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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2019-404-0278
[2019] NZHC 3256

BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Applicant
AND	SONNY TE ARAMOANA WAITI Respondent

Date of hearing: 28 November 2019

Appearances: HDL Steele and J-H Kang for the applicant
M J Dyhrberg QC for the respondent

Date of judgment 11 December 2019

JUDGMENT OF JAGOSE J

The judgment was delivered by me on 11 December 2019 at 4.45pm.

……
Registrar/Deputy Registrar

Solicitors/Counsel:
Marie Dyhrberg QC, Auckland
Meredith Connell, Auckland

[1] The Chief Executive of the Department of Corrections seeks an extended supervision order ("ESO") in respect of Mr Waiti.[1] An ESO is "to protect members of the community from those who … pose a real and ongoing risk of committing serious sexual or violent offences".[2]

[2] The application is brought on grounds I should be satisfied, having considered proffered health assessors' reports, Mr Waiti has, or had, a pervasive pattern of serious violent offending, and there is a very high risk he will in future commit a relevant violent offence.[3] The Chief Executive also seeks such an order endure for five years.[4] However, if I make the ESO, I must make it for the "minimum period required for the purposes of the safety of the community".[5]

[3] Since his release from imprisonment on 23 October 2019, and pending determination of the ESO application, Mr Waiti has been subject to an interim supervision order,[6] with special conditions,[7] including an intensive monitoring condition for its maximum duration of 12 months.[8] The Chief Executive also seeks an intensive monitoring condition in connection with the ESO. Although the District Court last sentenced Mr Waiti, that sought condition gives me jurisdiction here.[9]

[4] Mr Waiti does not oppose either imposition of a five-year ESO, or re-imposition of the intensive monitoring condition. But I am obliged to make my own assessment.[10]

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1 Parole Act 2002, s 107F.
2 Section 107I(1).
3 Section 107I(2).
4 Section 107I(4).
5 Section 107I(5).
6 Section 107FA.
7 Section 107IA.
8 Section 107IAC: "(2) An intensive monitoring condition is a condition requiring an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved, by a person authorised by the chief executive, to undertake person-to-person monitoring."
9 Sections 107D and 107IAB(2).
10 *Paniora v Chief Executive of the Department of Corrections* [2018] NZCA 607 at [21].

Mr Waiti's offending

[5] Mr Waiti is 33 years old, of Māori and Samoan descent, with affiliations to Ngāti Tūwharetoa and Te Arawa iwi. He has an extensive criminal history, commencing in 2002 with relatively minor offences (although following a history of violence at school), but rapidly escalating to serious violence the following year, with persistent serious violent offending thereafter.

[6] In 2013, Mr Waiti was sentenced to six years and five months' imprisonment, with a four-year minimum period of imprisonment for kidnapping. Kidnapping is a "relevant offence" for the purposes of an ESO.[11] Mr Waiti's present circumstances outlined at [3] above render him an "eligible offender" for those purposes, at least in terms of the latest offending and its sequelae.[12]

The health assessors' reports

[7] The Chief Executive commissioned a health assessment report from Steve Berry, a registered clinical psychologist and neuropsychologist. His report is dated 19 March 2019. Marie Dyhrberg QC, then acting as amicus,[13] also commissioned a psychological report from Jim van Rensburg, also a registered clinical psychologist, dated 5 November 2019.

[8] Section 107F(2A) requires every health assessor's report to "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

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11 Parole Act 2002, s 107B.

12 Section 107C.

13 With gratitude for her plain care in performance of the role as amicus, on 17 September 2019, Brewer J gave Ms Dyhrberg leave to be released from the role if she sought to represent Mr Waiti. That is the position she takes before me, as Mr Waiti's counsel.

(ii) there is a very high risk that the offender will in future commit a relevant violent offence.

For completeness, s 107IAA(1) and (2) provide:

> **107IAA Matters court must be satisfied of when assessing risk**
>
> (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.

[9] Mr Berry interviewed Mr Waiti for 45 minutes on 1 November 2018 and two hours on 22 November 2018. The first interview was interrupted by Mr Waiti's report Corrections "were piping voices through the speakers at night-time in order to unsettle him". After assessment by the Forensic Service, Corrections was advised by the Mason Clinic no further intervention was necessary.

[10] Mr Berry summarised Mr Waiti's violent offending, noting more than 20 of his nearly 50 convictions involve serious violence, including with weapons and in

disguise, against men and women known and unknown to him as well as police and prison officers. In addition to the index kidnapping offence, he has three other 'relevant offences': two aggravated robberies, and wounding with intent to cause grievous bodily harm, all in August 2003. As well as using violence for material gain, Mr Waiti is violent in personal and intimate relationships, exacerbated by paranoid tendencies given rise by his history of chronic substance abuse and psychosis. His recourse to violence as an emotional response has continued in prison.

[11] Also while in prison both in 2007 and (38 offences later) 2014, Mr Waiti received substantial therapy and treatment in the course of Corrections' intensive High Risk Personality Programmes. The former appeared to give him "some increased insight [into] … and some limited and fragile management" of the risk factors culminating in his offending. In the course of the latter, he was referred for psychiatric assessment and prescribed medication to address his paranoia and low mood. The medication permitted his continued participation in the programme, with good evidence his behaviour improved during that time (until his use of violence against another inmate had him removed). Mr Waiti also responded well to two months' treatment in 2017 for violent and general offending, although that also came to an end with violence towards an inmate and physical aggression toward a prison officer. But his deteriorating conduct may have been related to his ceasing to take his medication and experiencing increased paranoia. Mr Waiti says he participates in the programmes only to improve his prospects for release; nonetheless, he has not been resistant to any treatment offered.

[12] Mr Berry applied a number of "actuarial instruments and noted clinical risk factors" to assess the risk of Mr Waiti's commission of further serious violent offending in the community. On each the RoC*RoI,[14] the Violence Risk Scale,[15] and the Ontario Domestic Assault Risk Assessment,[16] he assessed Mr Waiti as being in a

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14 Leon Bakker, James O'Malley and David Riley "Risk of Reconviction: Statistical Models which predict four types of re-offending" (1999) Department of Corrections <www.corrections.govt.nz/resources/research_and_statistics/risk-of-reconviction>.

15 Stephen Wong and Audrey Gordon "The validity and reliability of the Violence Risk Scale: A treatment-friendly violence risk assessment tool" (2006) 12 Psychology Public Policy and Law 279.

16 N. Zoe Hilton and others "A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment" (2004) 16 Psychological Assessment 267.

high-risk category. On the Psychopathy Checklist-Revised[17], he reported Mr Waiti's 2009 assessment as "indicative of an individual with a high overall level of psychopathy and antisocial personality", which high score is "highly predictive of serious violent offending and fast speed of recidivism leading to reimprisonment". Mr Berry's short-form re-assessment of Mr Waiti established no change from the assessment ten years earlier.

[13] Taking into account all those factors, and other neuropsychological testing and clinical observations, Mr Berry considers "there is a Very High risk of Mr Waiti committing a further relevant offence when he is next released into the community". More specifically:

> Considering a combination of static and dynamic factors, Mr Waiti's overall risk of violent recidivism if he were to be released now, in the writer's opinion is ***Very High.*** If he begins a new relationship, his partner would be at elevated risk of being assaulted by Mr Waiti, especially if he ceases to take his medication and consequently becomes paranoid and agitated. He could also be violent to anyone in the community who aggravates him particularly in a situation in which he is using alcohol and/or other drugs to become intoxicated. Members of the community may also be harmed if Mr Waiti chooses to use violence to satisfy his material wants and needs. If he were to become involved in a dispute with a member of the general public, that person or people they are with, would be at significant risk of being assaulted by Mr Waiti, either with or without a weapon. His violent behaviour could escalate to be excessive and life-threatening. Police who have been called to deal with Mr Waiti's criminal behaviour could also be at significant risk of being assaulted by Mr Waiti. Rival gang members are also at risk of being subjected to violence by Mr Waiti if he were to re-new his gang associations. Finally, staff in institutional settings in which Mr Waiti may be placed are at significant risk of being assaulted by Mr Waiti if he feels he is being treated unfairly or has been disrespected.

[14] Mr Berry then turns to the s 107IAA traits and behavioural characteristics. He considers Mr Waiti is intensely driven to "commit acts of violence, particularly when angered in either domestic or other settings, when engaging in gang related activities and in response to perceived slights or perceived wrongdoing by others", and displays extreme aggressive volatility. He notes Mr Waiti's behaviour is not constrained by external controls, and exacerbated if not medicated for psychosis. Behavioural change obtained in prison programmes has not sustained.

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[17] Stephen Hart, David Cox and Robert Hare *The Hare Psychopathy Checklist: Screening Version* (Toronto, Multi-Health Systems, 1995).

[15] In Mr Berry's opinion, Mr Waiti's behaviour, while open to characterisation as vengeful, is not persistently so, but rather more reactive to situational factors. Correspondingly, neither is there evidence of long-term planning to use serious violence to achieve premeditated goals. But he displays:

> … a lifelong lack of self-regulatory capacity in relation to his violence and, as yet, there is limited evidence of any related skill acquisition notwithstanding some observed [temporary] general behavioural improvement … .

His understanding of his offending's impact on its victims is "embryonic", at best.

[16] Mr Berry concludes Mr Waiti presents a very high risk of violent recidivism to anyone with whom he is in a relationship, or in dispute.

[17] Mr van Rensburg interviewed Mr Waiti for two and a half hours on 19 September 2019. He also spoke with Ms Dyhrberg on 29 October 2019, and to Mr Waiti's father on 5 November 2019. Although without conducting alternative assessments and without access to Mr Berry's scoring data, his familiarity with the actuarial instruments used by Mr Berry and his knowledge of Mr Waiti's offending allow him to score Mr Waiti on the Violence Risk Scale "in the upper region of the high risk band", indicating his "very high probability of future violent offending". Mr van Rensburg finds affirmation for that prediction in Mr Waiti's offending in prison and on release.

[18] Mr van Rensburg's review of the s 107IAA traits and behavioural characteristics largely is consistent with Mr Berry's. He notes Mr Berry's recording of Mr Waiti's involvement in some 177 incidents of prison misconduct, 77 of which are described as 'prisoner behaviour', and extrapolates Mr Waiti's "sensitivity and reactivity to perceived injustice or rebuff … in a constant state of readiness to react violently should he feel rejected, humiliated or intimidated". He observes the more extreme aspects of Mr Waiti's offending appear to have been committed while under the influence of alcohol or methamphetamine.

[19] Mr van Rensburg offers the suggestion Mr Waiti's "persistent readiness (partly due to paranoid ideation or due to poly-substance abuse)" to resort to violence might

be seen as qualifying vengeful intention towards authority figures, including intimate partners and parents, by whom Mr Waiti has "ample reasons" to consider himself abandoned and mistreated. But he agrees Mr Waiti's behaviour – described as 'violent self-preservation', asserted "pre-emptively and instrumentally to meet his needs" – is reactive and unregulated.

[20] The psychologists were empanelled to give concurrent evidence before me, in particular to address the duration of the proposed order, required to be "the minimum period required for the purposes of the safety of the community",[18] on which their reports largely were silent.[19] Mr Berry said:

> [I]f Mr Waiti was to be judged successful in terms of leading an offence-free lifestyle for five years I would think that that would be a good indication that he was therefore of considerably reduced risk at that time. But at this stage it's difficult to pinpoint an exact appropriate time period but I do note Mr Waiti is at the highest end of the risk scale.

Mr van Rensburg largely concurred:

> [I]f he can stay clean and not re-offend within two to three years the chances are that he won't re-offend, well I won't say won't re-offend, but that the risk becomes a lot lower and it's on that basis that … the shortest possible period would probably be a good sign to him that there is some trust or some confidence in his ability this time to remain offence free.

But Mr Berry cautioned:

> [G]enerally the literature and research suggests that most resources should be directed at the most serious offenders. If you take that and extend that logically then one would expect Mr Waiti to be in the upper half of the duration of [the] order.
>
> …
>
> Mr van Rensburg's detailed a range of positives that we can see in Mr Waiti but I also am cautious because the actuarial results are typically what we rely on to determine risk and in this case it confirms a very high risk.

Considering an extended supervision order

[21] Section 107I(2) provides:

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18 Parole Act 2002, s 107I(5).

19 See *Moeke v The Chief Executive of the Department of Corrections* [2010] NZCA 60 at [28]–[29], commending the Chief Executive ensure psychological reports include a considerably greater focus on the appropriate minimum term.

> (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.

[22] In *Chief Executive, Department of Corrections v Alinizi*, the Court of Appeal explained the three-step process following determination of the offender as "eligible" for an ESO: I must determine if Mr Waiti is a pervasive sexual or violent offender; I must assess his specific qualification in terms of the s 107IAA traits and behavioural characteristics;[20] and, if qualifying, I must determine the risk of his future serious sexual or violent offending.[21]

—pervasive serious violent offending

[23] I am satisfied Mr Waiti has, or had, a pervasive pattern of serious violent offending.

[24] Mr Waiti was convicted of wounding with intent to cause grievous bodily harm and injuring with intent to injure on separate occasions in 2004;[22] aggravated assaults on prison and police officers respectively in 2005 and 2008;[23] assault of a woman, and separately three counts of common assault, in 2009;[24] and assault with a weapon in 2011.[25] There also are intermediate convictions for disorderly behaviour in a threatening manner or one likely to cause violence in 2002, 2009 and 2010;[26] and aggravated robberies with, and separate possessions of, offensive weapons in 2002, 2004, 2008, and 2010.[27]

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20 At [8] above.
21 *Chief Executive, Department of Corrections v Alinizi* [2016] NZCA 468 at [13].
22 Crimes Act 1961, ss 188(1) and 189(2).
23 Section 192(2).
24 Sections 194(b) and 196.
25 Section 202C(1).
26 Summary Offences Act 1981, s 3.
27 Crimes Act 1961, ss 202A(4) and 235(c).

[25] I do not overlook the violence in the index kidnapping,[28] in which he dragged his intimate partner, caught by her leg on his car's tow bar in an attempt to escape from its boot into which he had forced her, along the highway for some 1.6 kilometres at speeds between 90 to 100 kilometres per hour despite witnesses' attempts to have him stop. Some more kilometres down the road, after his swerve at one witness dislodged the victim from the car and tow bar, a witness saw him "pull over … walk around the vehicle and then drive off". That allows an inference Mr Waiti knew the victim was being dragged behind his car. The sentencing Judge found "actual and threatened violence and indeed in my view the injury inflicted on her was to a degree foreseeable", and imposed a minimum period of imprisonment as necessitated in significant part by his "almost continuous [violent offending] since 2002".[29]

—qualification for risk assessment

[26] I also am satisfied Mr Waiti 'qualifies' for my determination if there is a very high risk he will in future commit a relevant violent offence. To explain, the question of Mr Waiti's qualification requires my satisfaction as to each his severe disturbance in behavioural functioning; either his planning of violent offences to achieve a premeditated goal, or his limited self-regulatory capacity; and his lack of empathy for his victims.

[27] First, I am satisfied Mr Waiti's behavioural functioning is severely disturbed. I accept disturbance is evidenced by the intensity of his drive to commit acts of violence, as illustrated by his criminal history, his resort to violence in contest with 'authority' figures, and its continuation while incarcerated. The ease with which Mr Waiti resorts to serious violence, even in circumstances in which that is to his detriment in excluding him from recognised desirable treatment, establishes his extreme aggressive volatility.

[28] But Mr Waiti's violent behaviour is characterised as his self-preserving reaction to perceived challenge. While possibly 'vengeful' – in the sense of defeating such challenges, and restoring his unchallenged presence – there is little evidence such

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28 Section 209.

29 *R v Waiti* DC Rotorua CRI 2013-063-001725, 25 October 2013 at [3]–[4], [15], and [23].

is his persistently harboured intention, and still less against one or more other people (although the latter is not material, if open to being met by the target "at the time").[30] Mr Berry says instead "his offending has been typically reactive to situational factors (such as arguments and gang confrontations)". Subject to his suggestion of a possible meaning to be attributed to s 107IAA(2)(a)(iii)'s phrase,[31] Mr van Rensburg agrees.

[29] There are cases in which ESOs have been made despite the particular characteristic not expressly being found "established by evidence".[32] But on the face of s 107IAA(2), the characteristics are mandatory requirements; there must be evidence establishing "*each*" stipulated characteristic, for me to be satisfied of the offender's severely disturbed behavioural functioning. That is reinforced by s 107IAA(2)(a)'s subparagraphs' conjunctives "and". If so, the existence of such evidence constitutionally is important, because it founds a deprivation of liberty.[33]

[30] Section 107IAA was inserted by the Parole (Extended Supervision Orders) Amendment Act 2014 on 12 December 2014, to enhance the prior ESO regime (which addressed only offenders presenting "a real and ongoing risk of committing sexual offences against children or young persons"). In its draft formulation, paragraph (a) only stipulated "has a severe disturbance in behavioural functioning … ".[34] The Law and Order Select Committee recommended its clarification:[35]

> We recommend including in clause 12 of the bill a list of behavioural characteristics of an eligible violent offender indicative of a "severe disturbance in behavioural functioning". The Public Safety (Public Protection Orders) Bill defines this concept, but this is not suitable for extended supervision orders, because it sets an inappropriately high threshold. Without a reference to what constitutes "severe disturbance in behavioural functioning", specifically in respect of violent offenders, the court would have to define those behaviours, and might adopt the public protection orders terminology. We consider that including types of "severe disturbance in

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30 *Chief Executive of the Department of Corrections v CJW* [2016] NZHC 1082 at [41].

31 At [19] above.

32 For example, *Chief Executive of Department of Corrections v Paul* [2017] NZHC 1294 at [26]; and *Chief Executive, New Zealand Department of Corrections v Amohanga* [2017] NZHC 1406 at [35].

33 *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [35]–[36] and [83], albeit in relation to evidence of (minorly) different characteristics under the Public Safety (Public Protection Orders) Act 2014 (but see also [13] in relation to the Parole Act 2002).

34 Parole (Extended Supervision Orders) Amendment Bill 2014 (195–1), cl 12.

35 Parole (Extended Supervision Orders) Amendment Bill 2014 (195–2) (select committee report) at 3–4.

> behavioural functioning" appropriate to the specific context of extended supervision orders is necessary.

[31] In so recommending, the Select Committee was accepting submissions made to it by the Legislation Advisory Committee, to avoid "difficulties with having the same terminology in two (closely-linked) Acts if they are not intended to have the same meaning", suggesting:[36]

> …the Committee gives consideration to the definition of "severe disturbance of behavioural functioning" and "disturbance of behavioural functioning". Untangling this matter is important as this factor is the hinge on which the ESO regime turns, and if the RIS estimates of its incidence are accurate, there will be few opportunities to test and confirm aspects of the interpretation. A logical and well-established set of practical criteria should be clearly included.

[32] The "RIS estimates" came from the original Regulatory Impact Statement dated 21 November 2013.[37] It estimated only "1–2 very high risk violent offenders approximately every five years" would be placed on ESOs.[38] Without any more indication of source, the revised RIS dated 3 November 2014 included at its Appendix 1 the proposed criteria:

> 4. In determining whether an offender poses a very high risk of serious violent offending, the court must be satisfied that an offender:
>
> (a) displays severe disturbance in behavioural functioning, established by:
>
> - behavioural evidence of intense drive, desires or urges to commit acts of violence; and/or
> - evidence of extreme aggressive volatility; and/or
> - persistently harbouring vengeful intentions towards one or more other persons.
>
> …

As proposed, any one of the three characteristics would suffice to establish the disturbance, and evidence was not expressly required of the last.

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36 Legislation Advisory Committee "Submission to the Law and Order Select Committee on the Parole (Extended Supervision Orders) Amendment Bill 2014" at [18].

37 Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (21 November 2013).

38 Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014) at [34].

[33] From that legislative history, it is notable s 107IAA(2)(a)'s characteristics were intended to distinguish applications for ESOs from the "inappropriately high threshold" to be established for the court's satisfaction as to severe disturbance on applications for public protection orders. The Public Safety (Public Protection Orders) Bill's threshold (precisely replicated at s 13(2) of the Public Safety (Public Protection Orders) Act 2014) was:

> … a severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics:
>
> (a) an intense drive or urge to commit a particular form of offending:
>
> (b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:
>
> (c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims (within the general sense of that term and not merely as defined in section 3):
>
> (d) poor interpersonal relationships or social isolation or both.

[34] It is perhaps unfortunate the Select Committee used the word 'threshold' to deal with the Advisory Committee's plea for practical clarity. The public protection orders legislation uses "threshold" as a term of art for those orders' imposition on a person, one of which is the person is subject to an ESO with particular conditions.[39] A public protection order additionally requires the court to be satisfied of a very high risk of "imminent" offending.[40] But, as enacted, s 107IAA(2)(a) clearly establishes a much higher threshold to be satisfied of the offender's disturbance on application for an ESO than a public protection order, especially as public protection orders' (b) and (c) characteristics of the disturbance are required separately to be established in any event under s 107IAA(2)(b)(ii) (as an alternative) and (c).

[35] The result, effectively, is qualification for an ESO is all that severe disturbance qualifying for a public protection order, *and more*. Yet, in passage of the Bill, parliamentarians commended the select committee for:[41]

> … [its] good work here in making sure that the criteria were not quite as prescriptive as what would apply for a public protection order. The threshold test, again, is different. We are talking about a lower threshold.

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39 Public Safety (Public Protection Orders) Act 2014, s 7(1)(b).
40 Section 13(1)(b).
41 (2 December 2014) 702 NZPD 1021.

[36] Looking at ESO-qualifying 'severe disturbance' alone, such is required to be established from the combination of the required characteristics. While the complete statutory wording is important, to summarise, it is a severe disturbance characterised by violence, volatility, and vengeance. But the disturbance's materiality is in the offender's either planned resort to violence to achieve a specific end, or disinhibition. The point is, either by design or inadvertence, the offender's disturbed behaviour may be realised. And the offender lacks comprehension of the impact of the violence on victims, meaning there is no claim on self-control. In that context, "persistent harbouring of vengeful intentions" is required to provide motivation for unpredictable resort to violence. But why only that particular combination qualifies as the necessary 'severe disturbance' is unexplained.

[37] The singular characteristic of "persistently harbouring of vengeful intentions towards 1 or more other persons" is followed by the as-singular alternative to the court's additional satisfaction the offender has "limited self-regulatory capacity" – that s/he "displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal".[42] It is unclear how those two forward-looking factors – intention and premeditation – should interrelate, as they must when reliance is placed on the latter, and especially if the vengeance characteristic only has resonance together with its violent and volatile counterparts. (Similarly, "extreme aggressive volatility" is "closely aligned to" "limited self-regulatory capacity".)[43] If persistent vengeful intention is part (together with intense violent disposition and extreme aggressive volatility) of every severe disturbance justifying an ESO, then it seems implausible it would be evidenced by other than as also would qualify for planning of serious violent offences to meet a premeditated goal. Only offenders' empathy would be enough to avoid an ESO's imposition.

[38] Notably, the health assessors advise they are not aware of any clinical foundation for s 107IAA(2)(a)(iii)'s phrase.[44] Thus the 'severe disturbance' of which

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42 Parole Act 2002, s 107IAA(2)(b).

43 *Chief Executive of the Department of Corrections v CJW*, above n 30, at [36].

44 The health assessors gave concurrent expert oral evidence, predominantly on the duration of the proposed order. I address that at [49] and following below. But the health assessors remained in court during subsequent legal argument, including on s 107IAA(2)'s aggregation. In response to my query if paragraph (a)(iii) had any clinical foundation, the Commissioner's counsel, Henry Steele, offered to obtain the health assessors' advice, which they gave in answer to my question.

it is a part also cannot be an identified psychopathy. Paragraph (a)'s combination therefore is the statute's own construct. But that seems not to have been appreciated in the parliamentary debates: "[t]he sort of behavioural conditions we are talking about here are those that can be assessed only by a registered and highly trained medical professional".[45]

[39] For all the above reasons, s 107IAA(2)(a)'s literal construction may not have been intended: it is to establish a standalone "severe disturbance in behavioural functioning" without any aetiology, and presents a threshold significantly above that (for public protection orders) assessed to be "inappropriately high". Instead, any of paragraph (a)'s characteristics – at least the former two recognisably having clinical foundation, and then to be reinforced by paragraphs (b) and (c) criteria for the realisation of the risk – may be thought 'appropriate' to establish the qualifying disturbance.

[40] Even if paragraph a's "and"s may have been open to being construed as 'or's,[46] that course is closed by its requirement also the offender's disturbance be "established by evidence of *each* of the following characteristics" (emphasis added). That is consistent with the exceptional nature of the provision, in pursuing community safety by providing for particular violent offenders' extended supervision in the community, after conclusion of their sentence, as an alternative to a sentence of preventive detention at the outset.[47] There is to be "very high risk" of their future violent offending before ESOs are justified.

[41] The requirement for paragraph (a)'s particular combination provides that exceptionality; its establishment is a matter for my assessment of the evidence. I accept the assessors' evidence of Mr Waiti's violence and volatility. So far as his "persistent harbouring of vengeful intentions" is concerned, his history of paranoia (especially in relation to "perceived disrespect and wrongdoing") provides a foundation for the intention, while his as-persistent resort to violence makes it out. Mr Berry observes

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45 (2 December 2014) 702 NZPD 1028.

46 *Doe d Bedford v White* (1827) 4 Bing 276, 130 ER 773; *Boy Scouts of Canada v Doyle* (1997) 149 DLR (4th) 22 at [58]; and *Waitemata Health v Attorney-General* [2001] NZFLR 1122 (CA) at [122] (cited in *University of Canterbury v Insurance Council of New Zealand Inc* [2013] NZCA 471, [2014] 2 NZLR 12 at [30]).

47 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126 at [85] and [98].

"even seemingly instrumentally motivated offences, such as aggravated robberies, have been motivated by [Mr Waiti's] desire to deflect and release negative emotions". In providing such motivation, Mr Waiti's continuous determination to redress his persecutory delusions may be described as his vengeful intention. Although that determination is not addressed against any individual (and Mr Berry records Mr Waiti "did not reveal any current ideation associated with harming himself or others"), it is enough such will be his target.[48]

[42] I therefore am satisfied by the evidence Mr Waiti has a qualifying severe disturbance in his behavioural functioning.

[43] But I do not come easily to that conclusion. It rests on a construction which does not flow easily from s 107IAA(2)(a)(iii)'s words, or as a necessary inference from their place in the paragraph's formulation, or to characterise any recognised "severe disturbance in behavioural functioning". I am troubled by the subparagraph's lack of clinical foundation, and its redundancy in (or of) the "behavioural evidence" anticipated by s 107IAA(2)(b)(ii). In providing that enabling interpretation, I am influenced by both parties' request for an ESO's imposition here – including very articulately and non-demonstratively from Mr Waiti himself, as providing the security he requires safely to transition to his "new" self in the community – and the health assessors' advice there is a very high risk of Mr Waiti's violent (re-)offending against indeterminate members of the community.

[44] If it is also to be a purposive construction, as the Chief Executive urged I should make, Parliament's intention needs to be rather more clear than can be taken from the statutory words or their context alone. I do not know if Parliament's intention is reflected by comments of its members in the course of the Bill's passage, but the threshold for ESO-qualifying "disturbance" seems materially higher than that qualifying for public protection orders. Those comments include a plea:[49]

> … Parliament … maintain oversight over these orders to ensure they are appropriately used, because they are taking us well beyond where our previous conventions have taken us. Internationally they are not used widely either. We do accept the need for these orders. We do accept the need for flexibility to

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48 *Chief Executive of the Department of Corrections v CJW*, above n 30, at [41].
49 (04 December 2014) 702 NZPD 1169.

> manage serious offenders who continue to pose a risk to the community, but we also ask that we take our role very seriously in ensuring their appropriate use and their frugal use.

The forecast frugality of "1–2 very high risk violent offenders approximately every five years" also seems an understatement;[50] in the five years since s 107IAA(2)'s introduction, at least five ESOs already have been made to address the very high risk of future violent offending.[51]

[45] Next, I also am satisfied from his criminal record, but also from the psychologists' reports, Mr Waiti has limited self-regulatory capacity. To some degree, this is the alternative characterisation of his aggressive volatility.[52] But the evidence suggests Mr Waiti strategically deploys violence in response to perceived slight, rather than instinctively uses it as an inveterate coping mechanism. Of note in this context also is his participation in rehabilitative courses, which presumably offer alternative coping mechanisms, and his fledgling ability (but fleeting preparedness) to adopt them instead. Nonetheless, what self-regulatory capacity he may have remains limited.

[46] Last, Mr Waiti's lack of empathy for his victims, and his lack of understanding for the impact of his violent offending on them, is endemic in his offending. Despite Mr Waiti's mental health issues, predominantly presenting as paranoid ideation and agitation, also of note is his intelligence, creativity, and (incarcerated) steps towards self-improvement. The psychopathy reported from 2009 continues undiminished, but Mr van Rensburg is optimistic much was driven from Mr Waiti's poor mental health, now less prevalent due his maturity and medication.

—risk of future relevant violent offending

[47] Mr Waiti's 'qualification' for my determination of his risk of relevant violent offending, his past offending and continuing personal characteristics as predictive of his future conduct, and his rating in the "upper half" of actuarial tools designed to

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50 At [32] above.

51 *Department of Corrections v McCord* [2017] NZHC 744 (although made in relation to the risk of the offender committing a future relevant sexual and/or violent offence); *Chief Executive, Department of Corrections v Paniora* [2018] NZHC 1505; *Chief Executive, New Zealand Department of Corrections v Amohanga,* above n 32; *Chief Executive of Department of Corrections v Paul,* above n 32; and *Chief Executive of the Department of Corrections v CJW*, above n 30.

52 *Chief Executive of the Department of Corrections v CJW*, above n 30, at [36].

provide assessments of violent recidivism, all satisfy me there is a very high risk Mr Waiti will commit a relevant violent offence. Mr Waiti's placement in the worse part of those risk assessment scales is particularly informative, as the only forward-looking factually-based evidence before me. It serves to offset what aspirations may be taken from his reinvention, despite their clear desirability and hopeful prospect.

[48] I therefore will make an ESO, to protect the community from the real and ongoing risk of Mr Waiti's serious violent offending on his release into it.

The term of the order

[49] Section 107I(4) and (5) provide:

> (4) Every extended supervision order must state the term of the order, which may not exceed 10 years.
>
> (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.

[50] Obviously, given his relevant violent offending qualifies for the making of an ESO, the level of risk posed by Mr Waiti is very high. The seriousness of the harm that might be caused to victims is of those relevant violent offences. Mr Berry said victims were "at significant risk of being assaulted by Mr Waiti, with or without a weapon …, [which] could escalate to be excessive and life-threatening".

[51] Also material is Mr Berry's observation "Mr Waiti's release plans are lacking because they are not detailed and not backed by confirmed agreement. … [Their] absence … is an egregious gap in [his] preparation for release". An adequate plan would identify risk factors, risk situations, and coping mechanisms. The Court of Appeal commended health assessors' "thorough assessment of the efficacy and suitability of post-release plans including their nature and duration" for consideration of an ESO's minimum term.[53]

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53 *Moeke v The Chief Executive of the Department of Corrections*, above n 19, at [29(b)].

[52] Mr Waiti has taken some steps to address the perceived risks, but they are "embryonic".[54] Nonetheless, those first steps – taken together with Mr van Rensburg's hopefulness Mr Waiti's psychopathic tendencies may have been more redolent of formerly untreated symptoms of his mental illness than of any enduring pathology – are what enable a minimum term short of the maximum permissible. Mr Berry cautiously allows any diminution in psychopathy may be able to be demonstrated over subsequent years.

[53] In *Department of Corrections v Nepia*, Kós J observed "[c]ases where an ESO of ten years have been ordered typically involve a recurring pattern of sexual offending".[55] Lesser terms are justified by offenders' advancing age,[56] but also by their acceptance of responsibility, positive response to treatment, and access to support.[57] An organising principle for the imposition of a minimum term at the maximum period available may be the pathological nature of such offending, habitually denied by offenders, and therefore an absence of treatment. Comparatively, serious violent offending appears more frequently environmental, less open to denial, and for which treatment and support are more accepted.[58]

[54] In my assessment, 'the likely duration of the risk' here is five years, as a period of time during which any diminution of risk will become evident as not requiring the ESO's continuation, and conversely any persistence or exacerbation justifying its review.[59]

[55] I will therefore make an ESO for a term of five years.

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54 At [15] above.

55 *Department of Corrections v Nepia* [2014] NZHC 1448 at [41].

56 See *Wardle v Chief Executive of the Department of Corrections* [2017] NZCA 298 at [65]; and *Chief Executive, Department of Corrections v van der Plaat* [2016] NZHC 3186 at [70].

57 See *The Chief Executive of the Department of Corrections v H (CA359/05)* CA359/05, 1 May 2006 (five years); and *Chief Executive Department of Corrections v Clark* [2017] NZHC 771 (two years).

58 *Chief Executive, Department of Corrections v Paniora* [2018] NZHC 1505 at [42]; *Paniora v Chief Executive of the Department of Corrections*, above n 10, at [22], citing *Chief Executive, Department of Corrections v Alinizi,* above n 21, at [38].

59 Parole Act 2002, s 107RA.

Imposition of intensive monitoring condition

[56] As said, the Chief Executive seeks an intensive monitoring condition in connection with the ESO.[60] When I make the ESO, I may make an order requiring the Parole Board to impose an intensive monitoring condition,[61] and to specify its maximum duration, which can be no longer than 12 months.[62] Notably, that is not an order requiring the Board to impose such a condition of any specified duration – only that I am to specify the maximum duration of any condition I order the Board to impose. Except for the coincident making of an ESO, and the Chief Executive's application, there is no statutory threshold for the order. But its exceptionally intrusive, time-limited, and one-off aspects are all indicia it is a response to a need to assert external control at a transitional point of high risk.[63]

[57] Mr Berry explained "Mr Waiti's current plan is insufficient to manage his risk upon release". Mr Waiti has been subject to intensive monitoring since his release, in connection with the currently applicable interim supervision order. Sanctions have been ineffective to constrain his violence, which appears maintained by:

> … a range of antisocial beliefs, the pursuit of alcohol and other drugs, a tendency to act in an impulsive and disinhibited fashion after using alcohol or other drugs and periods of non-compliance with taking medication for auditory hallucinations and paranoia. He also has been influenced by relationships with antisocial associates.

It is clear from the evidence intensive monitoring remains justified. It is essentially for 'line of sight' person-to-person monitoring of Mr Waiti.

[58] Only the Parole Board imposes intensive monitoring conditions; my role is to "make an order requiring the Board" to do so.[64] If so ordered, the Board is to impose an intensive monitoring condition.[65] The maximum duration of that condition is to be specified by the Court.[66] Whatever duration up to that maximum is imposed by the

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60 At [3] above.
61 Parole Act 2002, s 107IAC(1). Subsection (2) defines "intensive monitoring condition": see above n 8.
62 Parole Act 2002, s 107IAC(3).
63 See also *Chief Executive of Department of Corrections v Paul,* above n 32, at [39].
64 Parole Act 2002, s 107IAC(1).
65 Section 107IAC(4).
66 Section 107IAC(3).

Board, the condition only applies during the first 12 months of the ESO.[67] Neither the Court in specifying the maximum duration, nor the Board in imposing the condition, is either required to take or prohibited from taking into account time spent on intensive monitoring conditions in association with interim supervision orders.[68]

[59] Given the risk here sought to be ameliorated by the intensive monitoring condition, Mr Waiti's inability to manage that risk, and the community interest in keeping him from reoffending, the Board should have the greatest discretion as to the duration of the intensive monitoring condition it imposes. I am provided with no basis to contemplate limiting the Board's discretion. I will specify the maximum duration of the intensive monitoring condition as 12 months.

Imposition of special conditions on interim basis

[60] Last, the Chief Executive seeks orders imposing special conditions on Mr Waiti on an interim basis, including an intensive monitoring condition. 'Special conditions' are designed to:[69]

> (a) reduce the risk of reoffending by the offender; or
>
> (b) facilitate or promote the rehabilitation and reintegration of the offender; or
>
> (c) provide for the reasonable concerns of victims of the offender; or
>
> (d) comply, in the case of an offender subject to an extended supervision order, with an order of the court … to impose an intensive monitoring condition.

[61] When I make the ESO, I may make such special conditions, but only if I am satisfied there may not be sufficient time, before the ESO comes into force, for the Board to determine which (if any) should be imposed.[70] The special conditions apply for three months, or until the Board determines any earlier application for special conditions.[71]

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67 Section 107K(3)(ba).
68 *Chief Executive, Department of Corrections v Paniora*, above n 58, at [52]; *Paniora v Chief Executive of the Department of Corrections*, above n 10, at [28] and [33].
69 Parole Act 2002, s 15(2).
70 Sections 107IA(1) and (2).
71 Section 107L(2A).

[62] As said, Mr Waiti is presently subject to an interim supervision order, with special and intensive monitoring conditions.[72] On my making of the ESO, the interim supervision order "ceases to have effect".[73] However, although any standard release conditions are discharged when the ESO comes into force,[74] standard extended supervision conditions then apply,[75] and any special conditions to which Mr Waiti is subject when the ESO comes into force continue in force for three months, or until the Board determines any earlier application for special conditions.[76] That is, of course, the same extent as would apply to any special conditions I made on an interim basis.[77]

[63] I apprehend the Chief Executive's objective, in seeking orders imposing special conditions on Mr Waiti on an interim basis, is to maintain the special conditions associated with the interim supervision order, pending the Board's determination of special conditions to be associated with the ESO. Discontinuity in the conditions' application is possible if an ESO was determined to come into force at a later date, if special conditions associated with an applicable interim supervision order ceased to have effect at the time of the ESO's determination, and thus did not apply to the offender when the ESO came into force. But that is addressed by having the ESO come into force on the day it is made,[78] as the Chief Executive seeks and the legislation establishes by default. (That coincidence of timing satisfies me there may not be sufficient time, before the ESO comes into force, for the Board to determine which (if any) special conditions should be imposed.)

[64] It is therefore unclear what purpose the special conditions now sought on an interim basis have, if they only are to duplicate the special conditions already applying (and continuing to apply) to Mr Waiti. I am reluctant to make orders duplicating special conditions to which Mr Waiti is already subject when the ESO comes into force. But I accept the interim supervision order was drawn up in terms expressly stating it "applies until the application for an ESO with intensive monitoring condition

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72 See [3] above.
73 Parole Act 2002, s 107FA(6).
74 Section 107L(2).
75 Section 107J(2)(a).
76 Section 107L(2A).
77 Section 107IA(4)(b).
78 Section 107L(1)(c)(i).

is finally determined". Out of an abundance of caution, I will impose the special and intensive monitoring conditions sought on an interim basis under s 107IA.

[65] The Chief Executive may wish to consider if applications for special conditions on an interim basis are warranted on any future application for an ESO (whether or not in relation to Mr Waiti). A better approach may be to allow the statutory mechanism for interim supervision orders full effect.

Orders

[66] I make an extended supervision order in relation to Mr Waiti in terms of s 107I of the Parole Act 2002, with a term of five years.

[67] Under s 107IAC of the Parole Act 2002, I require the Parole Board to impose on Mr Waiti an intensive monitoring condition, the maximum duration of which is 12 months.

[68] I make an order under s 107IA of the Parole Act 2002, imposing special and intensive monitoring conditions on Mr Waiti on an interim basis.

Directions

[69] My minute of 10 December 2019 – in response to Stuff Limited's application to access this judgment under the Senior Courts (Access to Court Documents) Rules 2017, opposed by Ms Dyhrberg on grounds "[t]here are sensitive matters in the documents that ought to be suppressed" – advised I will embargo the judgment from publication for a brief period after its issue to enable her to consider if anything in it may be affected by any suppression order Mr Waiti would seek. But, as my minute explained, Stuff Limited's right to access the judgment is not affected.

[70] I therefore direct:

(a) this judgment is embargoed from publication until **9.00 am on Tuesday, 17 December 2019**;

(b) Ms Dyhrberg is to identify any of its content as may be affected by any suppression order Mr Waiti would seek by memorandum filed no later than **5.00 pm on Thursday, 12 December 2019**;

(c) the Commissioner (and, if it wishes to do so, Stuff Limited) is to respond by memorandum filed no later than **5.00 pm on Friday, 13 December 2019**;

(d) a teleconference be convened before me at **9.00 am on Monday, 16 December 2019**, to determine what (if any) interim redaction may be required in advance of determination of any application for suppression orders.

—Jagose J