA) in respect of the extended supervision order (ESO) and public protection order (PPO) regimes.[1] These regimes enable the detention of persons who have committed serious sexual or violence offences after the completion of their sentences for that offending. The application does not relate to any specific ESO or PPO. Rather, Mr Chisnall seeks to impugn the powers enabling such orders. The Attorney-General opposes both applications, including on the basis that Mr Chisnall does not have standing.

[2] As set out by the Court of Appeal in *Taylor*, to find inconsistency, "the Court must identify a limitation upon a protected right and find the two incompatible, in the sense that the limitation cannot be justified in a free and democratic society".[2] The BORA rights in focus affirm two immunities, the immunity from increased penalty and the immunity from second penalty. The central issue to resolve therefore is whether an ESO and/or a PPO impose an unjustifiable penalty.

The questions

[3] Given this, the following questions are raised by Mr Chisnall's application:

(a) Does Mr Chisnall have standing to make an application for inconsistency?

(b) What is a penalty?

(c) Is an ESO a penalty?

(d) If so, is an ESO justified per s 5 BORA?

(e) Is a PPO a penalty?

(f) If so, is a PPO justified per s 5 BORA?

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1 The ESO regime is set out in the Parole Act 2002 at sections [107A]-[107Z]. The PPO regime is set out in the Public Safety (Public Protection Orders) Act 2014

2 *Taylor v Attorney-General* [2017] NZCA at [6].

(g) Are there other unjustified rights infringements?

(h) Should declarations of inconsistency be made?

Declarations sought

[4] Mr Chisnall has sought the following specific declarations:

1. Declaring that section 13(1) of the Public Safety (Public Protection Orders) Act is inconsistent with section 26(1) of the New Zealand Bill of Rights Act, as informed by Articles 15 and 26 of the International Covenant on Civil and Political Rights.

2. Declaring that section 13(1) of the Public Safety (Public Protection Orders) Act is inconsistent with section 26(2) of the New Zealand Bill of Rights Act, as informed by Articles 14(7) and 26 of the International Covenant on Civil and Political Rights.

3. Declaring that the manner and method of obtaining information for a psychological report in support of the application for a public protection order breached, and the making of a public protection order against Mr Chisnall would breach, his rights under sections 9, 18, 22, 23(5), 24(e) 25(a), (c) and (d), and 27 of the New Zealand Bill of Rights Act 1990, as informed by Articles 9, 10, 12, 14, and 26 of the International Covenant on Civil and Political Rights.

4. Declaring that section 107I(2) of the Parole Act 2002 is inconsistent with section 26(1) of the New Zealand Bill of Rights Act, as informed by Articles 15 and 26 of the International Covenant on Civil and Political Rights.

5. Declaring that section 107I(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act, as informed by Articles 14(7) and 26 of the International Covenant on Civil and Political Rights.

6. Declaring that the manner and method of obtaining information for a psychological report in support of the application for an extended supervision order breached, and the making of a public protection order against Mr Chisnall would breach, his rights under sections 18, 22, 23(5), 25(a), (c) and (d), and 27 of the New Zealand Bill of Rights Act 1990, and Articles 9, 10, 12, 14, and 26 of the International Covenant on Civil and Political Rights.

[5] As noted, my judgment will focus on the applications for declarations 2 and 5.

Standing

[6] Mr Chisnall has multiple convictions for very serious sexual offending. He was due for release on 27 April 2016, having served a full 11-year sentence for two counts of sexual violation by rape. On 15 April 2016, the Chief Executive Officer applied for a PPO or, in the alternative, an ESO. An interim detention order was granted.[3] Mr Chisnall's appeals against the interim order to the Court of Appeal and the Supreme Court were not successful. Both Courts concluded that an interim detention order was necessary to meet the very high risk of imminent serious sexual offending posed by Mr Chisnall's release.[4] The Courts also found that the risk to public safety could not be met by less restrictive options.

[7] The High Court then made a final PPO on 14 December 2017. The Court was satisfied that Mr Chisnall posed a very high risk of imminent serious sexual offending were he to be released into the community unsupervised.[5] Further, the Court was not persuaded that the ESO with intensive monitoring would be sufficient to mitigate the very high risk that Mr Chisnall posed.[6] On 23 October 2019, the Court of Appeal quashed the PPO.[7] The Court found that the High Court approached the availability of an ESO in the wrong way. The Court stated that, notwithstanding that the risk threshold for a PPO had been established, the statutory regime envisages that the Court could be satisfied that the (lesser) controls provided by an ESO may nevertheless be sufficient to mitigate the risk. Mr Chisnall is now subject to an interim protection order pending reconsideration of the PPO application by the High Court.

[8] Given this background, as Mr Chisnall appears to qualify for detention pursuant to either the PPO regime or the ESO regime, he has standing to make the present applications. In short, he has a legitimate interest in the assessment of the rights consistency of those regimes.

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3 *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 784 [*Chisnall* HC].

4 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 [*Chisnall CA* (2016)]; *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 [*Chisnall SC*].

5 *Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 3120 at [114].

6 At [119].

7 *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 [*Chisnall* CA (2019)]. This decision was brought to my attention after the hearing by Counsel for Mr Chisnall. An opportunity to submit on it was not sought by the parties.

Background

[9] The ESO and PPO regimes enable (among other things) the supervision and detention of persons who, following completion of a sentence for sexual or violent offending, are assessed as presenting a high risk of sexual offending or a very high risk of violent offending. They form part of a matrix of regimes that provide for the management of persons who are considered to present a danger to the public. This matrix includes preventive detention; an indeterminate sentence which may be imposed in respect of sexual or violent offenders who are likely to commit another qualifying offence if released at the expiry date. [8]

[10] It also includes the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act). Those Acts enable detention in cases of dangerous persons with specified mental health disorders and preventive measures for dangerous persons with specified intellectual disabilities. The ESO and PPO regimes then provide for the management of a residual category of dangerous persons who present with certain risk characteristics but do not fall within the scope of preventive detention at the time of sentence, MHCAT Act or the IDCCR Act.

[11] The legislative background to the ESO and PPO regimes is addressed below at [72]- [82] and [129]-[133].

BORA

[12] Mr Chisnall's primary claim is that the ESO and PPO regimes are inconsistent with the right affirmed by s 26(2). His secondary claim is that, as a corollary of that inconsistency, the regimes also infringe ss 9, 18, 22, 23(5), 24(e), 25(a), (c) and (d) and s 27 of the BORA. The Attorney-General, however, frames the key issues as follows:

(a) Whether the powers to make ESOs and PPOs are prima facie inconsistent with the BORA and cannot be justified; and

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[8] First introduced in 1954 per the Criminal Justice Act 1954, s 24.

(b) Whether the retrospective effect (if any) of the ESO and PPO is prima facie inconsistent with s 26 and cannot be justified.

[13] With the benefit of full argument, the central issue raised by Mr Chisnall is whether the ESO and PPO regimes unjustifiably infringe the rights affirmed by s 25(g) and s 26(2). The extent to which those regimes otherwise infringe other rights affirmed by BORA is secondary to this issue, which I address briefly below at [150]-[153]. Given this, I focus on the rights affirmed by ss 25(g) and 26(2) and their significance.

Immunity from increased and second penalty

[14] Section 25(g) states:

> **25. Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (g) The right if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of a lesser penalty.

[15] Section 26 states:

> **26 Retroactive penalties and double jeopardy**
>
> (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
>
> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[16] Section 26(1) is not engaged by an ESO or PPO because those regimes do not involve a further "conviction".

[17] The Attorney-General refers to breach of s 25(g) as an "increased penalty" and to breach of s 26(2) as a "second penalty". I agree that is the outcome of a breach of those sections, but I prefer a front-end description, that is to describe the rights

affirmed by those sections as providing an immunity from increased and/or second penalty.

[18] The significance of the immunity from increased penalty was explained by Gault J (speaking for himself, Richardson P and Keith J) in *Poumako*.[9] He said:

> [6] To summarise at this point:
>
> - The principle against retrospective criminal liability and retrospective increased penalties is well established.
>
> - Its fundamental character does not allow for any "reasonable limits" (although questions may arise about the extent of a criminal proscription as appears in the controversial litigation about marital rape) ...; and
>
> - The reasons for the principle in terms of prior direction or deterrence and the consequent possibility of knowing compliance, and justice, in not being subject to unknowable penalties, are long established and impregnable….

[19] Further emphasising the impregnable nature of this immunity, Gault J also observed:[10]

> … it is difficult to imagine any possible justification for the retrospective changes in penalty.

[20] Similarly, as Thomas J also explained in the same case, though dealing more generally with retrospective legislation:[11]

> - [Retrospective legislation] is contrary to "a constitutive principle of the rule of law – there can be no crime without law. Dicey in his famous *Introduction to the Study of the Law of Constitution* (10th ed, 1959) at 102 and 108, was firm in the view that the principle a person should only be convicted and punished on the basis of existing law was a major component of the rule of law… But Professors Wade and Bradley can have the last word. In *Constitutional and Administrative Law* (10th ed, 1985) at p 614 the distinguished authors simply confirm that retrospective legislation is repugnant to the rule of law.

[21] Reinforcing its normative force, the BORA affirms New Zealand's commitment to the International Covenant on Civil and Political Rights 1966

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9 *R v Poumako* [2000] 2 NZLR 695 (CA).
10 At [33].
11 At [75].

(ICCPR). Section 25(g) in fact broadly corresponds to art 15 of the ICCPR.[12] That article states:

> **Article 15**
>
> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[22] The immunity from retrospective increased penalty affirmed by art 15(1) of the ICCPR was said by Gault, Keith and McGrath JJ in *Pora* to be:[13]

> …not subject to any possible limit (as for instance are the rights to freedom of expression and freedom of association) and is not subject to derogation in time of emergency threatening the life of the nation (again unlike those freedoms and also other rights in respect of criminal proceedings).

[23] This right was similarly described by Elias CJ and Keith J as non-derogable in *R v Mist*.[14] Furthermore, as Keith J (speaking for himself and Elias CJ) also explained in *Mist*:

> [29] While a primary rationale of the principle of non-retrospectivity is accessibility and foreseeability with deterrence as a consequence, it has other rationales. One is simple fairness: the state, through its institutions, should make determinations of criminal guilt and impose serious penalties only by reference to the law in force and applicable … to the accused at the time of the crime.

[24] Like s 25(g), the normative worth of the immunity afforded by s 26(2) is reinforced by its correspondence to art 14.7 of the ICCPR, which states:

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12 Section 25(g) was designed to give effect to art 15 – see *R v Mist* [2005] 2 NZLR 791 (CA), at [15] and [16].

13 *R v Pora* [2001] 2 NZLR 37 at [79].

14 *R v Mist,* above n 12 at [13]. Article 4.1 provides for derogation of rights in times of public emergency. Article 4.2 provides that no derogation of art 15 (among others) may be made under the provision.

> **Article 14**
>
> …
>
> (7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[25] Furthermore, insofar as s 26(2) provides immunity from a retroactive or retrospective second penalty, it is similarly impregnable. Section 26(2) is also, however, directed to a broader principle, namely double punishment, which may include but is not limited to retroactive penalty. As the Court of Appeal said in *Daniels*, it is "concerned with criminal process and prevents the punishment function of that process being revisited"[15] and "it accords with the long standing common law principles of autrefois acquit or autrefois convict".[16]

[26] The facts in *Daniels* are illustrative of the prospective effect of the immunity afforded by s 26(2) and its significance. In that case, Mr Daniels had been convicted of rape and sentenced to nine years' imprisonment. The victim subsequently issued civil proceedings seeking exemplary damages. At issue was whether s 26(2) provided immunity to such proceedings. The majority decided that it did not provide an automatic immunity to the claim for exemplary damages, because it applied only to criminal proceedings. However, they concluded that the avoidance of double punishment nevertheless operated to preclude the civil claim once it was accepted that exemplary damages are punitive.[17]

[27] Thomas J, in dissent, would not impose an absolute bar on a claim for exemplary damages. In his view, s 26(2) was restricted to criminal proceedings only. His observations about the normative and prescriptive significance of the immunity from double punishment, however, resonate in the present context. He said:[18]

> Section 26(2) of the New Zealand Bill of Rights Act 1990 provides that no one who has been finally acquitted or convicted of an offence shall be tried or punished for it again. It affirms two elementary principles of the criminal law; one, that a person cannot be put in jeopardy of being prosecuted for the same

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15 *Daniels* [1998] 3 NZLR 22 (CA) at 33.
16 At 34.
17 At 47.
18 At 57.

> offence a second time, and, the other, that no one shall be punished for the same offence twice.
>
> Both principles have their roots in the history of criminal law and reflect notions of criminal justice which are deeply ingrained in the social consciousness of the community. The idea underlying protection against double jeopardy is that the state, with all its resources and power, is not to be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him or her to embarrassment, expense and ordeal and compelling them to live in a continuing state of anxiety, as well as enhancing the possibility that, even though innocent, they may be found guilty. See *Green v United States* 355 US 184 (1957), per Black J at pp 187 – 188. The principle of protection against double punishment prevents a person from suffering the patent injustice of being punished twice for the same offence.

[28] As Thomas J also noted:[19]

> Double jeopardy and double punishment remain an affront to common notions of fairness.

[29] Thus, contrary to the submission otherwise by Ms Todd,[20] s 26(2) provides immunity from "prospective" as well as retrospective second penalty. This immunity, however, does not appear to carry the same prescriptive weight as the immunity from retrospective penalty. Unlike art 15, the right affirmed by art 14 is not listed as a non-derogable right. I return to the significance of this below.

Justification

[30] Section 5 of BORA sets the frame for the justification inquiry. It states:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[31] Mr Keith submits that given the impregnability and non-derogability of the immunity to retrospective penalty affirmed by s 25(g) and s 26(2), there can be no justification for breach of them. But as Ms Todd submits, any irrebuttable assumption of that kind is irreconcilable with the plain meaning and effect of s 5. Rather, as I will now explain, the assessment of justification is a key step in the interpretative process.

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19 At 58.

20 I return to this issue below at [84].

Interpreting BORA

[32] While the methodology to be used to interpret BORA to assess rights consistency is not without some controversy,[21] the approach adopted by the majority in *Hansen* appears now to be the orthodoxy in circumstances where the intention of Parliament is clear.[22] As Tipping J summarised in *Hansen*:[23]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[33] As to justification per s 5, he also stated:

> **[**104**]** This approach can be said to raise the following issues:
>
> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b)
>
> (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

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21 See comments by Elias CJ in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [6].
22 *R v Hansen*, above n 21.
23 At [92].

[34] And further:

> [123] Whether a limit on a right or freedom is justified under s 5 is essentially an inquiry into whether a justified end is achieved by proportionate means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub-issues inform that ultimate head issue. They include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom. The Court's function is not immutably to substitute its own view for that of the legislature. If the Court agrees with the legislature that the limit is justified, no further issue arises. If the Court does not agree, it must nevertheless ask itself whether the legislature was entitled, to use Lord Hoffmann's word, to come to the conclusion under challenge. It is only if Parliament was not so entitled that the Court should find the limit to be unjustified.
>
> [124] In this way and to this extent the Court's function is one of review. It is not one of directly substituting the Court's own judgment. But the more intensely it is appropriate to review Parliament's appreciation of the matter, the closer the Court's role will approach a simple substitution of its own view. This is the regime under which the Courts manage the ever-present potential for tension between democratically elected representatives and unelected Judges concerning when and to what extent a parliamentary majority may limit individual rights and freedoms.

[35] Those who claim the limit is reasonable and justified carry the onus to satisfy the Court that this is demonstrably so.[24]

[36] In cases, however, where there is no meaning that was obviously intended by Parliament, the approach taken by the Court of Appeal in *Moonen* may be preferable.[25] In short, this involves first identifying the scope of the relevant right. It then effectively involves engagement with s 6 at steps 1 and 2 of *Hansen*, so as to identify the meaning which constitutes the least possible limitation on the right in question, before moving to the justification assessment.[26] For reasons explained below, I have preferred this approach to the interpretation of the PPO regime.

What is a penalty?

[37] While several decisions across multiple jurisdictions were tabled by counsel for my consideration,[27] three judgments – one home grown, and two from a very

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24 At [108].

25 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [17]-[19].

26 At [17].

27 Including *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1 (SC); *R v Rodgers* [2006] 1 SCR 554; *Engel v Netherlands* (1979-1980) 1 EHRR 647; *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 340; *MB v Secretary of State for Home Department* [2008] 1 AC 440

distant jurisdictions – provide a most helpful frame for the assessment of whether a legislative scheme imposes a penalty: *Belcher v Chief Executive Officer of the Department of Corrections*[28], *Ilnseher*[29] and *KRJ.*[30] The Crown accepts *Belcher* is persuasive authority about the nature and effect of the ESO regime. *Ilnseher* provides a recent statement by the European Court of Human Rights (ECHR) on the application of arts 5 and 7 of the European Convention of Human Rights to preventive detention. As I will explain below, those articles are comparable to ss 22 and 25(g) of the BORA. *KRJ*, a decision of the Canadian Supreme Court, identified the type of punishment that might qualify as a penalty in the present context.

Belcher

[38] The Court of Appeal in *Belcher* addressed the effect of the ESO regime, as it was in 2007. Mr Belcher was the subject of an application for an ESO. He sought a declaration that the relevant provisions of the Parole Act 2002 relating to ESOs were unjustifiably inconsistent with the BORA. The Court referred to a policy paper for the Cabinet Social Development Committee, wherein the Minister of Justice identified a "critical gap in the ability to monitor offenders beyond the end of parole", noting particularly concerns about a group of child sex offenders. The same paper noted that the scheme was likely to be contentious insofar as it encroached on civil liberties and had retrospective effect. The Court also referred to the advice of the Attorney-General who said that:

> 14. … the provisions of the bill that allow for the more significant restrictions of liberty (i.e. significant restrictions of movement and association, electronic monitoring, and 12 months home detention) available under the ESO to be (retrospectively) imposed on transitional eligible offenders and current inmates and parolees, constitute a prima facie infringement of s 26(2) of the Bill of Rights Act that is not capable of justification under s 5 of the Act.

[39] Having summarised the ESO scheme as it then was, the Court concluded that an ESO was punitive, having regard to the following factors:

(HL); *Kansas v Hendricks* 521 US 346; 138 L Ed 2d 501 (1997); *Vinter v United Kingdom* (2013) 63 EHRR 1; *R v Vinter* [2009] EWCA Crim 1399; *R v Bamber* [2009] EWCA Crim 962; *R v Moore* [2009] EWCA Crim 555; *James, Wells and Lee v United Kingdom* (2013) 56 EHRR 12; and *R (James) v Secretary of State* [2009] UKHL 22.

28 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

29 *Ilnseher v Germany* [2018] ECHR 991 (Grand Chamber).

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

[47] …

(a) The triggering event is a criminal conviction;

(b) The respondent to an ESO application is, throughout the ESO legislation, referred to as "the offender";

(c) Eligibility for an ESO (in non-transitional cases) depends upon an application either before sentence expiry date or while the offender is still subject to release conditions;

(d) An application for an ESO is made to the "the sentencing court";

(e) Where an application is made, a summons may be issued to secure the attendance of the offender and the provisions of ss 24 – 25 of the Summary Proceedings Act 1957 apply (s 107G(2));

(f) Alternatively, the appearance of the offender can be secured by the issue of a warrant for the offender's arrest (s 107G(3)), in which case ss 22 and 23 of the Summary Proceedings Act and s 316 of the Crimes Act apply;

(g) The offender must be present at the hearing (s 107G(4));

(h) If the proceedings are adjourned, the offender, if not already in custody, can be remanded to the new date at large, on bail or in custody (although only for periods of up to eight days (s 107G(5) – (6));

(i) Sections 71, 201, 203, 204 and 206 of the Summary Proceedings Act, ss 138 – 141 of the Criminal Justice Act 1985 and the Costs in Criminal Cases Act 1967 apply to applications for ESOs (s 107G(7) – (10));

(j) Victims are to be notified of hearings and may make submissions in writing or, with the leave of the Court, orally (s 107H(5));

(k) The consequences of an ESO are in effect a subset of the sanctions which can be imposed on offenders and extend to detention for up to 12 months (in the form of home detention) (ss 107J and 107K);

(l) The right of appeal is borrowed from the Crimes Act (s 107R);

(m) It is an offence to breach the terms of an ESO and an offender is liable to up to two years' imprisonment; and

(n) Applications for ESOs are classed as being criminal for the purposes of the Legal Services Act 2000 (s 107X).

[40] The Court also noted:

[48] We do not see it as decisive that the aim of the ESO scheme is to reduce offending and that the incidents of an ESO order are associated with this aim as opposed to the direct sanctioning of the offender for purposes of

> denunciation, deterrence or holding to account. The same is true (or partly true) of many criminal law sanctions (for instance, preventive detention and supervision) which are nonetheless plainly penalties.

[41] The Court thus concluded:

> [49] We recognise that the authorities relied on by the Crown could support a different conclusion. But, in the end, we have concluded that the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour amounts to punishment and thus engages ss 25 and 26 of the NZBORA. We see this approach as more properly representative of our legal tradition. If the imposition of such sanctions is truly in the public interest, then justification under s 5 is available and, in any event, there is the ability of the legislature to override ss 25 and 26.

[42] The Court also found that the ESO was intentionally retrospective. Nevertheless, the Court did not think it was able to determine whether a declaration of inconsistency should be made and reserved leave for further consideration of that issue. It transpired that the Court did not in the end make a declaration because it did not consider it could make such a declaration in criminal proceedings.[31]

Ilnseher

[43] In *Ilnseher*, the ECHR found that the preventive detention of Mr Ilnseher did not infringe arts 5(1) and 7 of the European Convention of Human Rights. Those articles broadly correspond to ss 22, 25(g) and 26(2) of the BORA respectively. Article 5(1) states:

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to

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[31] *Belcher v Chief Executive of the Department of Corrections (No. 2)* [2007] NZCA 174, at [17].

prevent his committing an offence or fleeing after having done so

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[44] Article 7 states:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised norms.

[45] The Court said that, insofar as concerns art 5(1), one of the proper grounds for preventive detention was identified, in that case, namely an "unsound mind". The Court observed that "unsound mind" need not be co-extensive with domestic law relating to mental disorders.[32] Mr Ilnseher suffered from persistent sexual sadism, so this ground was satisfied. In addition, the Court found that the detention was necessary and effected in an appropriate institution for mental health patients;[33] that is an institution with an individualised therapy programme.[34] The Court therefore concluded:[35]

> Given … the domestic courts established a considerable danger for the individuals concerned of becoming the victims of one of the most serious offences punishable … the Court is satisfied that the applicant's deprivation of liberty had also been shown to have been necessary in the circumstances.

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32 From [145].
33 At [167]-[168].
34 At [167]-[168].
35 At [168].

[46] In relation to art 7, the Court set out some key principles as follows:[36]

(a) Article 7 should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

(b) It is necessary to go behind appearances and assess whether a particular measure amounts in substance to a "penalty".

(c) Whether the measure is a penalty is informed by 'whether the measure in question was imposed following conviction for a "criminal offence"'.

(d) Other relevant factors include the nature and purpose of the measure, the procedures involved in its making and implementation, and its severity.

(e) The specific conditions of the execution of the measure in question may be relevant in terms of the assessment of the nature, purpose and severity of that measure.

(f) Some aspects are static, for example, whether the measure in question was imposed following conviction. In contrast, the nature and purpose of the measure and its severity are dynamic; and the actual way the measure was executed throughout the period of detention must therefore be taken into consideration.

[47] In Mr Ilnseher's case, the preventive detention was extended because of and with a view to treating a disorder so that it was not a penalty.[37] It was also relevant that the domestic regime had made a clear distinction between preventive detention for a therapeutic purpose and the imposition of a penalty. This was contrasted to an earlier

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36 At [204]–[208].
37 At [212]-[213].

domestic position, where the detention was effected in an ordinary prison in a separate wing.[38]

[48] In finding that Mr Ilnseher's detention was not a penalty, the Court observed that:

(a) The treatment of Mr Ilnseher was aimed at reducing the threat persons pose to the public to such an extent that the detention may be terminated as soon as possible.[39]

(b) Preventive detention could only be ordered under a new precondition – namely, he was found to suffer from a mental disorder and this condition was "independent of the initial sanction imposed for a criminal offence."[40]

(c) The medical and therapeutic provision was central to the specific measures of care provided to the applicant. This fact altered the nature and purpose of the detention of persons such as the applicant and transformed it into a measure focused on the medical and therapeutic treatment of persons with a criminal history.[41]

(d) By contrast, a preventive detention "not executed with a view to treating the detainee's mental disorder, even if implemented in accordance with the new legislative framework, still constitutes a penalty…" [42]

(e) The length of the detention was not decisive because release was dependent on the assessment of risk because of a mental disorder and subject to judicial reviews.

[49] The Court concluded:

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38 Referring to *M v Germany* [2009] ECHR 49.
39 At [223].
40 At [225]-[226].
41 At [227].
42 At [228].

> 236. In view of the foregoing considerations, the Court, having assessed the relevant factors in their entirety and making its own assessment, considers that the preventive detention implemented in accordance with the new legislative framework in the applicant's case during the period here at issue can no longer be classified as a penalty within the meaning of Article 7 § 1. The applicant's preventive detention was imposed because of and with a view to the need to treat his mental disorder, having regard to his criminal history. The Court accepts that the nature and purpose of his preventive detention, in particular, was substantially different from those of ordinary preventive detention executed irrespective of a mental disorder. The punitive element of preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances that the measure was no longer a penalty.

KRJ

[50] The Supreme Court in *KRJ* was tasked with the assessment of whether a restraint on contact and/or internet access qualified as unjustified retrospective punishment. The Court was concerned with the potential infringement of Section 11(i) of the Canadian Charter of Rights and Freedoms. This section corresponds to s 25(g) of the BORA. The majority found that a measure constitutes a punishment if it is a consequence of conviction that forms part of the arsenal of sanctions to which a accused may be liable in respect of the offence, and either it is imposed in furtherance of the purposes and principles of sentencing or it has a significant impact on the defendant's liberty.[43] The Court concluded that the retrospective imposition of a restraint on contact and on internet use was punishment. It found however that the restraint on internet use was justified.[44]

Summary

[51] With the assistance of the foregoing, I consider that the following factors are relevant to whether a measure may qualify as a penalty:

(a) The measure is imposed following a conviction;

(b) The measure forms part of an arsenal of sanctions imposed in furtherance of sentencing purposes and principles and/or has a significant impact on the liberty of the person;

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43 *KRJ,* above n 30 at [41].
44 At [114].

(c) The purpose of the measure is punitive or partially punitive;

(d) The process used to impose the measure is a criminal process;

(e) The measure is given effect to in a prison or a prison-like institution or may result in imprisonment;

(f) The measure is non-therapeutic or not implemented in a therapeutic way;

(g) The severity of the conditions of the measure.

The ESO regime

[52] To evaluate the rights consistency of the ESO and PPO regimes, it is necessary to examine the applicable statutory schemes in depth. However, while each regime overlaps insofar as they apply broadly to the same cohort of qualifying persons, their origins, procedure and effect are sufficiently distinct to warrant separate consideration. I therefore deal first with the application in relation to the ESO regime.

Purpose

[53] The ESO regime is part of the Parole Act 2002, the purpose of which is "to reform the law relating to the release from detention of offenders serving sentences of imprisonment, and to replace the provisions of Parts 4 and 6 of the Criminal Justice Act 1985."[45] Section 107I also states that for ESOs specifically, the purpose is "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."

[45] Section 3.

Scope

[54] Only "eligible offenders" as defined at s 107C may be subject to an ESO. Most relevantly:

> **107C Meaning of eligible offender**
>
> (1) In this Part, eligible offender means an offender who—
>
> (a) is not subject to an indeterminate sentence but is a person who has been sentenced to imprisonment for a relevant offence (and that sentence has not been quashed or otherwise set aside) and has not ceased, since his or her latest conviction for a relevant offence (that has not been quashed or otherwise set aside), to be subject to any or all of the following:
>
> (i) a sentence of imprisonment (whether for a relevant offence or otherwise):
>
> (ii) release conditions (whether suspended or not):
>
> (iii) an extended supervision order; ….

[55] Further:

> (2) To avoid doubt, and to confirm the retrospective application of this provision, despite any enactment or rule of law, an offender may be an eligible offender even if he or she committed a relevant offence, was most recently convicted, or became subject to release conditions or an extended supervision order before this Part and any amendments to it came into force.

[56] The meaning of "relevant offence" is defined in s 107B and includes a wide range of sexual and violence offences set out in the Crimes Act 1961.

[57] The offender must also display or possess several "high risk" or "very high risk" behavioural characteristics. These are stated in s 107IAA:

> (1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that the offender—
>
> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and

(d) displays either or both of the following:

(i) a lack of acceptance of responsibility or remorse for past offending:

(ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

(2) A court may determine that there is a very high risk that an eligible offender will commit a relevant violent offence only if it is satisfied that the offender—

(a) has a severe disturbance in behavioural functioning established by evidence of each of the following characteristics:

(i) intense drive, desires, or urges to commit acts of violence; and

(ii) extreme aggressive volatility; and

(iii) persistent harbouring of vengeful intentions towards 1 or more other persons; and

(b) either—

(i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or

(ii) has limited self-regulatory capacity; and

(c) displays an absence of understanding for or concern about the impact of his or her violence on actual or potential victims.

Effect

[58] Conditions of an ESO may include standard release and special conditions. Standard release conditions include:[46]

(a) Reporting in person to a probation officer;

(b) Prior written consent of a probation officer to change residential address;

[46] Section 107.

(c) The offender must not reside at any address at which a probation officer has directed the offender not to reside;

(d) The offender must not leave New Zealand;

(e) If a probation officer directs, the offender must provide biometric information;

(f) The offender must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer;

(g) Non-association with persons under 16 or any victim of the offence.

[59] Special conditions may be imposed by the sentencing court on an interim basis and by the Parole Board on the application of the Chief Executive.[47] These may include conditions about residential restrictions, participation in a programme, prohibiting consumption of drugs and alcohol, prohibition on entering specified areas, and electronic monitoring.[48]

[60] When the Chief Executive makes an application for an ESO, they may also apply to the sentencing court for an intensive monitoring condition (IMC). This type of condition may also be imposed by the Parole Board. An IMC is a condition requiring an offender to submit to being accompanied and monitored up to 24 hours a day.[49]

[61] Section 107T makes it an offence to breach an ESO:

> An offender who is subject to an extended supervision order or interim supervision order and who breaches, without reasonable excuse, any conditions attaching to that order commits an offence and is liable on conviction to imprisonment for a term not exceeding 2 years.

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47 Sections 107IA and 107K.
48 See s 15.
49 Section 107IAC(2).

Process of imposing an ESO

[62] An application for an ESO is made to a "sentencing court" by the Chief Executive of Corrections, pursuant to s 107F:[50] It must be accompanied by a health assessor's report, as defined in s 4 of the Sentencing Act 2002.

[63] Subsections (2A) and (3) then set out the requirements for a health assessor report:

> (2A) Every health assessor's report must address one or both of the following questions:
>
> (a) whether—
>
> (i) the offender displays each of the traits and behavioural characteristics specified in section 107IAA(1); and
>
> (ii) there is a high risk that the offender will in future commit a relevant sexual offence.
>
> (b) whether—
>
> (i) the offender displays each of the behavioural characteristics specified in section 107IAA(2); and
>
> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.
>
> (2) To avoid doubt, in addressing any matter to be referred to in the health assessor's report, the health assessor may take into account any statement of the offender or any other person concerning any conduct of the offender, whether or not that conduct constitutes an offence and whether or not the offender has been charged with, or convicted of, an offence in respect of that conduct.

[64] Before an application for an ESO is finally determined, an interim supervision order (ISO) may be imposed.[51] This may include standard or special release conditions.

[65] The procedure for the application for an ESO is set out in s 107G. The Chief Executive must ensure the offender who is the subject of the application is served with a copy of the application, the health assessor's report, any affidavits accompanying

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50 See s 107I.
51 Section 107FA.

the application, and a notice setting out the procedure and the offender's rights in terms of the application as soon as practicable after the application has been made.[52]

[66] An offender who is the subject of an ESO application must be present at the hearing of the application.[53] A Judge, Registrar, Justice, or Community Magistrate may issue a summons to an offender about whom an ESO application has been made, while a Judge may issue a warrant for the arrest of an offender if they are of the opinion it is necessary to compel the offender's attendance. [54] The Court is also empowered to bail an offender pending and during the ESO hearing.[55]

[67] Subsections 107G(7) (11) incorporate various provisions of the Criminal Procedure Act 2011 to deal with the management of criminal records, contempt of court, procedural irregularity, the content of summons, warrants or other forms, and suppression. The Costs in Criminal Cases Act 1967 also applies.

[68] Subsections 107I(2)-(5) then govern the process for making an ESO:

> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> (i) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.
>
> (3) To avoid doubt, a sentencing court may make an extended supervision order in relation to an offender who was, at the time the application for the order was made, an eligible offender, even if, by the time the order is made, the offender has ceased to be an eligible offender.
>
> (4) Every extended supervision order must state the term of the order, which may not exceed 10 years.

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52 Section 107G (1).
53 Section 107G (4).
54 Section 107G (2)-(3).
55 Section 107G (5)-(6).

(5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—

(a) the level of risk posed by the offender; and

(b) the seriousness of the harm that might be caused to victims; and

(c) the likely duration of the risk.

Rehabilitative provisions

[69] The Parole Act expressly provides for rehabilitation while subject to an ESO. As noted, a standard condition may be imposed so that the offender must take part in a rehabilitative and reintegrative needs assessment when directed to do so by a probation officer. Furthermore, under s 107K, as mentioned, the Board may impose special conditions onto an offender subject to an ESO. These conditions can include, as per s 15(3)(b), a condition "requiring the offender to participate in a programme (as defined in s 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender."

Review and release conditions

[70] Section 107RA sets out the review requirements for ESOs. In summary, the object of the review is to assess the risk presented by the offender. To this end, the ESO must be reviewed, if an offender has not ceased to be subject to an extended supervision order since first becoming subject to an ESO, on the date that is 15 years after the date on which the first ESO commenced; and thereafter, 5 years after the imposition of any and each new ESO.[56] Following the review, the Court must either confirm the order or cancel it. The Court may only confirm the order if, based on the matters set out in s 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.

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56 Section 107RA.

[71] Furthermore, either the offender subject to the ESO or the Chief Executive can also apply to have the order cancelled at any time on the grounds that the offender poses neither a high risk of committing a relevant sexual offence, nor a very high risk of committing a relevant violent offence, within the remaining term of the order.[57]

Parliamentary materials

[72] Save in two respects, I have not found it necessary to rely on the parliamentary materials for assistance. It is evident that little if any consideration was given to a civil ESO regime and the risk of recidivism appears to have been largely assumed. I otherwise consider that the Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 (PSA) broadly speak for themselves. However, given the emphasis placed on some of the background materials by the Attorney-General, I make the following observations.

[73] The protective object and potentially punitive effect of ESOs is identified in various parliamentary materials in the lead up to the inception of the ESO regime, including Cabinet papers and the report of the Attorney-General, as noted by the Court of Appeal in *Belcher*.[58] I do not repeat reference to them here. The punitive nature of the regime was also identified by the then Attorney-General in his reports to Parliament in 2009 and in 2014. Relevantly, the Attorney-General observed in 2014:[59]

> Double jeopardy arises because the restrictive conditions add a further penalty to the sentence the offender has already served. Many if not most offenders eligible for an ESO would have been eligible at the time of sentencing for an indefinite sentence of preventive detention but either it was not sought or the Court chose not to impose it. In this way the ESO regime constitutes an additional criminal punishment imposed after sentence.

[74] The Attorney-General concluded:

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57 Section 107M.

58 See also Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill* at [12] and [15]; Cabinet Legislation Committee *Parole (Extended Supervision) and Sentencing Amendment Bill: Approval for Introduction* (5 November 2003) at [7] and [8]; Justice and Electoral Committee *Parole (Extended Supervision) and Sentencing Amendment Bill* at 5; Andrew Bridgman *Departmental Report: Parole (Extended Supervision Orders) and Sentencing Amendment Bill* (3 May 2004) at 6 and 8.

59 Christopher Finlayson Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill (27 March 2014) at [14].

> For the present, an ESO remains as a criminal penalty. For that reason, the limitation on s 26 of the Bill of Rights Act arising from the Parole (Extended Supervision Orders) Amendment Bill is not demonstrably justified in a free and democratic society and the Bill is therefore inconsistent with the Bill of Rights Act.

[75] The protective purpose, the scope and form of the ESO regime, and its justification, was also identified in Cabinet papers and departmental reports. The Regulatory Impact Statement (RIS) of 3 November 2014, provides a helpful summary.[60] It said:[61]

> Legislation for extended supervision orders has previously been found to be non-compliant with the New Zealand Bill of Rights Act 1990. Courts have determined that the order is criminal, rather than civil, in nature. Proposals to enhance extended supervision orders need to carefully consider the human rights balance of the regime, weighing the rights of the individual against the right of the public to be safe from harm.
>
> Given the risk of serious harm posed by these offenders, there is a strong argument that the proposed enhancements strike an appropriate human rights balance.

[76] The RIS stated that public safety is jeopardised because:[62]

(a) an ESO can only be imposed for up to 10 years, but some offenders may continue to pose a risk after that period;

(b) there are no long-term options for managing the risk of serious harm if an offender does not meet the criteria for a PPO; and

(c) the current standard condition allows "even the highest risk child sex offenders on the most intensive form of management under an ESO" to have regular contact with young children.

[77] The RIS then described the policy objective of the Bill as follows:[63]

> The primary objective is to minimise the risk of serious harm to the public caused by offenders who, following the completion of a finite sentence, are

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60 Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014).
61 At [5].
62 At [15].
63 At [16]-[17].

> considered to pose a high risk of committing serious sexual offences or a very high risk of serious violent offences.
>
> Secondary objectives include cost effectiveness and justice sector integrity, including the human rights of offenders, the rights of the public to be free from harm and public confidence in the justice system.

[78] The RIS concluded that non-regulatory options, such as voluntary participation by offenders after release from prison in activities and support networks that reduce the risk of offending, would not be sufficient as offenders would be able to opt out of such activities and there would be no further overarching monitoring and management.[64]

[79] The RIS went on to consider enhancements to ESOs:[65]

> To address the serious risks to public safety posed by the highest risk offenders at the end of a finite sentence, enhancements to extended supervision orders have been considered that would:
>
> - enable extended supervision orders to be applied for as long as they are needed, subject to an offender's risk of re-offending, with mandatory review by the courts every five years
> - expand the scope of extended supervision orders beyond high risk sex offenders against children to include a small number of high risk sex offenders against adults and a very small number of high risk violent offenders.

[80] In relation to the length of ESOs, the RIS noted:[66]

> Enabling extended supervision orders to be renewed on an on-going basis is the preferred approach as it provides for the greatest level of public safety, while mitigating potential human rights concerns through regular mandatory court review and incurring additional costs only in relation to the on-going management of those offenders that continue to pose a high risk of serious harm.

[81] In its conclusion, the RIS identified the potential impact of the Bill on human rights:[67]

> Given the criminal nature of the extended supervision order legislation, the proposed enhancements may be considered further punishment of sentenced offenders contrary to human rights in the New Zealand Bill of Rights Act.

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64 At [18]-[20].
65 At [21].
66 At [27].
67 At [69]-[70].

> However, given the risk of serious harm posed by these offenders, there is a strong argument that the proposed enhancements strike an appropriate balance between the rights of the public to be free from harm and the rights of offenders.
>
> Revising the legislated criteria to more clearly establish that only the highest risk offenders would be eligible for an extended supervision order may also help justify the enhancements in accordance with section 5 of the New Zealand Bill of Rights Act.

[82] An alternative civil regime was addressed in supplementary advice to the Law and Order Committee. It noted:[68]

> Corrections has given preliminary consideration to what amendments may be needed to make the ESO regime civil in nature, and in particular re-creating ESOs as part of a civil framework with PPOs. This would be a substantial piece of work requiring a wide range of issues to be identified and resolved.
>
> It is important that the ability to safely manage high risk offenders on ESOs and protect the community from the risk of serious harm not be compromised by work to make the regime civil in nature. Given the urgency of the ESO Bill, Corrections considers that retaining the existing regime, although deemed criminal in nature, provides the best means at the current stage of achieving the objective of protecting public safety and upholding the rights of victims and offenders.

Is an ESO a penalty?

[83] Mr Keith submitted that the Court of Appeal in *Belcher* found that the ESO regime breached s 25(g) and s 26(2) of the BORA insofar as it imposed a retrospective penalty.[69] While that finding related to an earlier version of the ESO scheme, he contended that the present regime is materially the same and thus it follows that it also breaches those sections. More broadly, Mr Keith submitted that the assumption of risk upon which the ESO (and PPO) scheme is premised lacked scientific rigour. He is also critical of the absence of any meaningful assessment of alternative methods of addressing the risk.

[84] Ms Todd accepted that *Belcher*, while not binding on me, is strong authority for the proposition that the ESO regime imposes a retrospective penalty. She submitted, however, that since *Belcher* the regime has been modified specifically to

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68 Department of Corrections *Parole (Extended Supervision Orders) Amendment Bill – Information Requested by the Committee* (3 November 2014) at [4]-[5].

69 From [48] onwards.

respond to identified behavioural traits and risks which are relevant to whether it is substantively inconsistent with those rights. Furthermore, she submitted that the ESO and PPO regimes do not impose a second penalty penalty per s 25(g) or s 26(2) in relation to persons who offended after those regimes came into force. That is because, she contended, a person under a qualifying offence is liable to be detained as part of the penalty for that offence under the Parole Act and under the Public Safety Act. This is reinforced by the fact that the availability of an ESO forms part of the assessment about whether preventive detention should be imposed.

ESO – assessment

[85] The ESO regime enables (among other things) supervision or detention of any person who has committed a qualifying sexual or violence offence and who meets the criteria for risk of committing a similar offence. It may be imposed for an initial period of up to 10 years with reviews every 5 years thereafter. It mirrors the pre-*Belcher* regime insofar as it is directed to "protect" the public from qualifying offenders by subjecting them to ongoing restrictions on movements, including intensive monitoring for the first year and electronic monitoring. It also employs the same criminal justice procedures, including application to the sentencing court, summons to and warrant for the arrest of an offender, presence of the offender at the hearing, bail and relevant provisions of the Criminal Procedure Act 2011, including rights of appeal.[70] An ESO application also remains a criminal proceeding for which legal aid may be granted.[71]

[86] The post *Belcher* amendments reduce some of the punitive elements of the prior regime. The present regime introduced much more complex and higher thresholds of qualifying risk. This includes the requirements for the offender to display a "high risk" and "very high risk" of committing relevant sexual offences or violent offences respectively, and to display specific behavioural characteristics. The provisions relating to "transitional eligible offenders" have been removed. These provisions made clear that the ESO scheme applied to offenders who ceased to be eligible offenders before the scheme came into effect. The new regime also incorporates, as a standard condition, a power to impose a requirement to attend a

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70 Section 107G, s 107R.
71 Section 107X.

rehabilitative programme. The same requirement could only be imposed as a special condition under the pre-*Belcher* regime.

[87] But the current ESO regime continues to punish – that is to (among other things) detain an eligible "offender" who presents a risk to the public without the need for a fresh offence. It is a scheme that carries multiple factors said to exemplify a penalty regime. Overall, it is as much, if not more punitive than it was when the Court of Appeal reviewed it in *Belcher* in 2007. It now applies to a much larger class of eligible offenders. It continues to be embedded within the criminal justice regime. While not binding on me, the corresponding conclusion of the Court of Appeal that the ESO regime is a penalty and thus engages s 25(g) and s 26 is highly persuasive as to the effect of the present ESO regime.

[88] The Court also said that "there can be no room for doubt that the intention of legislature in enacting the ESO legislation was that it should apply retrospectively and that orders could be imposed retrospectively in the absence of the consent of the offender."[72] I agree with this conclusion insofar as concerns the present ESO regime given the clearly intentional retrospective effect of s 107C(2).

[89] There is one residual issue not obviously addressed in *Belcher*, namely whether s 26(2) is engaged in relation to "prospective" ESOs, that is in respect of ESOs imposed on an offender who committed his qualifying offending after the ESO regime, as amended in 2014, came into force. As mentioned, s 26(2) provides immunity from retrospective and prospective second penalties. But Ms Todd contends that whatever the procedure for imposing ESOs, there is no breach of s 26(2) if every component of the penalty is provided for in the law on the day of the commission of the offence. However, an ESO is predicated on qualifying offending for which a finite sentence must first be served and is only imposed after a second criminal justice procedure is completed.[73] The decision to impose and the nature and scope of the ESO is then based on an assessment of apparent risk, rather than the commission of a further offence. Put another way, but for the qualifying offending and subsequent criminal justice process, no ESO could be imposed. Accordingly, the prospective imposition of an

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72 *Belcher,* above n 28, at [56].
73 See also *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [2] and [13].

ESO engages the immunity from double punishment affirmed by s 26(2). This interpretative outcome is consistent with an interpretation that gives that immunity from double punishment practical and effective force.[74]

[90] I am therefore satisfied that an ESO imposes a limit on the rights and immunities against increased and second penalties affirmed by s 25(g) and s 26(2) BORA.

[91] I turn then to examine whether this limitation is justified per s 5 BORA.

Is a ESO justified?

[92] I have found it necessary to approach the issue of justification by reference to retrospective and prospective penalty separately, as they engage different principles; dealing first with retrospective ESOs.

[93] Ms Todd submitted that Parliament's choice to empower the courts to retrospectively detain persons who present a high risk or very high risk of sexual or violent offending is a reasonable and proportionate response to an enduring problem caused by the gap resulting from the repeal of the all-purpose mental health legislation, the Mental Health Act 1969. Ms Todd also submitted that Parliament should be accorded a considerable margin of appreciation of latitude in its choice of ESOs as reasonable and justifiable means. I agree, in part. The express legislative object of protecting the public from a high risk of sexual offending and/or a very high risk of violent offending is rationally connected to the limitation on the immunity from retrospective increased penalty imposed by an ESO. The impairment also appears to be reasonably necessary and proportionate as it may be tailored to the nature and scale of the qualifying risk individual cases.

[94] For my part, no legislative fact or scientific evidence is necessary to prove the rational connection to and the reasonableness of this impairment and/or the proportionality of the impairment to the importance of the objective. Management of a high or very high risk to the public of sexual or violent offending is a legitimate

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74 As to the requirement to give affirmed rights their practical and effective force, see *R v Mist*, above n 12 at [45].

objective, and the scheme proceeds on the basis that there will be expert assessment of the identified risks and behavioural characteristics prior to the imposition of an ESO. While that assessment may be difficult to make, and perhaps fraught, it is nonetheless a reasonable method.

[95] Furthermore, as noted in *Ilnseher* the severity of the conditions of the measure and the actual way in which the measure is implemented are relevant to the determination of whether the measure materially infringes the principle of immunity from retrospective and/or second penalty. For example, an ESO genuinely directed to the rehabilitation and therapy of a high-risk person may be a reasonable and proportionate response to object of public protection.[75] There is also evident scope within the present ESO regime to apply a genuinely rehabilitative and therapeutic approach directed to the offender's risk factors. In a choice between a therapeutic approach and a non-therapeutic approach, it can be fairly assumed I think that a Judge (or Parole Board) would look where possible prefer the former over the latter, because the Court and the Parole Board is obliged to prefer a rights consistent outcome. Mr Chisnall's case is illustrative of this. [76]

[96] Nevertheless, having regard to the otherwise impregnable and non-derogable nature of the immunity from retrospective penalty and its deep normative and constitutional significance, the public protection purpose is not sufficiently important to justify that limitation on the immunity from retrospective penalty. Indeed, if that were so, the immunity could be justifiably subject to limitation for a wide range of offending risks,[77] thus emasculating the immunity from retrospective penalty at a fundamental level.

[97] Put another way, in cases of retrospective penalty, Parliament's justification must hit the bull's eye of a very small target – to use Tipping J's metaphor.[78] Any other approach would too readily permit an unknowable State punishment of potentially indefinite duration. Even with judicial oversight, that is a repugnant idea.

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75 *Ilnseher v Germany,* above n 29.

76 *Chisnall SC* above n 4*, Chisnall CA* (2019), above n 7.

77 For example: illegal drug dealing; drunk, dangerous or careless driving; and more generally any welfare regulatory offending that endangers the public.

78 *R v Hansen,* above n 21, at [119].

Public protection per se, even from significant possible harm, is not sufficiently crucial in my view to justify a limitation on the immunity from retrospective penalty of the type and duration (potentially indefinite) empowered by the ESO regime. The lack of substantive consideration of a civil, expressly non-punitive regime also reinforces this conclusion.

[98] The position is different in relation to the prospective second penalty imposed by the ESO regime. The prospect of a ESO post-sentence will be knowable at the time of the offending. Furthermore, as Mr Keith acknowledged, the availability of an ESO in many cases is a factor that will militate against the imposition of a sentence of preventive detention which carries the prospect of imprisonment without release. The ESO is therefore a mechanism for managing the long-term risk to the public without the immediate imposition of the most severe sentence that can be lawfully imposed.[79] Judges familiar with the decision to impose preventive detention will understand the prescriptive significance and value of an alternative regime which enables the assessment of risk to be undertaken at the time of release rather than at sentence. All of this bears on the reasonableness and proportionality of an ESO. The severity of the conditions of ESO and their implementation also have heightened relevance in this context.

[99] Accordingly, while there remains something unfair about subjecting an offender to the prospect of an indefinite number of post sentence ESOs, the extent to which a prospective ESO is an unjustified limitation of the immunity from second penalty needs to be worked out on the facts of the specific case, and in particular in light of the conditions of the ESO and its implementation.

An alternative meaning?

[100] The clear purpose, policy and scheme of the ESO regime is to remove the risk presented by qualifying offenders, if necessary, irrespective of retrospectivity. It is, in short, a retrospective criminal sanction. The effect of this is that an interpretation of

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[79] See for example *R v Parahi* [2005] 3 NZLR 356 (CA) at [90]. See also *Franklin v R* [2018] NZCA 495.

the ESO regime that is consistent with the immunity from retrospective penalty affirmed by s25(g) and s26 is unavailable.

The PPO regime

Purpose

[101] PPOs are governed by the PSA. Section 4 sets out the Act's objective:

> **4 Objective of Act**
>
> (1) The objective of this Act is to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences.
>
> (2) It is not an objective of this Act to punish persons against whom orders are made under this Act.

[102] Section 5 also contains several principles that people exercising powers under the Act must have regard to:

> **5 Principles**
>
> Every person or court exercising a power under this Act must have regard to the following principles:
>
> (a) orders under this Act are not imposed to punish persons and the previous commission of an offence is only 1 of several factors that are relevant to assessing whether there is a very high risk of imminent serious sexual or violent offending by a person:
>
> (b) a public protection order should only be imposed if the magnitude of the risk posed by the respondent justifies the imposition of the order:
>
> (c) a public protection order should not be imposed on a person who is eligible to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:
>
> (d) persons who are detained in a residence under a public protection order should have as much autonomy and quality of life as possible, while ensuring the orderly functioning and safety within the residence.

[103] The combined effect of the purpose and principles of the PSA was captured by Elias CJ in *Chisnall* when emphasising the importance of alternatives to a PPO. The Chief Justice said:[80]

> [38] The availability of extended supervision orders and interim supervision orders as alternative means of monitoring risk is a factor that bears on whether the more restrictive public protection order (and interim detention order pending its determination) is appropriate. The policy of the Public Safety Act expressed in its purpose and the principles contained in s 5 emphasise that orders made under it are not punitive and are directed at public safety. The high threshold set by the legislation for public protection orders and the availability of less intrusive means of protecting public safety in orders under the Parole Act indicate a legislative scheme that the "very high risk of imminent serious sexual or violent offending by the respondent" is risk which cannot be acceptably managed by conditions under an extended supervision order or interim supervision order. The Public Safety Act is to be interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty.
>
> [39] The text of s 13 and the definition of "imminent" links the risk which is to be addressed by the orders to provision of opportunity through removal of restraint. The Judge must be satisfied not only that the risk is a high one but that it is likely to occur if the opportunity arises. Under the definition the person must be expected to commit a serious sexual or violent offence as soon as he or she has suitable opportunity to do so. The criteria in s 13(2) indicate that "imminent" in this context is not a purely temporal assessment but one linked to opportunity. The order is aimed at preventing the opportunity arising where the Judge is satisfied that an offence of the type is likely to be committed by the respondent when he or she has suitable opportunity.
>
> [40] If conditions can be put in place without detention that would remove the opportunity or restrict it to an extent that there is no longer very high risk of imminent offending of the type, then a public protection order or an interim detention order ought not to be made. That is clear from the scheme of the legislation and is consistent with the protections contained in the New Zealand Bill of Rights Act.

Criteria

[104] To be the subject of a PPO, a person must meet the threshold for its imposition. This threshold is set out in s 7:

> **7 Threshold for imposition of public protection order**
>
> (1) A person aged 18 years or older meets the threshold for the imposition of a public protection order if—
>
> (a) the person—

[80] *Chisnall SC,* above n 4, at [37]-[40]. This view was also adopted by the majority at [83]. See also *Chisnall CA* (2016)*,* above n 4.

(ii) is detained in a prison under a determinate sentence for a serious sexual or violent offence; and

(iii) must be released from detention not later than 6 months after the date on which the chief executive applies for a public protection order against the person; or

(b) the person is subject to an extended supervision order and—

(i) is, or has been, subject to a condition of full-time accompaniment and monitoring imposed under section 107K of the Parole Act 2002; or

(ii) is subject to a condition of long-term full-time placement in the care of an appropriate agency, person, or persons for the purposes of a programme under sections 15(3)(b) and 16(c) of the Parole Act 2002; or

(c) the person is subject to a protective supervision order; or

(d) the person—

(i) has arrived in New Zealand within 6 months of ceasing to be subject to any sentence, supervision conditions, or order imposed on the person for a serious sexual or violent offence by an overseas court; and

(ii) has, since that arrival, been in New Zealand for less than 6 months; and

(iii) resides or intends to reside in New Zealand; or

(e) the person—

(i) has committed a serious sexual or violent offence; and

(ii) in respect of that offence,—

(A) has been determined to be a returning prisoner under the Returning Offenders (Management and Information) Act 2015; or

(B) is a returning offender to whom subpart 3 of Part 2 of that Act applies; and

(iii) is subject to release conditions under the Returning Offenders (Management and Information) Act 2015.

(2) For the purposes of this Act, a person meets the threshold for a public protection order if the person meets the threshold at the time that the chief executive applies for that order against the person.

In this section, extended supervision order means an order imposed, whether before, on, or after the commencement of this section, under section 107I of the Parole Act 2002 on a person who was an eligible offender (within the meaning of section 107C(1) of that Act) because the person had been sentenced to imprisonment for a relevant offence (within the meaning of that section) that is also a serious sexual or violent offence (within the meaning of section 3).

[105] Under s 8, the chief executive may apply for a PPO:

> **8 Chief executive may apply for public protection order**
>
> (1) The chief executive may apply to the court for a public protection order against a person who meets the threshold for such an order on the ground that there is a very high risk of imminent serious sexual or violent offending by the person.
>
> (2) As soon as practicable after an application is made under subsection (1), the chief executive must advise every victim of the respondent that the application has been made.

[106] Section 9 provides that this application must be accompanied by at least two reports that have been separately prepared by health assessors (at least one of whom is a registered psychologist). These reports must address whether the respondent exhibits "to a high level" each of the four characteristics set out in s 13(2), and whether the respondent presents a very high risk of imminent serious sexual or violent offending.

[107] Section 12 provides for redirection of eligible persons to the MHCAT and IDCCR regimes as follows:

> **12 Assessment whether respondent mentally disordered or intellectually disabled**
>
> (1) This section applies where a court is satisfied that it could make a public protection order against a respondent and it appears to the court that the respondent may be mentally disordered or intellectually disabled.
>
> (2) The court may, instead of making a public protection order, direct the chief executive to consider the appropriateness of an application in respect of the respondent under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

(3) Where the court gives a direction under subsection (2), the court must, if the respondent is not then detained under section 107, order the interim detention of the respondent under that section.

(4) For the purposes of any application under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 made as a result of the consideration directed under subsection (2) and for any determination arising out of such an application, the respondent is taken to be detained in a prison under an order of committal.

[108] A direction of this kind was made in *Chief Executive of Department of Corrections v R*:[81]

> [3] I conclude that an alternative to a PPO, based on placement under the 24/7 care of Te Roopu Taurima by consent may not be lawfully enforceable and provides too uncertain a basis for the otherwise very high risk presented by R. I am satisfied however that a direction pursuant to s 12 should be made, and I direct the Chief Executive to consider the appropriateness of an application under s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[109] The Court may make a PPO, as set out in s 13:

13 Court may make public protection order

(1) After considering all of the evidence offered in a proceeding on an application for a public protection order, and, in particular, the evidence given by 2 or more health assessors, including at least 1 registered psychologist, the court may make a public protection order against the respondent if the court is satisfied, on the balance of probabilities, that—

(a) the respondent meets the threshold for a public protection order; and

(b) there is a very high risk of imminent serious sexual or violent offending by the respondent if,—

(i) where the respondent is detained in a prison, the respondent is released from prison into the community; or

(ii) in any other case, the respondent is left unsupervised.

(2) The court may not make a finding of the kind described in subsection (1)(b) unless satisfied that the respondent exhibits a severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics:

(a) an intense drive or urge to commit a particular form of offending:

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81 *Chief Executive of Department of Corrections v R,* at 76.

(b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:

(c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims (within the general sense of that term and not merely as defined in section 3):

(d) poor interpersonal relationships or social isolation or both.

[110] The meaning and effect of s 13 is largely uncontroversial. It involves a three-stage test, namely:[82]

(a) determine whether the respondent exhibits a severe disturbance in behavioural functioning, based on the s 13(2) characteristics; and

(b) if so, determine whether the respondent poses a very high risk of imminent sexual or violent offending; and

(c) assess whether a lesser alternative is available.[83]

Conditions

[111] Subpart 3 sets out the status of residents. There are several conditions that apply to residents. These include:

(a) Section 20, which provides that residents must stay in the residence they have been designated;

(b) Section 21, which provides that the chief executive has the legal custody of every resident;

(c) Section 22, which requires residents to comply with lawful directions; and

(d) Section 23, which prohibits residents from possessing prohibited items.

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82 *Chief Executive of Department of Corrections v Chisnall*, above n 5, at [41].
83 *Chisnall CA* (2019), above n 7 at [42].

[112] There is also a range of provisions containing security measures residents must submit to:

(a) Sections 63-67 permit searches (including rub down searches, scanner searches, x ray searches, strip searches (where reasonable grounds exist) and searches, using dogs, of residents, residents' property and anyone who wishes to enter the residence.

(b) Section 68 requires residents to submit to drug or alcohol tests where the manager has reasonable grounds to believe they have used any prohibited substances.

(c) Section 71 provides that the manager may, under certain circumstances, place the resident in seclusion.

(d) Section 72 provides that a manager may restrain a resident (within certain conditions) if necessary to prevent the resident endangering their own health or the health of others, seriously damaging property, seriously compromising their own care and well-being or that of others, or escaping.

[113] A Court may, on application of the Chief Executive, order that a person subject to a PPO be detained in a prison instead of residence if they pose "such an unacceptably high risk to himself or to others, or to both, that person cannot be managed safely in the residence".[84] A person so imprisoned must be treated in the same way as a prisoner who is committed to prison because they are awaiting trial. Prison detention is subject to review within one month and must be reviewed by a Court within one year.[85]

Rehabilitative provisions

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84 Section 85.
85 Sections 87 and 88.

[114] Sections 28 to 40 set out the "rights" of residents. Section 27 provides that a resident "has the rights of a person of full capacity who is not subject to a public protection order" except to the extent that those rights are limited under the Act.

[115] One of the rights in the Act is a right to rehabilitative treatment, set out at s 36:

> **36 Right to rehabilitative treatment**
>
> A resident is entitled to receive rehabilitative treatment if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident.

[116] The Act also requires the manager of residences to provide management plans for residents. This involves assessing the needs of the resident, including, under s 41(2)(e), identifying "steps to be taken to facilitate the resident's rehabilitation and reintegration into the community." Pursuant to s 42(3)(c), the management plans must then set out "a personalised management programme for the goals of the resident that will contribute towards his or her eventual release from the residence and reintegration into the community."

[117] Under s 26(1)(d), the Chief Executive may also grant a resident leave from the residence "to attend a rehabilitation programme identified in the resident's management plan."

[118] Other (partially) protected rights include:[86]

(a) earnings from work;

(b) the right to legal advice;

(c) the right to vote;

(d) recreational and cultural activities;

(e) the right to receive and send written communications;

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86 Sections 27-39.

(f) access to media;

(g) visitors and oral communications with people outside the residence;

(h) the right to medical treatment;

(i) the right to information;

(j) the right to be treated in manner that respects their cultural and ethnic identity, language, and religious or ethical beliefs; and

(k) the right to obtain a benefit.

Review and release provisions

[119] Section 15 provides for the yearly review of PPOs by a review panel.

[120] Section 16 also requires the Court to undertake a review within every 5-year period of the continuing justification of the order and the Court may direct an order to do so after 10 years.

[121] Under s 17, a person who is subject to a PPO may also, with leave of the Court, apply to the court for a review of the order.

[122] Section 18 sets out the requirements around reviews. The Court must be provided with all reports provided to the review panel and may call for supplementary reports. The Court must consider whether there is still a very high risk of imminent serious sexual or violent offending and the Court must take into account whether the affected persons continues to exhibit a severe disturbance in behavioural functioning. If the Court is satisfied, on the balance of probabilities, that there no longer is a very high risk of imminent serious sexual or violent offending by the person subject to the PPO, the Court must make a finding to that effect.

Protective Supervision Orders

[123] When a Court makes a finding under s 18, the Court must cancel the PPO and impose a protective supervision order (PSO) in its place.[87] A PSO can contain certain requirements, as noted in s 94:

> **94 Requirements may be included in protective supervision order**
>
> The court may include in any protective supervision order under section 93 any requirements that the court considers necessary to—
>
> (a) reduce the risk of reoffending by the person under protective supervision:
>
> (b) facilitate or promote the rehabilitation and reintegration into the community of the person under protective supervision:
>
> (c) provide for the reasonable concerns of victims (within the general sense of that term and not merely as defined in section 3) of the person under protective supervision.

[124] These requirements can include drug or alcohol requirements, the parameters of which the Act sets out in detail. A person subject to a drug or alcohol requirement may be directed to undergo testing or submit to continuous monitoring[88], but there are clear rules around how notice of this direction may be given,[89] where the testing procedure can be carried out,[90] and what the information obtained from the testing may be used for.[91]

[125] It is an offence to breach a PSO.[92] If a person is subject to drug or alcohol requirements, it is also an offence if they refuse or fail to adhere to the requirements (for example, by refusing to undergo a testing procedure or to submit to continuous monitoring when directed to do so) without reasonable excuse.[93] It is also an offence for a person subject to a PSO with a drug or alcohol requirement, who has been directed to submit to continuous monitoring, to refuse to allow an authorised person entry to their residential address for purposes related to the PSO.[94]

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87 Section 93(1).
88 Section 95B.
89 Section 95C.
90 Section 95D
91 Section 95E.
92 Section 103.
93 Section 103A.
94 Section 103B.

[126] Under s 96, the chief executive or the person subject to a protective supervision order may apply at any time to the court for the variation or discharge of a requirement of a PSO. The court may then vary or discharge any requirement forming part of the order. The review panel may also modify such a requirement on application by the chief executive or the person subject to a PSO, but only if satisfied the modification will render the requirement less restrictive.[95]

[127] The Act also requires mandatory reviews of the PSO within every 5-year period.

[128] A person subject to a PSO may also, with the leave of the Court, apply to the Court for a review of the order.[96] On a review of a PSO, the Chief Executive must provide the Court with current reports on the person subject to the order.[97] The Court's jurisdiction to cancel the PSO is set out in s 102 if the affected person has not committed any sexual or violent offences nor breached any requirements included in the order.

Parliamentary materials

[129] As with my assessment of the ESO regime, I have not found it necessary to rely on the parliamentary materials, so I will examine the parliamentary materials only briefly. A Cabinet Domestic Policy Committee Paper of 10 August 2011 identified the risk presented by a very small group of offenders who appeared resistant to rehabilitation usually as a result of intelligence and other cognitive deficits.[98] A civil detention order was identified as a potential response. This was followed by a RIS produced by the Department of Corrections dated 20 March 2012. Among other things, it reviewed overseas experience and it discussed a number of options, including civil detention via PPOs. The RIS concluded that the PPO would best meet the public safety policy objective.

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95 Section 97.
96 Section 100.
97 Section 101.
98 Judith Collins *Management of High Risk Sexual and Violent Offenders at End of Sentence* (10 August 2011).

[130] A Cabinet Social Policy Paper of 21 March 2012 also addressed the potential impact of the PPO regime and foreshadowed a legislative framework adaptable enough to ensure detainees could be managed according to their needs, while still providing for protections for detainees' rights.[99] The potential for conflict with the immunity from double punishment, together with the prospect that some detainees will never be released, was also identified. But lesser forms of supervision were not considered adequate. This was followed by a Cabinet decision to establish a PPO scheme on 2 April 2012[100], which took shape in the Public Safety (Public Protection Orders) Bill of 18 September 2012.

Public Safety (Public Protection Orders) Bill – 18 September 2012

[131] The explanatory note to the Public Safety (Public Protection Orders) Bill (the Bill) identified the tension between PPOs and human rights considerations:

> The Bill is a proportionate balance between the State's legitimate objective of protecting citizens from almost certain serious sexual or violent harm and the right of those on a public protection order to be subject to the least restrictive form of detention to achieve that objective.
>
> While it is possible that detainees will never be released from a public protection order, there are credible pathways for release. The pathways would include a management plan, rehabilitation, treatment, regular and early reviews of status, and post-release supervision.

Attorney-General's Report – 4 October 2012

[132] The Attorney-General, however, concluded that the Bill complied with the BORA. He noted:[101]

> The risk of breach of ss 22 and 26 was raised at the time that the Bill was proposed. I concluded that, unless the Bill incorporated the key safeguards necessary for a civil committal regime, it would not be Bill of Rights compliant.
>
> The Bill as introduced includes such safeguards at each of the stages of the making, administration and review or cancellation of orders. The Bill also contains broad interpretative principles to ensure its operation as a committal,

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99 Judith Collins and Anne Tolley *Public Protection Orders: Establishing a Civil Detention Regime* (21 March 2012).

100 Cabinet Minute of Decision "Public Protection Orders: Establishing a Civil Detention Regime" (2 April 2012) CAB Min (12) 11/9.

101 Christopher Finlayson *Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990* (4 October 2012) at [5]-[6].

> and not punitive, regime. For those reasons, I conclude that it complies with the Bill of Rights Act.

[133] Over the course of the next two years, the Bill was subject to multiple inputs, variously addressing the form, shape and scope of the proposed civil public protection regime, with specific regard to the balance between protection and the rights of affected persons, including their rights to rehabilitation.[102] The PSA, as enacted, is the product of this lengthy process.

Is a PPO a penalty?

[134] Mr Keith submits that the PPO regime, like the ESO regime, imposes a fresh penalty on an offender for specified sexual or violence offending and is thus a second penalty. Referring to *Ilnseher*,[103] he says that a PPO is punitive because it is predicated on qualifying offending, is not a measure of last resort for the shortest period and does not have a genuinely therapeutic objective. Rather, he says, it is directed to protecting the public from certain types of risk. While the imposition of a PPO is subject to judicial oversight, the inherent inflexibility of the regime once the qualifying risk is identified means that a lengthy or indeterminate period of incarceration is inevitable. In addition, Mr Keith submits there is no supporting assessment to suggest that the persons subject to a PPO have, as suggested by counsel for the Attorney-General, immutable characteristics or that they are untreatable and, in short, that the entire premise of the regime has a flimsy unscientific basis. This means that a PPO will inevitably infringe ss 25 and 26(2) of the BORA.

[135] Ms Todd, assisted by Mr McKillop, submits that the purpose of the PPO regime is not to punish, but rather to protect the public from significant harm. They say there is a pressing need to manage the risk presented by persons who have engaged in certain types of criminal offending and who present a very high risk of imminent harm to the public and that the PPO regimes are proportionate to meet that pressing need.

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102 See Legislation Advisory Committee *Public Safety (Public Protection Orders) Bill* (31 October 2013); Ministry of Justice and Department of Corrections *Public Safety (Public Protection Orders) Bill – Initial Briefing* (4 November 2013); Ministry of Justice and Department of Corrections *Additional Briefing: Public Safety (Public Protection Orders) Bill* (3 December 2013); and Ministry of Justice and Department of Corrections *Public Safety (Public Protection Orders) Bill – Departmental Report* (25 February 2014).

103 *Ilnseher v Germany,* above n 29.

Furthermore, they submit there were and are no reasonable alternatives, noting that the offenders to which the PPO regime applies do not fit within or are not eligible for treatment within the mental health regime or the intellectual disability regime (and if they are, they will be directed to those regimes).

[136] They also say the parliamentary records show that careful consideration was given to an eligible person's BORA rights and the PPO scheme was developed to ensure it was a committal rather than a punitive regime. Indicative of this, the legislative scheme involves a civil commitment exercise, including:

(a) It involves a civil application to the High Court.

(b) Civil legal aid is involved.

(c) There is no requirement for the offender to be present or for the victim to be involved in the process.

(d) While the trigger is criminal offending, the threshold criteria include behavioural characteristics and very imminent risk of violent offending.

(e) The mechanism of detention is not prison-like, involving as much autonomy as possible, a right to rehabilitative treatment and a right to access, on a limited basis at least, news and media. There are comprehensive review mechanisms with judicial oversight.

[137] They also say that, in any event, whether the imposition of a PPO is inconsistent with BORA will depend on the precise terms of the PPO.

Assessment

[138] For reasons that should become obvious, in completing this assessment I have preferred to approach the assessment of rights infringement through the lens of s 6 BORA at the initial interpretative stage; that is where possible I have preferred a rights consistent construction of relevant parts of the PPO regime as mandated by s 6. For my part, this has been necessitated by the presence of multiple factors, some punitive,

some non-punitive and some therapeutic, within the PPO regime. Put another way, this is not a statutory regime where the apparent intention of Parliament to limit BORA rights is clear cut and thus the *Hansen* approach is inapposite.

[139] The PPO scheme includes several apparently punitive factors that point to a penalty regime, including:

(a) Any decision to impose a PPO is predicated on the existence of a qualifying sexual or violence offence;

(b) A PPO is an order of indefinite duration;

(c) Affected persons are detained on prison grounds;

(d) Affected persons are subject to the security measures noted at ss 63-72, including for example extensive search powers;

(e) The PPO may be applied retrospectively without the requirement for further corresponding offending, and it may do so prospectively, without end;

(f) The "right to rehabilitation," is conditional on the rehabilitation reducing the affected person's risk; and

(g) A person subject to a PSO may also be imprisoned (like a prisoner awaiting remand) for risk management purposes, without having committed a criminal offence.

[140] However, there are several important countervailing factors. First, the Act is expressly non-punitive. The significance of that was highlighted by Elias CJ in *Chisnall.*[104] Second, all persons exercising powers under the Act must have regard to the s 5 principles, including the principle that the autonomy and dignity of the detained person must be respected. This principle then corresponds to the bundle of protected

[104] *Chisnall SC,* above n 4 at [37].

rights expressly recognised and affirmed at ss 27-39 of the Act. These rights are to be curtailed only so far as necessary to secure the protection of the person or the public. Third, the process for the imposition of a PPO is not a criminal process. As noted above, the PPO regime is triggered and operates within the civil processes of the High Court. This is a marked difference from the ESO regime. Fourth, an eligible person may be redirected to the MHCAT and IDCCR regimes if they qualify for treatment within those regimes.

[141] Fifth, every major step in the PPO process is subject to judicial oversight, including review of PPOs. This is an important safeguard. As Elias CJ put it, the PSA is to be interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty.[105] This reduces the prospect of the imposition of a PPO unless the qualifying criteria are clearly met. It also provides surety that a rights consistent administration of the PSO regime will be preferred. Cumulatively, these factors strongly point to a committal process for persons with clear behavioural disorders and for the specific purpose of protecting the public.

[142] Overall, I am satisfied therefore that the PPO is not presumptively a penalty. This does not preclude the possibility that on the facts of a particular case, a PPO might operate like a penalty. Detention without rehabilitation on prison grounds might attract such a finding. Imprisonment of a person subject to a PPO without having committed a further offense may also qualify as a penalty. But those outcomes cannot be presumed, for the reasons already noted.

Demonstrably justified?

[143] As I am satisfied that a PPO is not presumptively a penalty, it is strictly unnecessary to examine whether the limits a PPO imposes on BORA rights are demonstrably justified. However, given the significance of this issue to the parties, I will make some brief observations about it.

[144] Like an ESO, a PPO is directed to public protection. That is a reasonable objective and for the reasons already expressed (at [140]-[142]) the limitations

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105 *Chisnall SC*, above n 4 at [38].

imposed by a PPO (sans the punitive components just mentioned – see also [145] below]) are rationally and proportionately connected to that objective. I also acknowledge that alternative options, including within the IDCCR regime were considered. However, if the PPO scheme imposes a penalty, then I would hold the limitation on the immunity from retrospective penalty or prospective second penalty to be unjustified. A retrospective penalty and or prospective second penalty of the form, type and potentially indefinite duration envisaged by a PPO is not capable of reasonable justification given the derogation that entails from the corresponding immunities affirmed by s 25(g) and s 26.

[145] As noted, the conditionality of rehabilitation, detention on prison grounds and imprisonment without further offending also raise the prospect of s 26(2) rights infringement. I propose therefore to address whether those aspects are justified for completeness.

[146] Dealing first with the requirement that rehabilitation must reduce risk; a PPO serves to protect the public from persons who present a clear, qualifying very high risk of danger. While therapy directed to risk reduction serves that purpose, that conditionality appears to cut across the non-punitive and dignity principles of the Act. Therapy is a prerequisite to humane treatment of a person detained, perhaps indefinitely, pursuant to a PPO. The requirement for risk reduction as a condition of rehabilitation is therefore evidently disproportionate on the face of the legislation. However, what therapy qualifies as risk reducing must be defined in a way that is sufficiently generous to conform to the non-punitive and dignity principles. This will inevitably bear on the legality of any decision not to enable therapy. Given this, the prospect of detention without therapy should be small.

[147] The identification of one facility, Matawhāiti, on prison grounds to accommodate PPO persons is also evidently discordant with the non-punitive principle as well as the dignity principle. That restriction is therefore also evidently disproportionate to the purpose of the Act on the face of the legislation. However, I qualify this observation in an important respect. I understand Matawhāiti is managed

by persons who are qualified to provide specialised care for PPO recipients.[106] The assessment therefore of inconsistency with the non-punitive and dignity principles, and s 25(g) and s 26 immunities, is one that should be undertaken on a case by case basis.

[148] Finally, I consider that the prospect of imprisonment at any time without further offending is disproportionate to the goal of public protection. It offends both the immunity from retrospective and prospective second penalty in a fundamental way and is inconsistent with the non-punitive and dignity principles of the Act. While I make no final determination of this point, I am presently unable to find demonstrable justification for it or read the provision in a rights compliant way.

Summary

[149] In the result, I do not consider that, overall, the PPO regime is a punitive regime or that a PPO is presumptively a penalty. While there may be cases where a PPO is imposed in a punitive way or with punitive effect, the evident purpose, policy and scheme of the Act is non-punitive.

Declarations 3 and 6 – other rights infringements

[150] I can deal with the application for declarations 3 and 6 briefly. Mr Keith contends, in short, the assessment processes of the ESO and PPO regimes infringe ss 9, 18, 22, 23(5), 25(a), (c) and (d), and 27 of the BORA. The extent to which these other BORA rights are infringed by the ESO and PPO regimes requires a fine grain analysis of the operation of the regime on the facts of a case. To illustrate, it is difficult to see how those regimes arbitrarily detain affected persons in breach of s 22 (freedom from arbitrary detention) and of s 27 (natural justice), given the elaborate steps required, including judicial oversight, to impose an ESO and PPO. Rather, there may be cases where the process of imposing an ESO or PPO has gone so wrong, a BORA breach comes into play.

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106 See discussion in *Chief Executive of Department of Corrections v R,* above n 76, at [18].

[151] Furthermore, due process rights affirmed by ss 24 and 25 are not obviously engaged. As the Court of Appeal stated in *McDonnell*: [107]

> [39] We do not consider it appropriate to treat an application for an ESO as being analogous with the bringing of a fresh charge against the offender. For example, it makes no sense to say that the right to be presumed innocent (of the offence which makes the offender eligible for the making of an ESO) applies to an offender who has been through a trial process and has been proved guilty according to law. A number of the other rights guaranteed by s 24 are equally inapplicable, such as the right to trial by jury (s 25(e)). We see the ESO process as analogous with the sentencing process which follows conviction, so that the rights guaranteed by ss 24 and 25 which apply in relation to sentencing apply equally to the ESO process. However, rights which are applicable to persons facing charges who have not yet been convicted, but which cease to be of relevance once a finding of guilt has been made according to law and a conviction has been entered, are not re-ignited when an ESO application is made.

[152] In terms of s 25(d), the Court of Appeal in *McDonnell* found that s 25(d) did not apply to ESOs[108] – and that even if it did, there would have been no breach because had the offender in that case participated in the assessment process, he would have done so because he consented, rather than because he was compelled.[109] The same can be said of any ESO offenders: there is nothing in the Act to suggest a person can be compelled to participate in an ESO clinical risk assessment process, so no issue arises in terms of s 25(d).

[153] I therefore decline to make declarations 3 and 6 effectively in the abstract.

Should declarations of inconsistency be made?

[154] As the Court of Appeal noted in *Electoral Commission v Tate*:[110]

> [30] A Court may, of course, decline to make a declaratory judgment or order under the Declaratory Judgments Act 1908. Section 10 expressly provides that the jurisdiction conferred upon the Court to give or make a declaratory judgment or order shall be discretionary and that the Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order. There may be a number of sound reasons why a declaratory judgment or order should be refused. Examples of grounds on which such judgments or

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107 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770. See also the assessment undertaken at [44]-[46] in respect of BORA s 27(1).

108 Citing *Burke v Superintendent of Wellington Prison* [2003] 3 NZLR 206 and *R v Jones* [1994] 2 SCR 229.

109 At [43].

110 *Electoral Commission v Tate* [1999] 3 NZLR 174.

> orders have been declined are cases where the question is one of mixed law and fact, or where the question is an abstract or hypothetical question, or where the order would have no utility.

[155] There is the added constitutional dimension here, as the Court of Appeal said in *Taylor*:[111]

> [73] We begin with comity. In the language of the Parliamentary Privilege Act 2014:
>
> > [T]he principle of comity… requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges…
>
> [74] This principle recognises not only that each branch has a separate sphere of influence but also that they overlap, necessitating restraint on all sides. Sir Owen Woodhouse, speaking extra-judicially, described comity as a convention made necessary by the imprecise distribution of constitutional powers among the three branches of government.94 Comity is reciprocal, finding expression not only in the Act but also in the Standing Orders of the House of Representatives, the Cabinet Manual, and numerous judicial decisions.
>
> [75] Deference is the term used to describe a court's decision to refrain from exercising its jurisdiction on the ground that another decision-maker enjoys greater institutional competence or experiences democratic accountability. These considerations may arise when the inconsistency concerns a protected right because, as the Bill of Rights itself recognises, rights must sometimes be balanced against other societal interests or other rights and such evaluative decisions may lie within the province of the legislative branch.

[156] With this guidance in mind I turn to examine whether declarations should be made.

ESO

[157] I have found that an ESO imposes an unjustified limitation on the immunity from retrospective penalty affirmed by s25g and s26(2). I have also come to the view that a declaration should be made. The breach of the otherwise impregnable and non-derogable immunity from retrospective penalty is simply not amenable to justification, whatever the precise terms of the ESO. The making of a declaration in such circumstances is also necessary to vindicate the right and is consistent with the

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111 *Taylor,* above n 2 (citations omitted).

orthodox function of this Court to determine and where necessary, make pronouncements about the legality of Crown action. Furthermore, a declaration of inconsistency can be made with precision, insofar as it is specifically directed to the retrospective application of the ESO regime per s107C(2), which states:

> (1) To avoid doubt, and to confirm the retrospective application of this provision, despite any enactment or rule of law, an offender may be an eligible offender even if he or she committed a relevant offence, was most recently convicted, or became subject to release conditions or an extended supervision order before this Part and any amendments to it came into force.

PPO

[158] I have found a PPO is presumptively not a penalty, but I consider that three elements of the PPO regime appear to be punitive, namely the conditionality of therapy to reduce risk, the location of the PPO facility on prison grounds, and the potential imprisonment of persons subject to PPOs without having offended. I consider, however, that the degree of inconsistency, and the extent to which that mandates a declaration of inconsistency should be determined when the corresponding provisions are in fact engaged and in light of the specific circumstances of the case.

[159] In the result, I make no declaration of inconsistency in relation to PPOs.

The answers

[160] I answer the questions as follows:

(a) Does Mr Chisnall have standing to make an application for inconsistency?

Yes. See discussion at [6]-[8]

(b) What is a penalty?

I have identified several factors, the presence or absence of which, tend to suggest that the measure is a penalty. See [37]-[51].

(c) Is an ESO a penalty?

For present purposes, there are two types of ESO, a retrospective ESO and a prospective ESO. A retrospective ESO is an ESO imposed on an offender who committed their qualifying offending before the ESO regime came into force in respect of that offending. A prospective ESO is an ESO imposed on an offender who committed their qualifying offending after the ESO regime came into force in respect of that offending. Both types of ESO are penalties. See discussion at [83]-[90].

(d) If so, is an ESO justified per s 5 BORA?

A retrospective ESO is not demonstrably justified. Whether a prospective ESO is justified needs to be worked out on a case by case basis, having specific regard to the terms of the ESO and its implementation. See discussion at [92]-[99].

(e) Is a PPO a penalty?

No, but elements of the PPO regime appear to be punitive, and a PPO may be imposed with punitive effect. See discussion at [134]-[142].

(f) If so, is a PPO justified per s 5 BORA?

If, contrary to my finding, a PPO is a penalty, then it would not be justified per s 5 BORA. See discussion at [143]-[144].

(g) Are there other unjustified rights infringements?

The answer will depend on the circumstances of the individual case. See discussion at [150]-[153].

(h) Should declarations of inconsistency be made?

Yes, in relation to retrospective ESOs – see [154]-159].

Result

[161] I will make a declaration that s 107I(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act, as informed by arts 14(7) and 26 of the International Covenant on Civil and Political Rights insofar as it applies retrospectively. The parties are to reach agreement on the wording of that declaration and file submissions within 10 working days.

[162] I decline to make any other declaration.

Costs

[163] If necessary, submissions on costs may be filed.