

He Puka Kaupapa | Issues Paper 51

Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu

**Public safety and serious
offenders: a review of
preventive detention and
post-sentence orders**



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake
Better law for Aotearoa New Zealand through independent review

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Have your say

We want to know what you think about the issues and proposals set out in this Issues Paper. We ask questions throughout this Issues Paper. We welcome feedback on these questions and on any other matters not addressed by them. Submitters can respond to any or all the questions.

Submissions on our Issues Paper must be received by **28 July 2023**.

You can email your submission to pdr@lawcom.govt.nz.

You can post your submission to

Review of Preventive Detention and Post-Sentence Orders
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We emphasise nevertheless that the views expressed in this Issues Paper are those of the Commission and not necessarily those of the people who have helped us.

Nō reira, ko tēnei mātou e mihi nei ki a koutou, kua whai wā ki te āwhina i a mātou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

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Contents

Have your say.....	iii
Acknowledgements	iv
Introduction	3
PART ONE: INTRODUCTORY MATTERS	8
Chapter 1: Origins and overview of the law	9
Introduction.....	9
History of preventive detention, ESOs and PPOs in Aotearoa New Zealand.....	9
Overview of current law	16
PART TWO: OVERARCHING ISSUES	25
Chapter 2: Te ao Māori and the preventive regimes	26
Introduction.....	26
Tikanga Māori.....	26
Te Tiriti o Waitangi Treaty of Waitangi.....	31
Issues	38
Preliminary views	41
Chapter 3: Key human rights issues	44
Introduction.....	44
Issues	45
Preliminary views.....	56
Chapter 4: Fragmentation of the law	63
Introduction.....	63
Background – How the fragmentation arose	63
Issues	64
PART THREE: ELIGIBILITY	67
Chapter 5: Preventive detention and young adults	68
Introduction.....	68
The law	69
Statistics on the use of preventive detention, ESOs and PPOs in relation to young adults	70
Our approach to the law on the age of eligibility	70
Issues	73
Chapter 6: Qualifying offences	79
Introduction.....	79
The law	79
Issues	82

Chapter 7: Overseas offending	93
Introduction.....	93
Returning Offenders Act.....	93
Issues.....	96
PART FOUR: IMPOSING PREVENTIVE DETENTION, EXTENDED SUPERVISION ORDERS AND PUBLIC PROTECTION ORDERS	99
Chapter 8: The legislative tests for imposing preventive detention, extended supervision orders and public protection orders	100
Introduction.....	100
The legislative tests.....	100
Issues.....	103
Chapter 9: Evidence of reoffending risk	115
Introduction.....	115
The law.....	115
Issues.....	118
PART FIVE: MANAGEMENT OF PEOPLE ON PREVENTIVE DETENTION, EXTENDED SUPERVISION ORDERS AND PUBLIC PROTECTION ORDERS	124
Chapter 10: Conditions and management in the community	125
The law.....	125
Issues.....	132
Chapter 11: Variation and termination of preventive detention, extended supervision orders and public protection orders	150
Preventive detention.....	150
Extended supervision orders.....	152
Public protection orders.....	154
Issues.....	155
PART SIX: PROPOSALS FOR REFORM	164
Chapter 12: Proposals for reform	165
Introduction.....	165
Proposal to facilitate tino rangatiratanga and enable Māori to live according to tikanga	166
Proposal to manage people detained beyond a determinate prison sentence for preventive reasons in different conditions to prison.....	169
Alternative proposals for when a court could impose preventive measures.....	171
Alternative proposals to address the fragmentation of the regimes.....	173
Proposals to reform preventive detention if it continues as a sentence	174
Proposals for reform related to eligibility for preventive measures	175
Proposals to reform the legislative tests for imposing preventive measures	178
Proposals for reform relating to conditions and management in the community.....	180

Introduction

1. Te Aka Matua o te Ture | Law Commission is reviewing the laws that aim to protect the community from reoffending risks posed by some people convicted of serious crimes. Those laws achieve this aim by providing for the detention or supervision of some people beyond a determinate prison sentence.
2. The focus of this review is the law relating to:
 - (a) preventive detention under the Sentencing Act 2002;
 - (b) extended supervision orders (ESOs) under the Parole Act 2002; and
 - (c) public protection orders (PPOs) under the Public Safety (Public Protection Orders) Act 2014.
3. This Issues Paper identifies issues with the law and presents proposals for reform. We ask several consultation questions throughout the Issues Paper to seek feedback from readers.
4. The Issues Paper addresses some difficult questions. The law must balance significant yet competing interests. On the one hand, it must aim to keep the community safe from harm. The law must enable a court to impose the restrictions on a person needed to prevent them from reoffending. On the other hand, people who have served determinate prison sentences have completed the punishment for their previous offending. To impose further and ongoing restrictions on them can result in serious intrusions on their rights and freedoms.
5. In recent years, preventive detention, ESOs and PPOs have been criticised for their inconsistency with human rights law. In 2017, the United Nations Human Rights Committee gave its views in *Miller v New Zealand*.¹ The Committee found that the preventive detention of two people in Aotearoa New Zealand breached the protections against arbitrary detention under the International Covenant on Civil and Political Rights. In 2021, te Kōti Pira | Court of Appeal made declarations in *Chisnall v Attorney-General* that the ESO and PPO regimes were inconsistent with the protection against second punishment under section 26(2) of the New Zealand Bill of Rights Act 1990 and that those inconsistencies had not been justified.² The decision has been appealed to te Kōti Mana Nui | Supreme Court and a judgment is awaited.
6. This review also takes place in the context of several other issues that reflect wider systemic issues with the criminal justice system in Aotearoa New Zealand. The

¹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

² *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484; and *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107.

overrepresentation of Māori among those subject to preventive detention and ESOs is a key issue.

7. We have identified the issues we discuss in this Issues Paper by relying on our terms of reference, which require us to give particular consideration to:
 - (a) whether the laws reflect current understandings of reoffending risks and provide an appropriate level of public protection;
 - (b) te Tiriti o Waitangi | Treaty of Waitangi, ao Māori perspectives and any matters of particular concern to Māori;
 - (c) consistency with domestic and international human rights law; and
 - (d) the relationship between sentences of preventive detention, ESOs and PPOs.
8. Some of the material in this Issues Paper includes discussion of instances of serious offending. This may be distressing for some readers.

STRUCTURE OF THIS ISSUES PAPER

9. This Issues Paper is organised into six parts:
 - (a) Part One sets out some introductory matters:
 - (i) Chapter 1 provides an overview of the current regimes and their origins. It provides information on how preventive detention, ESOs and PPOs operate in practice.
 - (b) Part Two discusses overarching issues that apply to preventive detention, ESOs and PPOs:
 - (i) Chapter 2 discusses applicable tikanga Māori and how we consider te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) should apply to this review. We then identify how the law could better enable Māori to live according to tikanga and give effect to obligations under the Treaty.
 - (ii) Chapter 3 focuses on key human rights issues. It identifies the main instances where the courts and human rights bodies have found Aotearoa New Zealand law in this area to be inconsistent with human rights. It introduces a key question (considered throughout this paper) of whether those inconsistencies can be justified for the purposes of human rights law.
 - (iii) Chapter 4 explains how preventive detention, ESOs and PPOs are fragmented into separate legislative regimes and do not work together cohesively.
 - (c) Part Three considers the eligibility criteria for preventive detention, ESOs and PPOs:
 - (i) Chapter 5 examines the age of eligibility for preventive detention.
 - (ii) Chapter 6 considers the offences that qualify a person for eligibility.
 - (iii) Chapter 7 considers the eligibility of people who have committed offences and been sentenced overseas.
 - (d) Part Four identifies issues with the law governing how a court determines whether to impose preventive detention, an ESO or a PPO:

- (i) Chapter 8 examines the legislative tests for determining whether a person's risk justifies imposing preventive detention, an ESO or a PPO.
 - (ii) Chapter 9 addresses concerns relating to the evidence on which a court determines a person's risk of reoffending.
- (e) Part Five deals with issues relating to how people are managed once they have become subject to preventive detention, an ESO or a PPO:
- (i) Chapter 10 focuses on how people may be managed in the community on parole or subject to an ESO.
 - (ii) Chapter 11 considers the law that applies to the variation and termination of preventive detention, ESOs and PPOs.
- (f) Part Six presents proposals for reform:
- (i) Chapter 12 sets out some high-level reform proposals for feedback.

Consultation questions

10. We ask questions throughout this Issues Paper. We welcome feedback on these questions and on any other matters not addressed by the questions. Submitters can respond to any or all of these questions.

OUR PROCESS SO FAR

11. We published terms of reference for this review in July 2022.
12. We have spent the initial phase of this review researching the law and issues. Our research has included a review of relevant cases and commentary, international human rights authorities and some analysis of the law in comparable jurisdictions. We have also begun preliminary engagement with experts and stakeholders. As part of this engagement, we have met with several teams within Ara Poutama | Department of Corrections who work closely with preventive detention, ESOs and PPOs such as the policy team, psychology practice group, probation team and high-risk team. Other stakeholders and experts we have engaged with include the Parole Board, several academics and practitioners who are experts in this area, the Office of the Ombudsman, the Criminal Cases Review Commission, Chief Victims Adviser Dr Kim McGregor and JustSpeak.
13. We have begun a process to inform ourselves about the tikanga concepts that may be engaged in promoting community safety and well-being and the management of reoffending risks. This has involved:
- (a) commissioning a literature review to identify potential tikanga that apply in the context in which preventive detention, ESOs and PPOs operate;
 - (b) a wānanga held with pūkenga tikanga to explore questions such as: What are the relevant tikanga that apply to the issues covered by this area of law? Are the themes we see emerging from the literature review the right ones? What would implementing the relevant tikanga look like? and
 - (c) commissioning a working paper to bring the material from the literature review and wānanga together.

NEXT STEPS

14. The feedback we receive will help us develop preferred options for reform. We will present those options in a Preferred Approach Paper which we will publish in mid-2024 for further consultation.
15. After consultation on the Preferred Approach Paper, we will develop our final recommendations for reform. We will deliver those recommendations in our final report to the Minister responsible for the Law Commission by the end of 2024.

TERMINOLOGY

16. The key abbreviations and terms used in this Issues Paper are set out below.

Ara Poutama	Ara Poutama Department of Corrections
chief executive	Chief executive of Ara Poutama Department of Corrections
Commission	Te Aka Matua o te Ture New Zealand Law Commission
ESO	Extended supervision order imposed under the Parole Act 2002
IM condition	Intensive monitoring condition under an ESO
ICCPR	International Covenant on Civil and Political Rights
IDO	Interim detention order imposed under the Public Safety Act
ISO	Interim supervision order imposed under the Parole Act 2002
MPI	Minimum period of imprisonment. In connection with preventive detention, MPI refers to the MPI period the court imposes under section 89 of the Sentencing Act 2002
NZ Bill of Rights	New Zealand Bill of Rights Act 1990
offender	Sometimes used to refer to a person subject to a preventive measure or a person against whom an application for a preventive measure is made or contemplated. The preventive detention and ESO legislation refer to the person subject to preventive detention or an ESO as an “offender”. The Public Safety Act variously uses the terms “respondent”, “resident” and “person subject to public protection order”. Where possible, we try to use “person” rather than the term “offender” to refer to people subject to preventive detention, ESOs and PPOs. The term “offender” is inaccurate, in that these measures are imposed on the basis of future risk rather than past offending and potentially detrimental to those subject to the orders.
Parole Board	New Zealand Parole Board
Preventive measure	A sentence of preventive detention, an ESO or a PPO

preventive regimes	Preventive detention, ESO and PPO regimes
PDO	Prison detention order imposed under the Public Safety Act
PPO	Public protection order imposed under the Public Safety Act
PSO	Protective supervision order imposed under the Public Safety Act
Public Safety Act	Public Safety (Public Protection Orders) Act 2014
qualifying offence	A serious sexual or violent offence that a person must be convicted of to be eligible for preventive detention, an ESO or a PPO and that the court must be satisfied the person poses a certain level of risk of committing
Returning Offenders Act	Returning Offenders (Management and Information) Act 2015
Tribunal	Te Rōpū Whakamana i te Tiriti o Waitangi Waitangi Tribunal
UNHRC	United Nations Human Rights Committee

Part One:

Introductory matters

CHAPTER 1

Origins and overview of the law

IN THIS CHAPTER, WE CONSIDER:

- the history of the preventive regimes;
- the current law relating to preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs);
- statistics relating to the use of preventive detention, ESOs and PPOs in practice.

INTRODUCTION

- 1.1 The aim of this chapter is to introduce the law that is reviewed in further detail in later chapters. We trace how the law developed and how it operates in practice.
- 1.2 Tikanga Māori, the first law of Aotearoa New Zealand, governed responses to offending and risks to community safety well before the English legal system was imposed. In Chapter 2, we discuss tikanga Māori relevant to community safety as well as how the law should enable Māori to act in accordance with tikanga Māori and give effect to obligations under te Tiriti o Waitangi | Treaty of Waitangi.

HISTORY OF PREVENTIVE DETENTION, ESOS AND PPOS IN AOTEAROA NEW ZEALAND

Preventive detention

- 1.3 Preventive detention has long been part of Aotearoa New Zealand's sentencing law. An early form of preventive detention was introduced in the Habitual Criminals and Offenders Act 1906. This was replaced by preventive detention under the Criminal Justice Act 1954, which continued (with some amendments) under the Criminal Justice Act 1985 and was eventually incorporated into the Sentencing Act 2002.

Habitual Criminals and Offenders Act 1906

- 1.4 Under this legislation, a person declared to be a “habitual criminal” or “habitual offender” at sentencing would be detained indefinitely in a reformatory prison after serving a finite sentence.
- 1.5 A person could be declared a habitual criminal for repeated sexual offending or if a person had a relatively significant history of violent or property offending.¹ A person could also be declared a habitual offender if they were convicted of a less serious offence and had a substantial history (at least six previous convictions) of offending such as vagrancy, being armed by night, resisting arrest, public betting, escaping custody, possession of burglary instruments and being found in a dwellinghouse or enclosed area without lawful excuse.²
- 1.6 There was no legislative requirement that the judge consider the person to be at risk of committing a particular offence in the future.
- 1.7 Upon application from a person detained under the Act, the court could recommend that the Governor of New Zealand discharge the person from detention if satisfied that the person had sufficiently reformed or that there was another good reason warranting discharge.³ If exercising discretion to discharge a person, the Governor could also order the person to report to a probation officer for up to two years.⁴ Failure to report as required was an offence and could also result in the person being recommitted to reformatory prison indeterminately.⁵

Criminal Justice Act 1954 and amendments of 1961 and 1967

- 1.8 Preventive detention under the Criminal Justice Act was similar in its focus to that under the Habitual Criminals and Offenders Act. In introducing the Criminal Justice Bill, the Minister of Justice said the sentence was directed at:⁶
- ... the criminal who has demonstrated that he will not respond to reformatory training and who seems to be determined that he is going to embark on a career of crime.
- 1.9 The sentence was a response to a perceived “high degree of recidivism” rather than being aimed at a particular type of offending.⁷ The Minister of Justice gave an example of a person for whom it was “obvious ... that the only adequate sentence is preventive detention”. That person was 49 years old and had 57 previous convictions, mostly for theft. He had repeatedly been sentenced to short periods of hard labour and imprisonment and continued to reoffend.⁸
- 1.10 As under the 1906 Act, a person aged at least 25 years old could be eligible for a sentence of preventive detention on the basis of sexual offending against children under 16 or other

¹ Habitual Criminal and Offenders Act 1906, s 2

² Habitual Criminal and Offenders Act 1906, s 4.

³ Habitual Criminal and Offenders Act 1906, s 6.

⁴ Habitual Criminal and Offenders Act 1906, s 7.

⁵ Habitual Criminal and Offenders Act 1906, ss 7(3) and 8(1).

⁶ (23 September 1954) 304 NZPD 1927.

⁷ (23 September 1954) 304 NZPD 1927.

⁸ (23 September 1954) 304 NZPD 1928.

habitual offending.⁹ For those convicted of sexual offending against children, preventive detention was an indeterminate sentence.¹⁰ Those convicted of other qualifying offending were detained for a maximum period of 14 years. The minimum term of detention before being considered for release by the New Zealand Parole Board (Parole Board) was three years.¹¹

- 1.11 The court could sentence an eligible person to preventive detention if satisfied that it was “expedient for the protection of the public” that the person “be detained in custody for a substantial period”.¹² The court was required to consider a report prepared by a probation officer or the superintendent of a prison about the person’s character and personal history.¹³ Again, there was no legislative requirement that the court consider the person to be at risk of committing a particular kind of offence.
- 1.12 The Criminal Justice Amendment Act 1961 expanded the qualifying offences to include some sexual offences committed against adults — namely rape, attempt to commit rape and assault with intent to commit rape.¹⁴
- 1.13 The Criminal Justice Amendment Act 1967 narrowed the qualifying offences to sexual offences only. Habitual non-sexual offending no longer qualified for preventive detention.
- 1.14 The 1967 amendments also removed the maximum 14-year period of imprisonment, thereby making preventive detention an indeterminate sentence for all qualifying offending rather than just those convicted of child sex offending.¹⁵

1981 Penal Policy Review Committee

- 1.15 In 1981, a Penal Policy Review Committee established by the then Department of Justice was directed to evaluate the sanctions and dispositions available to the courts in criminal cases.¹⁶ The Committee noted that the imposition of preventive detention was rare — at the time, there were only 15 people serving a sentence of preventive detention.¹⁷ The Committee expressed concern that there was no rationale for restricting preventive detention to sexual offenders. It also said there were indications that its use was “arbitrary, selective, and inequitable”. In particular, it noted the “difficulties of making accurate predictions of human behaviour”, which was “bound to lead to administrative caution and therefore disproportionately long periods of detention”. The Committee recommended the abolition of preventive detention. In its place, the Committee suggested that lengthy finite prison sentences be used where someone exhibited a continuing disposition and history of serious sexual or violent offending and a court was satisfied there was a strong risk of reoffending.¹⁸

⁹ Criminal Justice Act 1954, s 24(1).

¹⁰ Criminal Justice Act 1954, s 26(2)(b).

¹¹ Criminal Justice Act 1954, s 26(2)(a).

¹² Criminal Justice Act 1954, s 24(2).

¹³ Criminal Justice Act 1954, s 25.

¹⁴ Criminal Justice Amendment Act 1961, s 3(2)(b).

¹⁵ Criminal Justice Amendment Act 1967, s 3.

¹⁶ Working Party No. 1 *Final Report: Penal Policy Review* (Ministry of Justice, November 1981).

¹⁷ Working Party No. 1 *Final Report: Penal Policy Review* (Ministry of Justice, November 1981) at 46.

¹⁸ Working Party No. 1 *Final Report: Penal Policy Review* (Ministry of Justice, November 1981) at 46.

- 1.16 In 1983, however, a Commission of Inquiry into the release of a recidivist paedophile from a psychiatric hospital and his subsequent dealings with the criminal justice system expressed the opinion that “very great caution should be exercised before deciding to abolish this form of detention”.¹⁹

Criminal Justice Act 1985 and Criminal Justice Amendment Act 1987

- 1.17 Parliament did not abolish preventive detention. Rather, preventive detention continued with the enactment of the Criminal Justice Act 1985.²⁰ The qualifying offences remained sexual offending against children and young people and some sexual offences committed against adults.²¹
- 1.18 As with the 1954 legislation, the court could pass a sentence of preventive detention if “satisfied that it is expedient for the protection of the public” that the person “be detained in custody for a substantial period”.²²
- 1.19 Again, there was no legislative requirement under the Criminal Justice Act that the court consider the person to be at risk of committing a particular kind of offence.²³ However, it appears that the courts took this into account when considering whether it was expedient for the protection of the public that the person be detained in custody.²⁴
- 1.20 In 1987, the Criminal Justice Act was amended to enable preventive detention to be imposed for violent offending on the basis of “[g]rowing public concern” about the level of violent offending in society.²⁵ Deputy Prime Minister the Hon Geoffrey Palmer stated that new research disclosed “correlations between violent offending and violent sexual offending”, including that 46 per cent of those convicted of rape had a previous conviction for a violent offence.²⁶
- 1.21 The amendment also lowered the minimum age of eligibility from 25 years to 21 years.²⁷

Sentencing Act 2002

- 1.22 The Sentencing Act 2002 and Parole Act 2002 were enacted in response to a 1999 law and order referendum in which 92 per cent of voters agreed with the following question:²⁸

¹⁹ Chris Hurd “The Changing Face of Preventive Detention in New Zealand” (conference paper, undated) citing John Meek “The Revival of Preventive Detention in New Zealand 1986-93” (1995) 28 *Australian and New Zealand Journal of Criminology* 225 at 236.

²⁰ Many of the Penal Policy Review Committee’s other recommendations were implemented in the Criminal Justice Act 1985.

²¹ Criminal Justice Act 1985, s 75(4).

²² Criminal Justice Act 1985, s 75(2).

²³ Criminal Justice Act 1985, s 75(2).

²⁴ For example, in *R v Tipene* CA312/86, 21 May 1987, te Kōti Pira o Aotearoa | the Court of Appeal refused leave to appeal against a sentence of preventive detention imposed on a charge of indecent assault of a 13-year-old girl. The Court noted that the sentencing judge had two reports before him from psychiatrists and psychologists which both “expressed the view that there was a high probability that upon his return to the community Mr Tipene would offend again in relation to sexual offences.”

²⁵ (18 December 1986) 477 NZPD 6523.

²⁶ (18 December 1986) 477 NZPD 6523.

²⁷ Criminal Justice Amendment (no 2) Act 1987, s 2, amending s 75 of the Criminal Justice Act 1985.

²⁸ (28 March 2002) 599 NZPD (Sentencing and Parole Reform Bill- Second Reading, Phil Goff).

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them, and imposing minimum sentences and hard labour for all serious violent offenders?

- 1.23 The Sentencing Act removed the requirement for a person being sentenced to preventive detention to have been convicted of a qualifying offence on a previous occasion — for the first time, preventive detention could be imposed upon a person’s first conviction. The age of eligibility was lowered from 21 years to 18 years. The legislation also further expanded the qualifying offences, though not significantly.
- 1.24 There have been no substantive amendments to the sentence of preventive detention since 2002.

Extended supervision orders and public protection orders

- 1.25 ESOs and PPOs have a more recent history. ESOs were introduced by the Parole (Extended Supervision) Amendment Act 2004, and PPOs were introduced subsequently by the Public Safety (Public Protection Orders) Act 2014.

Parole (Extended Supervision) Amendment Act 2004

- 1.26 In 2003, the Minister of Justice proposed legislation to establish a new type of order, the ESO. The objective of the legislation was to address a “critical gap” in the ability of Ara Poutama | Department of Corrections (Ara Poutama) to manage child sex offenders who were not subject to preventive detention and who were in the community, no longer subject to parole or release conditions.²⁹ In a paper to the Cabinet Policy Committee, the Minister stated that public concern and media attention about the risks posed by child sex offenders in the community was high and that:³⁰

Improved knowledge about child sex offending recognises the distinct and long-term risks posed by this group of offenders to a vulnerable group of society and the need to manage those risks.

- 1.27 It is probable that ESOs were also a direct response to the concerns that Ara Poutama held about specific individuals who were shortly due for release from determinate sentences and who were considered to pose risks of future child sex offending. During the passing of the Parole (Extended Supervision) and Sentencing Amendment Bill, Ara Poutama identified 107 people either in prison or on release conditions for whom an application could be made.³¹ There were also concerns about a small number of people who had been released from psychiatric institutions in 1992 and who went on to commit serious sexual crimes against children.³² These individuals were sentenced prior to the introduction of the Sentencing Act and had not been eligible for preventive detention

²⁹ Ministry of Justice *Report for Cabinet Social Development Committee: Extended Supervision of Child Sex Offenders* (2003) at [13].

³⁰ Ministry of Justice *Report for Cabinet Social Development Committee: Extended Supervision of Child Sex Offenders* (2003) at [3].

³¹ Justice and Electoral Committee *Parole (Extended Supervision) and Sentencing Amendment Bill 88-2* (14 June 2004) at 2.

³² These people had been released from psychiatric institutions because their conditions did not fit the new definition of “mental disorder” under s 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992: Justice and Electoral Committee *Parole (Extended Supervision) and Sentencing Amendment Bill 88-2* (14 June 2004) at 3. They were not eligible for preventive detention under the Criminal Justice Act 1985 because, at that time, preventive detention could only be imposed if a person had previously been convicted of qualifying offending.

under the previous legislation. They had received determinate sentences and were considered to pose risks of future child sex offending when their sentences expired.³³

- 1.28 The relevant legislation inserted provisions governing ESOs into the Parole Act. As originally enacted, the Act only provided for ESOs in relation to child sex offenders who were likely to commit a sexual offence against a child or young person (under 16) when released.

Public Safety (Public Protection Orders) Act 2014 and Parole (Extended Supervision Orders) Amendment Act 2014

- 1.29 Prior to the 2011 general election, the Government announced that, if re-elected, it would introduce civil orders providing for the indefinite detention of violent and sexual offenders.³⁴ As discussed in Chapter 10, ESOs only allow for limited forms of detention within the community.
- 1.30 There are some indications that these reforms were also aimed at providing management options for specific individuals who were considered to pose a high risk of reoffending and who were due to be released into the community.³⁵
- 1.31 Ara Poutama was concerned that, even if a person were under an ESO and subject to intensive forms of restriction available under an ESO, this would not provide sufficient safety measures for the community. Its Regulatory Impact Statement highlighted several incidents where people on ESOs had committed offences despite being subject to intensive forms of restriction in the community.³⁶ In one instance, a person had sexually offended against a 16-year-old girl.³⁷ Other offences committed by people subject to strict ESO conditions included arson, assault, damaging property and theft. Ara Poutama argued there was a clear gap in the regulatory framework and these offenders needed

³³ Justice and Electoral Committee *Parole (Extended Supervision) and Sentencing Amendment Bill 88-2* (14 June 2004) at 3. One of the individuals released from Lake Alice psychiatric hospital went on to sexually assault multiple children and a mentally impaired woman. These acts resulted in public outcry, exacerbated by subsequent revelations that one of the nurses at Lake Alice had sought to forewarn supervisors and the Ministry of Health when the person was released back into the community. These actions put a spotlight on the lacuna in the law between the Sentencing Act 2002 and the revised Mental Health legislation. See Lara Caris “Extended Supervision Orders and Youth Offenders” (LLM Research Paper, Te Herenga Waka | Victoria University of Wellington, 2020) at 12–13.

³⁴ Tracy Watkins “National ramps up terms of serious offenders” (7 November 2011) <stuff.co.nz>.

³⁵ For example, during the second reading of the Public Safety (Public Protection Orders Bill), James Shaw, a non-Government Member of Parliament noted that the Bill had been introduced around the time of media interest in Stewart Murray Wilson: (26 November 2014) 702 NZPD 872. Wilson had been sentenced to 21 years’ imprisonment for sexually offending against 16 women and girls over a 25-year period. In November 2011, the media reported that Wilson, who was due to be released from prison the following year, was “four times more likely than the average rate to reoffend when released” and that he had “shown no interest in addressing his offending or managing the risk of reoffending”: “Beast of Blenheim at very high risk of reoffending – Parole Board” (2 November 2011) <stuff.co.nz>. See also Anna Leask “‘Beast’ still big risk: ex boarder” (4 November 2011) <nzherald.co.nz>; “‘Beast’ release horrifies ex-girlfriend” (3 November 2011) <nzherald.co.nz>; and John Pratt and John Anderson “The Beast of Blenheim’, Risk and the Rise of the Security Sanction” (2016) 49 *Australia and New Zealand Journal of Criminology* 528 at 529.

³⁶ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [17].

³⁷ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [17].

to be brought under a new system that kept them out of the community to increase community safety.³⁸

1.32 In 2012, Ara Poutama stated that there was a “distinct sub-group of offenders presenting a very high risk of imminent and serious re-offending” that was identifiable by certain characteristics.³⁹ It explained that “[o]ffenders of this type display few gains from rehabilitation or are unwilling to participate satisfactorily, usually as a result of low intelligence or other cognitive deficits”.⁴⁰

1.33 According to Ara Poutama, most of those who would be brought within the new scheme would be child sex offenders, although adult sex offenders might also fall within the group and a “very small number of violent offenders may also have the identified characteristics and may meet the imminence test”.⁴¹

1.34 In September 2012, the Public Safety (Public Protection Orders) Bill was introduced in Parliament. The explanatory note to the Bill stated:⁴²

Public safety is jeopardised by a small number of people who reach the end of a finite prison sentence or are subject to the most intensive form of an extended supervision order and pose a very high risk of imminent and serious sexual or violent reoffending. Less restrictive forms of supervision are not adequate for preventing almost certain further offending.

1.35 While the Public Safety (Public Protection Orders) Bill was progressing through Parliament, Ara Poutama proposed that ESOs should be expanded to align with PPOs. In its Initial Briefing on the Parole (Extended Supervision Orders) Amendment Bill, Ara Poutama stated that this would:⁴³

... provide a safety net in the event Corrections is unsuccessful in seeking a PPO for an offender and provide a management option for high risk adult sex offenders and very high risk violent offenders. While an ESO would not minimise the risk of serious harm posed by these offenders to the same extent as a PPO, it would provide a means of managing them in the community and reducing their risk of re-offending.

1.36 In December 2014, PPOs were introduced for serious sexual and violent offending and the scope of ESOs was expanded to include violent offending.

³⁸ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [13].

³⁹ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [23].

⁴⁰ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [24].

⁴¹ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [25].

⁴² Public Safety (Public Protection Orders) Bill 2012 (68-1) (explanatory note) at 1.

⁴³ Letter from Jo Field (Deputy Chief Executive, Service Development, Ara Poutama | Department of Corrections) to Mike Sabin MP (Chairperson, Law and Order Committee) regarding the Parole (Extended Supervision Orders) Amendment Bill – Initial Briefing (24 October 2014).

OVERVIEW OF CURRENT LAW

Preventive detention

- 1.37 Preventive detention is a sentence that may be imposed for the purpose of protecting the community from those who pose a significant and ongoing risk to the safety of its members.⁴⁴
- 1.38 Preventive detention is an alternative to a fixed term of imprisonment. It is an indeterminate sentence, which means there is no fixed expiry date and the Parole Board is responsible for deciding if and when the person can be released from prison. It is the most restrictive of the preventive regimes discussed in this Issues Paper.
- 1.39 Preventive detention may only be imposed when a person is convicted of certain qualifying serious sexual or violent offences (we discuss these offences in Chapter 6). Before imposing preventive detention, the court must be satisfied that the person is likely to commit another qualifying sexual or violent offence if the person was released at the expiry date of any other sentence the court could instead impose.⁴⁵
- 1.40 When considering whether to impose preventive detention, the court must consider reports from at least two appropriate health assessors (registered psychologists or registered psychiatrists) about the likelihood of the person committing a further qualifying sexual or violent offence.⁴⁶
- 1.41 The court must take into account:⁴⁷
- (a) any pattern of serious offending disclosed by the person's history;
 - (b) the seriousness of the harm to the community caused by the offending;
 - (c) information indicating a tendency to commit serious offences in future;
 - (d) the absence of, or failure of, efforts by the person to address the cause or causes of the offending; and
 - (e) the principle that a lengthy determinate sentence is preferable if this would provide adequate protection for society.
- 1.42 When the court sentences a person to preventive detention, it must also impose a minimum period of imprisonment (MPI) that the person must serve before they will be eligible for release from prison on parole. The MPI must be at least five years but is frequently longer. The MPI must be the longer of the minimum period of imprisonment required:⁴⁸
- (a) to reflect the gravity of the offence; or

⁴⁴ Sentencing Act 2002, s 87(1).

⁴⁵ Sentencing for preventive detention must take place in te Kōti Matua | High Court. Commonly, the proceedings will have been transferred to the High Court earlier in the process due to the seriousness of the charges (see the Criminal Procedure Act 2011, ss 66–70). If a person is convicted of a qualifying offence in te Kōti ā Rohe | District Court and a sentence of preventive detention is being considered, the person must be transferred to the High Court for sentencing (see the Sentencing Act 2002, s 90).

⁴⁶ Sentencing Act 2002, s 88(1)(b). "Health assessor" is defined in s 4 of the Sentencing Act 2002.

⁴⁷ Sentencing Act 2002, s 87(4).

⁴⁸ Sentencing Act 2002, s 89(2).

- (b) for the purposes of the safety of the community, in light of the person’s age and the risk posed at the time of sentencing.
- 1.43 Although eligible to be considered for parole at the end of the MPI, people subject to preventive detention typically serve many years beyond the MPI before they are released from prison.
- 1.44 When a person is eligible for parole, the Parole Board may direct their release on parole if:⁴⁹
- ... it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—
- (a) the support and supervision available to the offender following release; and
- (b) the public interest in the reintegration of the offending into society as a law-abiding citizen.
- 1.45 When assessing whether the person poses an “undue risk”, the Parole Board must consider both the likelihood of further offending and the nature and seriousness of any likely further offending.⁵⁰ The paramount consideration for the Parole Board in every case is the safety of the community.⁵¹ We discuss release on parole further in Chapter 11.
- 1.46 Once released on parole, a person sentenced to preventive detention is subject to parole conditions for life. We discuss these conditions in Chapter 10. They are also subject to recall to prison at any time for breach of parole conditions, which can result in the person spending many more years in custody.

Statistics

- 1.47 As discussed above, preventive detention has long been part of sentencing law in Aotearoa New Zealand. In the year ending 30 June 2022,⁵² eight people were sentenced to preventive detention.⁵³ The total number of people subject to preventive detention as at 30 June 2022 was 310.⁵⁴
- 1.48 The number of people sentenced to preventive detention each year has increased since the lowest period, when preventive detention was imposed on 18 occasions in total between 1967 and 1985.⁵⁵

⁴⁹ Parole Act 2002, s 28(2).

⁵⁰ Parole Act 2002, s 7(3).

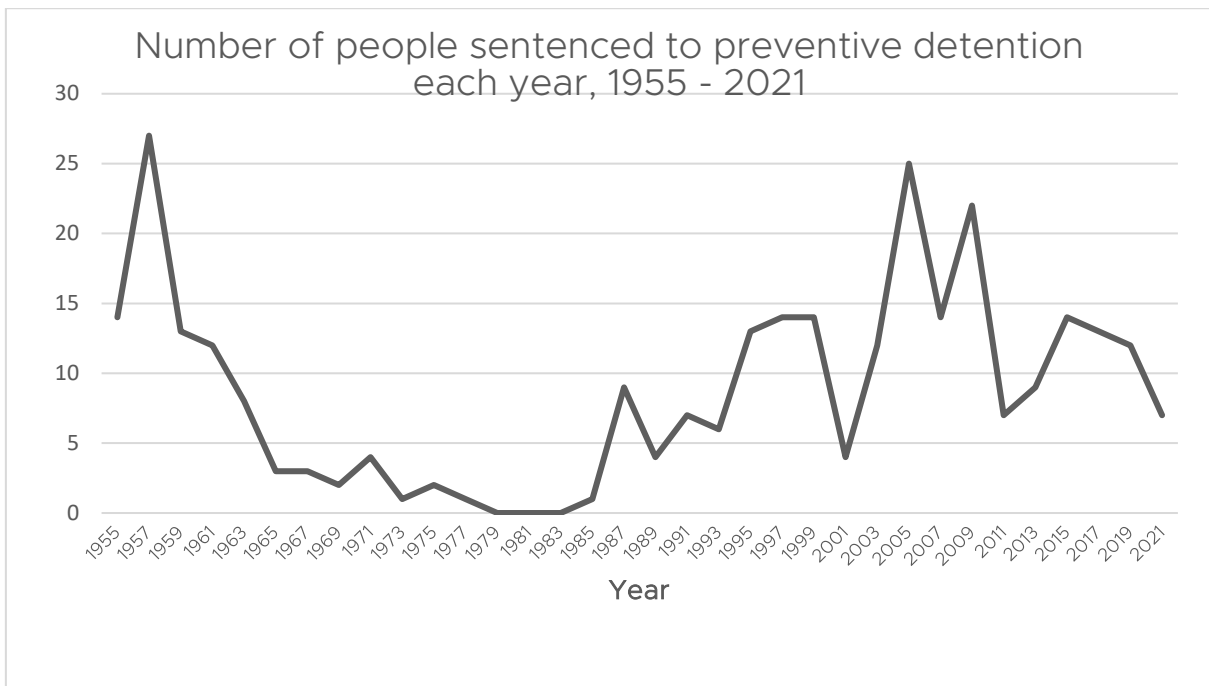
⁵¹ Parole Act 2002, s 7(1).

⁵² This is the most recent year for which there is a full set of data available.

⁵³ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁵⁴ This includes people subject to preventive detention who had been released on parole: Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁵⁵ A further five sentences of preventive detention were imposed during this period but were overturned on appeal.



- 1.49 Between 2008 and 2020, those who were sentenced to preventive detention and who had been released on parole spent an average of 16.2 years in prison prior to their first release on parole.⁵⁶
- 1.50 The qualifying offending for preventive detention is predominantly sexual offending. Of the 310 people subject to preventive detention as at 30 June 2022, 81 per cent were sentenced on the basis of sexual offending.⁵⁷ Seven of the eight people sentenced to preventive detention in the 2021/22 fiscal year were sentenced on the basis of sexual offending.⁵⁸
- 1.51 Between 1 July 2012 and 30 June 2022, 45 per cent of those sentenced to preventive detention identified as Māori.⁵⁹
- 1.52 According to the available records, only one woman has been sentenced to preventive detention.

Extended supervision orders

- 1.53 An ESO is an order that allows a person to be managed and monitored in the community. An ESO can be imposed on a person who has served a determinate

⁵⁶ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023). This does not include people who were also sentenced to life imprisonment.

⁵⁷ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁵⁸ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁵⁹ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023). During this period, 47 of the 104 people sentenced to preventive detention identified as Māori.

sentence of imprisonment⁶⁰ for serious sexual or violent offending and who continues to pose a real and ongoing risk of committing further serious sexual or violent offences, as defined in the legislation.⁶¹

- 1.54 The purpose of an ESO 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”.⁶² A person subject to an ESO has, by definition, completed the sentence that was imposed for their offending.⁶³
- 1.55 The chief executive of Ara Poutama (chief executive) may apply to the court for an ESO if a person is an “eligible offender”.⁶⁴ We discuss eligibility in Chapters 5 to 7. Generally, the application must be made before the person ceases to be subject to a sentence of imprisonment, release conditions or an existing ESO.⁶⁵
- 1.56 The court may impose an ESO if satisfied that:⁶⁶
- (a) the person 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 person will in future commit a relevant sexual offence;
 - (ii) there is a very high risk that the person will in future commit a relevant violent offence.
- 1.57 The court may only determine that there is the required level of risk if it is satisfied that the person displays particular traits and behavioural characteristics that are set out in legislation.⁶⁷ The court must consider a report from at least one health assessor (a registered psychologist or registered psychiatrist) about whether the person displays these traits and behavioural characteristics and whether there is the requisite risk of further offending.⁶⁸ We discuss these matters in Chapters 8 and 9.

⁶⁰ ESOs are not available for people who have been sentenced to preventive detention, who, if they are released into the community, will be subject to parole conditions for life.

⁶¹ Parole Act 2002, s 107I(1). There are four categories of “eligible offender” for an ESO. Three of these require a conviction for a “relevant offence” whether committed in Aotearoa New Zealand or overseas. The fourth category relates to certain people to whom subpart 3 of Part 2 of the Returning Offenders (Management and Information) Act 2015 applies. We discuss eligibility in Chapters 5 to 7.

⁶² Parole Act 2002, s 107I(1).

⁶³ If a person detained under a sentence is made subject to an ESO, the order comes into force on the person’s statutory release date: Parole Act 2002, s 107L.

⁶⁴ Parole Act 2002, s 107F. For people who are eligible on the basis of overseas offending, the application must be made within six months of the person’s arrival in Aotearoa New Zealand or before the end of the period for which the person is subject to release conditions under the Returning Offenders (Management and Information) Act 2015.

⁶⁵ Parole Act 107F.

⁶⁶ Parole Act 2002, s 107I(2).

⁶⁷ Parole Act 2002, s 107IAA.

⁶⁸ Parole Act 2002, s 107I(2).

- 1.58 An ESO may be imposed for up to 10 years.⁶⁹ Before an ESO expires, a court may impose a new, consecutive ESO.⁷⁰
- 1.59 People on ESOs are subject to conditions similar to parole. These may include conditions relating to where they can live and work and with whom they can associate with, as well as requirements to attend treatment programmes. Some people on ESOs are subject to restrictions on where they can go and may be electronically monitored. The most restrictive conditions include curfews and intensive person-to-person monitoring. We discuss ESO conditions in Chapter 10.
- 1.60 Breaching ESO conditions is an offence punishable by up to two years' imprisonment.⁷¹

Statistics

- 1.61 In the year ending 30 June 2022, 26 ESOs were imposed.⁷² The total number of people subject to an ESO, as at 30 June 2022, was 205 (not including people who were subject to interim ESOs at that date).⁷³
- 1.62 As with preventive detention, the qualifying offending for ESOs is predominantly sexual offending. Of the 205 people subject to ESOs as at 30 June 2022, 95 per cent were sentenced on the basis of sexual offending.⁷⁴ The prominence of sexual offending among the qualifying offences is likely due, in part, to the fact that, prior to 2014, violent offending did not qualify for an ESO. The trend has, however, continued. Of the 26 ESOs ordered in the year ending 30 June 2022, 87 per cent were imposed for sexual offending.
- 1.63 Between 1 July 2012 and 30 June 2022, 42 per cent of those made subject to an ESO identified as Māori.⁷⁵
- 1.64 Only one woman has been made subject to an ESO since the regime began in 2004.

Public protection orders

- 1.65 A PPO is an order that allows a person to be detained in a secure facility if they have served a determinate sentence of imprisonment for certain serious sexual or violent offences and continue to pose a very high risk of imminent and serious sexual or violent offending. The purpose of a PPO is “to protect members of the public from the almost

⁶⁹ Parole Act 2002, s 107I(4).

⁷⁰ Parole Act 2002, s 107C(1)(a)(iii).

⁷¹ Parole Act 2002, s 107T and 107TA(2).

⁷² Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁷³ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁷⁴ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁷⁵ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023). There were 329 ESOs imposed during this period, 138 of which were imposed on a person identifying as Māori.

- certain harm that would be inflicted by the commission of serious sexual or violent offences”.⁷⁶
- 1.66 The chief executive may apply to the court for a PPO.⁷⁷ Generally, the application must be made before a person ceases to be subject to a sentence of imprisonment, an ESO or a protective supervision order (PSO).⁷⁸
- 1.67 The court may make a PPO in relation to a person (called the respondent) if satisfied on the balance of probabilities that:⁷⁹
- (a) the respondent meets the threshold for a PPO; 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.
- 1.68 As with ESOs, the court must be satisfied that the respondent displays certain traits and characteristics. However, the traits and characteristics are different to those under the ESO regime. The court must consider evidence from two health assessors, one of whom must be a registered psychologist.⁸⁰
- 1.69 If a PPO is made, the person will be detained in a residence. Currently, Matawhāiti is the only PPO residence in Aotearoa New Zealand. Matawhāiti is a 24-bed facility located in the precincts of Christchurch Men’s Prison. While it is situated outside the Prison, it is contained within a four-metre-high electric fence and is staffed 24 hours a day.⁸¹
- 1.70 People subject to PPOs cannot leave the residence except with approval and must be under escort and supervision.⁸²
- 1.71 A resident is subject to fewer statutorily imposed restrictions than a person detained in a prison. At Matawhāiti, each resident lives in a separate unit with a bedroom, lounge, kitchenette and bathroom. Residents wear their own clothes, order their own groceries and can use a communal area from 7:30am to 9:00pm.⁸³
- 1.72 Residents are subject to standard rules and restrictions relating to, for example:
- (a) communication: communications may be checked and withheld, visits are supervised, phone calls are monitored; and

⁷⁶ Public Safety (Public Protection Orders) Act 2014, s 4(1).

⁷⁷ Public Safety (Public Protection Orders) Act 2014, s 8.

⁷⁸ Public Safety (Public Protection Orders) Act 2014, s 7. For people who are eligible on the basis of overseas offending, the application must be made within six months of the person’s arrival in Aotearoa New Zealand or before the end of the period for which the person is subject to release conditions under the Returning Offenders (Management and Information) Act 2015.

⁷⁹ Public Safety (Public Protection Orders) Act 2014, s 13.

⁸⁰ Public Safety (Public Protection Orders) Act 2014, s 13(1).

⁸¹ *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [45].

⁸² Public Safety (Public Protection Orders) Act 2014, ss 26 and 73.

⁸³ Peter Boshier *OPCAT Report on an Unannounced Inspection of Matawhāiti Residence under the Crimes of Torture Act 1989* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, Wellington, December 2020).

- (b) property: alcohol, tobacco and electronic communication devices are among the items prohibited.
- 1.73 Residents are also required to submit to security measures in certain situations, including:
- (a) searches of residents and their unit, including strip searches when entering or leaving the PPO residence;⁸⁴
 - (b) drug and alcohol tests;⁸⁵ and
 - (c) seclusion and restraint.⁸⁶
- 1.74 Each person subject to a PPO has a personal management plan that includes their needs, the treatment and programmes in which they will participate, their goals towards reintegration into the community and the nature and extent of the supervision they require.⁸⁷ The management plan is required to set out, where any of the resident's rights are to be limited, the nature of and reasons for the limit.⁸⁸
- 1.75 The residence manager may make rules for the management of the residence and for the conduct and safe custody of the residents,⁸⁹ and residents must comply with every lawful direction given to them by staff.⁹⁰ The manager may limit the rights of a resident to the extent reasonably necessary to prevent them from harming themselves or others or from disrupting the orderly functioning of the residence. In making a decision affecting a resident or residents, the manager must be guided by the following principles:⁹¹
- (a) A resident must be given as much autonomy and quality of life as is compatible with the health and safety and well-being of the resident and other persons and the orderly functioning of the residence.
 - (b) A decision that adversely affects a resident must be reasonable and proportionate to the objective sought to be achieved.
- 1.76 Residents must also be given the opportunity to provide input into the making of rules for the residence and the running of the residence.⁹²
- 1.77 A PPO is indefinite. If a PPO is made, the justification for the order must be reviewed by a review panel yearly and by a court at five-year intervals.⁹³ If the court is satisfied that there is no longer a very high risk of imminent serious sexual or violent offending by the person subject to the PPO, the court must cancel the PPO and instead impose a PSO.

⁸⁴ Public Safety (Public Protection Orders) Act 2014, s 63.

⁸⁵ Public Safety (Public Protection Orders) Act 2014, s 68.

⁸⁶ Public Safety (Public Protection Orders) Act 2014, s 71–72.

⁸⁷ Public Safety (Public Protection Orders) Act 2014, s 42.

⁸⁸ Public Safety (Public Protection Orders) Act 2014, s 42.

⁸⁹ Public Safety (Public Protection Orders) Act 2014, s 119.

⁹⁰ Public Safety (Public Protection Orders) Act 2014, s 22.

⁹¹ Public Safety (Public Protection Orders) Act 2014, s 27(4).

⁹² Public Safety (Public Protection Orders) Act 2014, s 27(5).

⁹³ Public Safety (Public Protection Orders) Act 2014, ss 15–16.

Prison detention orders

- 1.78 In some circumstances, a person subject to a PPO may be detained in a prison instead of a residence, subject to a prison detention order (PDO).
- 1.79 The court may, upon application by the chief executive, make a PDO if satisfied that:
- (a) the person would, if detained in a residence, pose such an unacceptably high risk to himself, herself or others that the person cannot be safely managed in the residence; and
 - (b) all less restrictive options for controlling the person's behaviour have been considered and any appropriate options have been tried.
- 1.80 A person subject to a PDO is detained in prison and must be treated the same way as a prisoner who is committed to prison solely because they are awaiting trial.⁹⁴ This means that they are subject to slightly different rules, obligations and entitlements as a person sentenced to preventive detention, who is treated as a sentenced prisoner. As with a person sentenced to imprisonment, breaches of rules and restrictions can be offences against discipline and subject to punishment.

Protective supervision orders

- 1.81 If a PPO is cancelled, the court must impose a PSO on the person who was subject to the PPO.⁹⁵ Before the court imposes a PSO, the person subject to the PPO and the chief executive must be given an opportunity to make submissions on the requirements that should be included in the PSO.⁹⁶
- 1.82 There are no standard conditions or requirements of a PSO. The court may include any requirements that are necessary to:⁹⁷
- (a) reduce the risk of reoffending;
 - (b) facilitate or promote the person's rehabilitation and reintegration into the community;
 - (c) provide for the reasonable concerns of victims.
- 1.83 There is no provision relating to the duration of PSO requirements. It appears that, unless they are varied or discharged by the court or review panel, they may be indefinite.⁹⁸

Statistics

- 1.84 Very few PPOs have been imposed to date. Only four people have been subject to PPOs in total from their introduction in 2014 until 30 June 2022.⁹⁹

⁹⁴ Public Safety (Public Protection Orders) Act 2014, s 86.

⁹⁵ Public Safety (Public Protection Orders) Act 2014, s 93(1).

⁹⁶ Public Safety (Public Protection Orders) Act 2014, s 93(2).

⁹⁷ Public Safety (Public Protection Orders) Act 2014, s 94.

⁹⁸ There is no time limit on a PSO. A PSO may be cancelled if the person subject to a PSO has not breached any requirements of the PSO or committed any serious sexual or violent offences in a five-year period: Public Safety (Public Protection Orders) Act 2014, s 102.

⁹⁹ According to Ara Poutama | Department of Corrections' Annual Reports. Ara Poutama is required to report annually on a number of matters relating to PPOs: Public Safety (Public Protection Orders) Act 2014, s 121.

- 1.85 As of 1 May 2023, there are two people subject to PPOs. One of these people is now subject to a PDO. The qualifying offending in respect of both people currently subject to PPOs was sexual in nature. One of these people identifies as Māori.
- 1.86 No women have been made subject to PPOs since the regime began.
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Part Two:

Overarching issues

CHAPTER 2

Te ao Māori and the preventive regimes

IN THIS CHAPTER, WE CONSIDER:

- tikanga Māori relevant to community safety and risks of serious reoffending;
- te Tiriti o Waitangi | Treaty of Waitangi; and
- issues with the current law regarding these matters.

INTRODUCTION

- 2.1 An ao Māori response to community safety and the risk of serious reoffending is likely to be considerably different to the preventive regimes. This chapter examines the key issues of how the preventive regimes can better enable Māori to live in accordance with tikanga and give better effect to the obligations arising from te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).
- 2.2 In the Introduction to this Issues Paper, we discuss the process that we have begun to inform ourselves about the tikanga Māori concepts that may be engaged in promoting community safety and wellbeing and the management of reoffending risks. We begin this chapter by exploring these tikanga Māori. We then discuss how the Treaty might apply in the context of this review. We examine how the law may be inconsistent with tikanga and Treaty obligations, and we present some preliminary views for reform.

TIKANGA MĀORI

- 2.3 Tikanga Māori is the first law of Aotearoa New Zealand as well as a broader system applicable to all aspects of society.¹ Tikanga derives from the word “tika”, which means “right” or “correct”,² and “tikanga” means the right way of doing things. Tikanga Māori

¹ There will be a fuller discussion of tikanga Māori, including some of the issues that arise when discussing tikanga Māori in non-Māori contexts, in the Law Commission’s forthcoming Study Paper on tikanga Māori.

² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 29.

includes a system of values and principles that guide and direct rights and obligations in a Māori way of living. It governs relationships by providing a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.³

- 2.4 As an independent source of rights and obligations in te ao Māori, tikanga continues to be observed every day within iwi, hapū and whānau and on marae. It is also practised to varying degrees in other places, in what might be termed kaupapa-based Māori organisations.
- 2.5 Tikanga Māori concepts are common in legislation and regulation. Tikanga Māori also “has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand where it is relevant”.⁴
- 2.6 We note that there are limits to our discussion of tikanga Māori in this chapter and within this Issues Paper. Tikanga Māori concepts are interrelated and operate within a worldview that is fundamentally different to the Western worldview. Tikanga concepts cannot be fully explained in English or by reference to laws based on the English system. Our focus, in this review, is on a particular aspect of the law and discusses tikanga Māori in a limited manner within this narrow context.

Tikanga Māori relating to community safety and offending

- 2.7 It has been said that tikanga is a “reiteration of the values and significance of whakapapa”.⁵ Whakapapa (genealogy) connects all things past, present and future to each other and to atua Māori (gods or ancestors). Whakapapa connects people to te taiao (the natural world) and defines their affiliations to whānau, hapū and iwi. Whakapapa frames a person’s identity and purpose and signifies expected roles, shared responsibilities and obligations.⁶ Whanaungatanga, or familial obligations, strengthens these connections.⁷
- 2.8 According to a Māori world view, every Māori person is born with an inherent tapu and mana. Tapu has been described as “the sacred life force which supports the mauri (spark of life) and is present in people, places and things”.⁸ Tapu is inseparable from mana, which is a broad concept representing a person’s authority and associated responsibilities,

³ Bishop Manuhuia Bennett “Te Pū Wānanga Seminar” (presented with Te Mātāhauariki Research Institute, 23 March 2000) as cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

⁴ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [19].

⁵ Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim dated 4 May 2016” Wai 2540, #A28 at [53].

⁶ Tāmati Kruger *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai me ngā ōta nō muri whakawhiu / Public Safety and Serious Offenders: a Review of Preventive Detention and Post-Sentence Orders* (wānanga held in Wellington, 19 October 2022).

⁷ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 337.

⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 51.

- reputation and influence.⁹ A person can enhance, maintain or diminish their mana through their actions, which will also impact the mana of their collective.¹⁰
- 2.9 In te ao Māori, whanaungatanga means that the individual is secondary to the collective.¹¹ Tikanga requires people to act in ways that strengthen and maintain relationships with others and with te taiao.¹² Maintaining balance between all these aspects is one of the key ideals in tikanga Māori.¹³ This may be achieved by utu — sometimes referred to as “the principle of reciprocity”, encompassing what needs to happen to achieve the state of ea (satisfaction).¹⁴
- 2.10 It has been suggested that, for Māori, public safety is achieved “when the functioning of communities and whānau reflects a collective sense of wellbeing”.¹⁵
- 2.11 In the past, definitions of unacceptable behaviour were drawn from these broader values and principles, including the belief that inherent tapu must not be abused and that “society could only function if all things, physical and spiritual, were held in balance”.¹⁶
- 2.12 Hara¹⁷ were offences involving the violation of tapu or “any action which disrupted relational stability”.¹⁸ The definitions of hara arose from a framework of social relationships based on group rather than individual concerns:¹⁹
- The rights of individuals, or the hurt they might suffer when their rights were abused, were indivisible from the welfare of the whanau, the hapu, the iwi.
- 2.13 For example, rape was a hara because it violated the inherent tapu of the victim and “in turn upset the spiritual, emotional and physical balance within the victim herself, and the relationships she had with her community and her tipuna”.²⁰
- 2.14 At a wānanga held with pūkenga, Tāmami Kruger referred to the pūrākau (story or legend) of Hinetiāma and her transition to Hinenuitepō, signifying the need for transition after tapu has been disrupted by a hara. The pūrākau speaks of Tāne, who created the first woman, Hineahuone, out of clay. They had a daughter, called Hinetiāma. Tāne also

⁹ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 338.

¹⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 50 and 56.

¹¹ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 13. The contributions to the tikanga and te Tiriti sections of the relevant chapter were made by Khylee Quince.

¹² Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 337.

¹³ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 14.

¹⁴ Hirini Moko Mead defines “ea” as “satisfaction” and “the successful closing of a sequence and the restoration of relationships or the securing of peaceful interrelationships”: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (1st ed, Huia Publishers, Wellington, 2003) at 359 and 31.

¹⁵ Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 12.

¹⁶ Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 28.

¹⁷ Also denoted by the word hē.

¹⁸ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) Hara at 74; and Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim dated 4 May 2016” Wai 2540, #A28 at [54].

¹⁹ Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 27.

²⁰ Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 28.

procreated with Hinētītama. When Hinētītama found out that her lover was also her father, she fled to Rarohenga (the underworld) where she became Hinenuitepō. According to Kruger, Hinētītama abandoned her former identity and recreated herself because her tapu was so corrupted by Tāne’s act of violence that she had no other option. Her metamorphosis as Hinenuitepō, or the maiden of the night, ensured she retained her connection to the divine.

- 2.15 According to Moana Jackson, committing a hara did not only cause imbalance, the act itself was *caused by* “an imbalance in the spiritual, emotional, physical or social well-being of an individual or whanau”.²¹ When a hara occurred, the core issue was to understand and respond to what was out of balance for the person who committed the hara, their whānau and the broader community.²²
- 2.16 Committing a hara would negatively affect the mana of the person who committed the hara as well as their associated familial groups.²³ Offending could disrupt a person’s tapu or diminish their mana to such an extent that they enter a state of rōrā (powerlessness), also referred to as being mana kore — having no mana, and effectively living without purpose.²⁴ As discussed above, Hinētītama’s tapu was disrupted because she was the victim of a hara. However, committing a hara can also disrupt a person’s tapu and signify the need for transition.
- 2.17 Resolution involved identifying the causes of the dispute or reasons for committing a hara in order to uncover and address the source of the problem. Resolving this conflict in accordance with tikanga was the preserve of rangatira (chiefs), supported by their whānau or hapū.²⁵ As noted further below, in te ao Māori, rangatiratanga is both the authority of a rangatira and the authority of Māori as people. Rangatiratanga involves the exercise of mana in accordance with and qualified by tikanga and associated kawa (protocols).
- 2.18 Responses to hara were grounded in the need to restore the relationship damaged by the wrong and achieve a state of ea — denoting that the required response had been completed and a resolution reached.²⁶ Responsibility for the offending was also a collective concern:²⁷

²¹ Moana Jackson *The Māori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 39.

²² Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 13.

²³ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 339.

²⁴ Tāmāti Kruger *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai me ngā ōta nō muri whakawhiu | Public Safety and Serious Offenders: a Review of Preventive Detention and Post-Sentence Orders* (wānanga held in Wellington, 19 October 2022).

²⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry – Part 1, Pre-Publication Version* (Wai 1040, 2022) at 349.

²⁶ Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim dated 4 May 2016” Wai 2540, #A28 at [54]; and Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) Ea at 58.

²⁷ Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 27.

An offender could not be isolated as solely responsible for wrongdoing; a victim could never be isolated as bearing alone the pain of an offence. There was a collective, rather than an individuated criminal responsibility, a sense of indirect as well as direct liability.

- 2.19 During our preliminary engagement with pūkenga, we have been told that the obligations and responsibilities of whakapapa are communal and reciprocal.²⁸ Where a person's relationship with their community (iwi, hapū or whānau) has been broken through offending, the community is not solely responsible for resolution. We have been told of instances where, after committing a hara, an individual's tapu was put to sleep — whakamoe i te tapu. The person is considered alive but without purpose. When balance has been restored and the harm put right, it can be awakened — whakaoho i te tapu. The individual's participation and fulfilment of their obligations is essential.²⁹
- 2.20 The appropriate utu for murder could involve death of the person who committed the hara or a member of their whānau or wider kin group. The utu for serious hara could involve muru (ritual seizure of goods from the offender or their whānau or community), pana (banishment), public shame and humiliation.³⁰
- 2.21 According to Tā Kim Workman, the emphasis on the future and relationships “prioritised a desire to reintegrate offenders into communities, heal victims and maintain a balance between the acknowledgement of past behaviour and moving on”.³¹ For example, pana was not necessarily permanent and could, in some cases, end when the banished person was prepared to make amends.³² According Jackson, to pana was “to send the wrongdoer to another part of his or her whakapapa — it was never to isolate them from it”.³³
- 2.22 In te ao Māori, the response to offending and community safety was ensured through tikanga Māori (such as pana and utu) rather than through detention or removing people permanently from their community.³⁴ In light of this tikanga, the notion of imprisonment was “simply unknown – in a very real sense it would have been culturally incomprehensible”.³⁵ Tā Kim Workman has written that, in te ao Māori, being imprisoned

²⁸ *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai me ngā ōta nō muri whakawhiu | Public Safety and Serious Offenders: a Review of Preventive Detention and Post-Sentence Orders* (wānanga held in Wellington, 19 October 2022).

²⁹ Tāmati Kruger *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai me ngā ōta nō muri whakawhiu | Public Safety and Serious Offenders: a Review of Preventive Detention and Post-Sentence Orders* (wānanga held in Wellington, 19 October 2022).

³⁰ Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 2; and Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) Kōhuru at 141, Muru at 254, Pana at 288, and Tapu at 404.

³¹ Kim Workman “Whānau Ora and Imprisonment” (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 2.

³² Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) Pana at 288. See also [#PAN 03], [#PAN 04], [#PAN 06] and [#PAN 08].

³³ Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim dated 4 May 2016” Wai 2540, #A28 at [86].

³⁴ Tai Ahu *Tuia te Kaho me te kākaho, kia ahu mai ko te Tukutuku: Working Paper on Preventive Detention Commissioned by Te Aka Matua o te Ture | Law Commission* (Whāia Legal, 17 February 2023) at [70(a)].

³⁵ Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim dated 4 May 2016” Wai 2540, #A28 at [85].

was the same as being taken captive, with “a profound effect on the personal, emotional and spiritual state of Māori”.³⁶ Ongoing punishment in the form of imprisonment could cause further imbalance to the individual and those around them.³⁷ It could perpetuate any disruption in their mana and tapu.³⁸

- 2.23 At the same time, recent input from Māori on reform to the criminal justice system recognises that some people will need to be separated from the community for a time due to the risk to themselves and others.³⁹ Nevertheless, this type of separation should have a rehabilitative focus and be a last resort.⁴⁰

QUESTION

Q1

Have we appropriately identified the relevant tikanga Māori?

TE TIRITI O WAITANGI | TREATY OF WAITANGI

- 2.24 Te Tiriti o Waitangi | Treaty of Waitangi⁴¹ is recognised as a foundation of government in Aotearoa New Zealand⁴² and of “constitutional significance” to the modern New Zealand state.⁴³
- 2.25 Te Aka Matua o te Ture | Law Commission (the Commission) has examined the significance of the Treaty to the development of the law in Aotearoa New Zealand in several recent publications.⁴⁴ Rather than restating these discussions, we highlight and develop the aspects of the analysis that are particularly relevant to the law in this area.
- 2.26 The Treaty comprises a Māori text and an English text, and there are well-known differences between them. In summary:

³⁶ Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, te Arotahi Series Paper, 3 September 2019) at 2.

³⁷ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 15.

³⁸ Tai Ahu *Tuia te kaho me te kākaho, kia ahu mai ko te Tukutuku: Working Paper on Preventive Detention Commissioned by Te Aka Matua o te Ture | Law Commission* (Whāia Legal, 17 February 2023) at [92(b)]; and Hunga Kaitiitiro i te Hauora o te Tangata | National Health Committee *Health in Justice: Kia Piki te Ora, Kia Tika! Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau* (Manatū Hauora | Ministry of Health, Wellington 2010) at 34.

³⁹ Ināia Tonu Nei *Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 22.

⁴⁰ Ināia Tonu Nei *Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 22.

⁴¹ When discussing te Tiriti o Waitangi | Treaty of Waitangi in this Paper, we use “the Treaty” as a generic term that is intended to capture the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term “te Tiriti”, refer to “the Māori text” or make this clear in the context. When we are referring to the English text only, we refer to “the English text” or make this clear in the context.

⁴² Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual 2017* 1 at 1.

⁴³ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151]. See also Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [7].

⁴⁴ For example, Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022); and Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person’s property on death* (NZLC R145, 2021).

- (a) Article 1 of the Māori text provides that rangatira Māori grant the Crown kāwanatanga. The English text provides that Māori rangatira cede sovereignty to the Crown.
- (b) Article 2 of the Māori text provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and all things valued and treasured. In the English text, article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.⁴⁵
- (c) Article 3 of the Māori text provides that the Crown agrees to care for Māori and give Māori the same rights and duties of citizenship as the people of England.⁴⁶ A similar undertaking is conveyed in article 3 of the English text, in which the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.⁴⁷
- 2.27 At the time of signing the Treaty, Crown representatives made oral undertakings and assurances to rangatira Māori, including an undertaking to respect Māori customs and law.⁴⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (the Tribunal) has concluded that these also form part of the agreement reached.⁴⁹
- 2.28 The Tribunal has said that precedence, or at least considerable weight, should be given to the Māori text when there is a difference between it and the English text. The reasons for this are discussed in recent Commission publications.⁵⁰

Kāwanatanga me tino rangatiratanga

- 2.29 Kāwanatanga, referenced in article 1 of the Māori text, has been translated as government or governorship.⁵¹ The Tribunal has said that governance “includes the power to make laws for peace and order.”⁵² It has also noted that, in 1840, rangatira would have expected kāwanatanga to be exercised in relation to non-Māori only.⁵³

⁴⁵ Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

⁴⁶ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

⁴⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

⁴⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 114.

⁴⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526–527.

⁵⁰ See Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at 3.8 – 3.24; Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person’s property on death* (NZLC IP46, 2021) at 2.6–2.35; Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person’s property on death* (NZLC R145, 2021) at 2.54–2.67; and Te Aka Matua o te Ture | Law Commission *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at 2.6–2.29.

⁵¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at xxviii.

⁵² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 25.

⁵³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 419.

- 2.30 We consider that, in relation to kāwanatanga, the need to keep communities safe from serious offending falls within the Crown’s authority to make laws for the good order and security of the country. The primary concern of the preventive detention, extended supervision order (ESO) and public protection order (PPO) legislation is the maintenance of public safety. Maintaining public safety extends to the safety and wellbeing of Māori communities.⁵⁴
- 2.31 Tino rangatiratanga, referenced in article 2 of the Māori text, has been described as the exercise of the chieftainship of rangatira, which is unqualified except by applicable tikanga.⁵⁵ In the context of articles 1 and 2 of the Māori text, the Tribunal has observed that the guarantee of tino rangatiratanga:⁵⁶
- ... requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values.
- 2.32 Rangatiratanga can embody the authority and responsibilities of a rangatira to maintain the welfare and defend the interests of their people.⁵⁷ It can also involve the authority and responsibilities of the people themselves, which, in the context of this review, includes hapū, whānau and non-tribal/non-kin groups.⁵⁸ It involves the exercise of mana in accordance with and qualified by tikanga and its associated kawa.⁵⁹
- 2.33 Traditionally, this has included managing anti-social behaviour through the relevant tikanga, as discussed in the section on tikanga Māori. According to Jackson:⁶⁰
- Which particular sanction was correct or which course of action was appropriate at any given time were decisions made by the people – chiefs, tohunga, or the community assembled in runanga or hapu gatherings.
- 2.34 The Treaty guarantee of tino rangatiratanga is relevant to this review because of the impacts on Māori lives, collective decision-making and community responsibilities arising from the need to address the significant risks of reoffending posed by some people. Māori

⁵⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26.

⁵⁵ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319. Kawharu explained that the term emphasised to rangatira their complete control according to their customs. The term has also been translated as “paramount authority”: Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 19–22; and “absolute authority”: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whāia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

⁵⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21.

⁵⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26–27.

⁵⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998). The Tribunal said that rangatiratanga is exercised by Māori groups and Māori communities, whether tribally based or not. The Tribunal preferred the term “non-tribal” to refer to such groups.

⁵⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 41–42 and 229; and Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 36–38. See also the discussion in Matike Mai Aotearoa *He Whakaaro Here Whakaamu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 34.

⁶⁰ Moana Jackson *The Māori and the Criminal Justice System | He Whaipaanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 42.

individuals and their communities are affected as people subject to preventive orders and as potential victims of reoffending.

2.35 In the criminal justice context, the Tribunal has said:⁶¹

We understand the Crown’s kāwanatanga responsibility is to commit to reducing reoffending by Māori in order to maintain public safety ... We acknowledge that the Crown has a kāwanatanga right to decide on policy and strategies in fulfilling its responsibilities, but this right must be considered alongside the guarantee to Māori of the exercise of their rangatiratanga ...

Māori have a clear interest in the safety and well-being of their communities through the successful rehabilitation and reintegration of offenders. ... As we see it, rangatiratanga demands that Māori be substantially involved in matters affecting them. This includes Māori being involved in maintaining the safety of their families and communities.

The Treaty principles

2.36 The Treaty principles have become important tools in understanding the Treaty and have an extensive history in the Tribunal and the courts.

2.37 We note that some regard the Treaty principles as distorting or diminishing the clear terms of the Māori text.⁶² It is important to recall the Tribunal’s explanation of Treaty principles in the *Muriwhenua* report. There, the Tribunal explained that, although its statutory role is to inquire into the consistency of the Crown’s acts and omissions against the Treaty principles, this “does not mean that the terms [of the Treaty] can be negated or reduced”.⁶³ Rather, the principles “enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.⁶⁴

2.38 We consider this review engages the principles of partnership, active protection, equity and options, noting that these may overlap to some extent.

The principle of partnership

2.39 The Treaty has been described as a partnership between the Crown and Māori arising from the agreements reached in articles 1 and 2.⁶⁵ The Tribunal has said that partnership “serves to describe a relationship where one party is not subordinate to the other but

⁶¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26.

⁶² For example, see Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 263–264. See also the discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 348 onwards for an in-depth discussion of the texts.

⁶³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

⁶⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386. In this Issues Paper, we refer to the principles of the Treaty imposing obligations. We use this language to reflect statements by the Tribunal. However, we consider the source of these obligations to be the text of the Treaty.

⁶⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 192.

where each must respect the other's status and authority in all walks of life".⁶⁶ The relationship should be founded on good faith and respect.⁶⁷

- 2.40 The starting point should be shared decision-making, but the form the partnership takes will depend on what the rights and interests of the Treaty partners require in the circumstances.⁶⁸ Both Māori and the Crown should participate in identifying the nature and extent of the rights and interests engaged and how they may be protected through the partnership.⁶⁹
- 2.41 The guarantee of tino rangatiratanga means it is for Māori to say what Māori interests are and to articulate how they might best be protected.⁷⁰ At *Ināia Tonu Nei*, a hui Māori on justice reform, participants said, "Māori who work within the community know the needs of whānau more than anyone else."⁷¹
- 2.42 The Tribunal has said that the requirement for the Crown to partner with Māori in developing and implementing policy is heightened where there are disparities in outcomes,⁷² as there are in this area of the law.
- 2.43 In the context of disproportionate reoffending and reimprisonment rates for Māori, the Tribunal said that a "bold approach to partnership" was required, where the Crown and Māori would work together at a high level to achieve their mutual interests in reducing Māori reoffending.⁷³ The Tribunal said:⁷⁴
- We cannot foresee a satisfactory resolution to this situation without Māori being at the table to design and implement both strategic-level documents and Māori-centred programmes and initiatives.
- 2.44 The Tribunal said that this is even more important when Māori are actively seeking greater involvement.⁷⁵

⁶⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 27–28.

⁶⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Wai 776, 1999) at 38.

⁶⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 341.

⁶⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 341. See also *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 667 per Cooke P; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Crown's Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 12.

⁷⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at xxvi.

⁷¹ *Ināia Tonu Nei Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 16.

⁷² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 44.

⁷³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 63.

⁷⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 62.

⁷⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 63.

- 2.45 At *Ināia Tonu Nei*, the hui participants said that “Māori want to lead the way in reforming the justice system”:⁷⁶

Māori have the knowledge, relationships, experience and capability to lead this. However, crucially, they need funding and support to enable this to happen. Māori are calling for the Crown to work with them to lead responses to improve the wellbeing of Māori and reduce the amount of exposure Māori have with the justice system.

The principle of active protection

- 2.46 The principle of active protection is a central principle arising from the Treaty.⁷⁷ It encompasses an obligation on the Crown to actively protect Māori resources, Māori cultural practices and Māori themselves, as groups and individuals.⁷⁸
- 2.47 The principle also encompasses an obligation to actively protect tino rangatiratanga. Rangatiratanga is exercised within te ao Māori every day and independently of New Zealand law. However, in some situations, consistency with the Treaty may require that provision for the exercise of tino rangatiratanga be made in legislation.
- 2.48 The Tribunal has made clear that “the principle of active protection is heightened in circumstances of inequity between Māori and non-Māori”.⁷⁹ This is regardless of the cause of the inequities. As well as being overrepresented amongst people subject to preventive detention and ESOs (discussed further below), Māori are likely to be overrepresented amongst victims of serious offending. A 2021 report found that Māori are more likely to be victims of intimate partner violence and sexual violence than the New Zealand average and almost twice as likely to be victims of interpersonal violence than the New Zealand average.⁸⁰

The principle of equity

- 2.49 The principle of equity arises from article 3 of the Treaty and imposes an obligation on the Crown to act fairly between Māori and non-Māori.⁸¹ It includes a duty to guarantee Māori freedom from discrimination.

⁷⁶ *Ināia Tonu Nei Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 16.

⁷⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 12. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26. In the English text of the Treaty, it is article 2 that provides that the Crown “guarantees” Māori the continued possession of their lands and other resources. Article 3 of both texts also includes an undertaking by the Crown to protect Māori rights and interests. The preamble records the Queen’s desire (in the English translation of the Māori text) to “protect the chiefs and subtribes of New Zealand”: Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 93.

⁷⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005) at 12.

⁷⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī!* (Wai 2540, 2017) at 27

⁸⁰ New Zealand Crimes and Victims Survey *Māori Victimisation in Aotearoa New Zealand: Results Drawn from Cycle 1 and 2 (2018/19) of the New Zealand Crime and Victims Survey* (Te Tāhū o te Ture | Ministry of Justice, April 2021).

⁸¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

- 2.50 Together with the principle of active protection, the principle of equity requires the Crown to act fairly to reduce inequities between Māori and non-Māori — this includes an obligation to promote positive equity.⁸²
- 2.51 There is a disproportionate connection between Māori and the justice system through the impact of earlier policies, laws and institutions.⁸³ In the Tribunal inquiry into disproportionate reoffending rates, the Crown and claimant witnesses “agreed that the legacies of colonisation have influenced the position of indigenous peoples in the corrections system in New Zealand and elsewhere”.⁸⁴ However, the Tribunal has stated that the principle of equity applies “regardless of the cause of disparity”.⁸⁵
- 2.52 In the 1989 *Mataitai* paper, the Commission reflected on the principle of equality before the law embodied in article 3 of te Tiriti and said that, while it means that those in like circumstances should be treated alike, subjecting people to the same rules when they are not in like circumstances can deny, rather than promote, equality.⁸⁶

The principle of options

- 2.53 This principle is concerned with the choices open to Māori.⁸⁷ The Treaty envisages the protection of tribal authority, culture and customs and also confers the same rights and privileges as British subjects on individual Māori. Māori are free to pursue either or both of these.⁸⁸ This assures Māori the right to choose their social and cultural path.⁸⁹ The Tribunal has described the choice as one to “develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds”.⁹⁰
- 2.54 The options open to Māori, as we see them, are essentially concerned with the decisions Māori may make every day to live in and engage with te ao Māori and te ao Pākehā.

⁸² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 14; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 195.

⁸³ Len Cook *A Statistical Window for the Justice System: Putting a Spotlight on the Scale of State Custody across Generations of Māori* (Institute for Governance and Policy Studies, Working Paper 20/02, November 2020) at 1.

⁸⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 42.

⁸⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 13 citing Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Urewera Volume VIII* (Wai 894, 2017) at 3773.

⁸⁶ Te Aka Matua o te Ture | Law Commission *The Treaty of Waitangi and Māori Fisheries: Mataitai Nga Tikanga Māori me te Tiriti o Waitangi* (NZLC PP9, 1989) at 90.

⁸⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁸⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁸⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 65.

⁹⁰ Te Rōpū Whakamana o Te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 195.

- 2.55 The Crown should ensure, as part of its responsible exercise of its *kāwanatanga*, that options remain open to Māori as genuinely as is possible.⁹¹ For example, in the context of health, the Tribunal has said that the principle of options requires the Crown to provide for and properly resource kaupapa Māori health services.⁹² Any option offered should be well supported, as the Crown is responsible for ensuring Māori are not disadvantaged by their choice of health service.⁹³
- 2.56 Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group has noted that solutions to problems with the justice system that affect Māori must be led locally and by Māori, not imposed by those with no connection to the communities concerned. However, resourcing is critical — “communities struggling with multiple deprivations cannot be expected to also find the extra reserves required to address their current needs in relation to the justice system”.⁹⁴

QUESTION

Q2

Do you agree with our preliminary views about how the Treaty may apply in the context of this review?

ISSUES

The law fails to enable Māori to live in accordance with tikanga

- 2.57 In our preliminary view, the current laws governing the preventive regimes are inconsistent with tikanga Māori. Responses grounded in tikanga to a person who is at risk of offending should work to restore a person’s mana, protect their tapu, and achieve ea by restoring the offender “back to their community as a fully functioning human being.”⁹⁵ Conversely, isolating a person from their community may undermine and disrupt whakapapa and whanaungatanga.
- 2.58 We recognise the work being done to reorient the corrections system by prioritising and embedding kaupapa Māori approaches in the management of people under the care of

⁹¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 24, where the Tribunal observed in that context that “[a]fter 170 years during which Māori have been socially, culturally, and economically swamped, it will no longer be possible to deliver tino rangatiratanga in the sense of full authority over all taonga Māori.” See also the discussion at 269.

⁹² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 46.

⁹³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 46.

⁹⁴ Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, June 2019) at 26.

⁹⁵ Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 2. We acknowledge that the criminal justice system should also help to restore the mana of people who are harmed by offending. The Chief Victims Advisor has recommended that the government develop a system that is focused on restoring victims’ wellbeing and incorporates tikanga Māori and te ao Māori models of healing: Chief Victims Advisor to Government *Te Tangi o te Manawanui: Recommendations for Reform* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, September 2019) at 4.

Ara Poutama | Department of Corrections (Ara Poutama).⁹⁶ Even so, the preventive regimes may be irreconcilable with tikanga. Throughout this Issues Paper, we discuss specific issues with preventive detention, ESOs and PPOs and whether the law enables Māori to live in accordance with tikanga. At a more general level, however, the practice of subjecting people to indeterminate prison sentences, detention in the PPO residence or the potentially severe restrictions of an ESO may unduly isolate people from their communities and preclude meaningful relationships with whānau, hapū and iwi. This may disrupt the fundamental values of whakapapa and whanaungatanga. The restrictions may also be seen as a perpetuation of punishment.⁹⁷ The measures may continue to negatively impact a person's mana, tapu and mauri and hinder effective restoration to their community. For example, breaches of tikanga and erosion of mana in prison undermine the hauora (health and wellbeing) of Māori prisoners.⁹⁸

- 2.59 The preventive regimes developed out of a legal system that was imposed on Māori after the signing of the Treaty. As noted by Jackson, the criminal justice system was built on Pākehā attitudes and values, not Māori notions of justice.⁹⁹ It imposed concepts that were foreign to Māori, could be incompatible with or even damaging to tikanga¹⁰⁰ and alienated many Māori.¹⁰¹ In our view, more could be done to reverse this imposition by enabling tikanga-based approaches to address the reoffending risks of some people.
- 2.60 In addition, the significance of tikanga to the development of the law is reinforced by Aotearoa New Zealand's international commitments in relation to Māori, including its affirmation in 2010 of Te Whakapuakitanga o te Rūnanga Whakakotahi i ngā Iwi o te Ao mō ngā Tika o ngā Iwi Taketake | United Nations Declaration on the Rights of Indigenous Peoples.¹⁰²

⁹⁶ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019-2024* (19 August 2019).

⁹⁷ Tai Ahu Tuia *te kaho me te kākaho, kia ahu mai ko te Tukutuku: Working Paper on Preventive Detention Commissioned by Te Aka Matua o te Ture | Law Commission* (Whāia Legal, 17 February 2023) at [83].

⁹⁸ Hunga Kaititiro i te Hauora o te Tangata | National Health Committee *Health in Justice: Kia Piki te Ora, Kia Tika! Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau* (Manatū Hauora | Ministry of Health, Wellington, 2010) at 34.

⁹⁹ Moana Jackson *The Māori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988).

¹⁰⁰ Khylee Quince "Māori and the Criminal Justice System in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 341.

¹⁰¹ Moana Jackson *The Māori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 111.

¹⁰² *Te Whakapuakitanga o te Rūnanga Whakakotahi i ngā Iwi o te Ao mō ngā Tika o ngā Iwi Taketake | United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007). The UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and addresses the rights to self-determination, preservation of culture and institutions, participation in decision-making and consultation, and rights to lands and resources. As a declaration rather than a convention, the UNDRIP does not have legally binding force attached to it in international law. However, the UNDRIP is widely viewed as not creating new rights but rather elaborating on internationally recognised human rights as they apply to indigenous peoples and individuals and in this way having a binding effect: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 34–35, 38–39 and 40–44.

The law fails to give effect to obligations under the Treaty

- 2.61 As we discuss above, tikanga Māori is also significant in terms of Treaty rights and obligations that relate to tikanga, and it may be possible or necessary to give effect to rights and obligations under the Treaty as they relate to tikanga through law reform.
- 2.62 More generally, in our preliminary research and engagement, we have discerned a clear desire from Māori to manage people at risk of reoffending in different ways to the current preventive regimes. In line with the Tribunal's views in the criminal justice context, tino rangatiratanga demands that Māori be substantially involved in maintaining the safety of their communities through the successful rehabilitation and reintegration of offenders.¹⁰³ This includes a rangatiratanga right of Māori to ensure that tikanga is followed appropriately and under the correct authority.
- 2.63 The overrepresentation of Māori subject to preventive detention and ESOs also engages the principle of equity and underscores the responsibility of the Crown to enable and support tino rangatiratanga.¹⁰⁴ As we state in Chapter 1, between 1 July 2012 and 30 June 2022, 45 per cent of those sentenced to preventive detention identified as Māori and 42 per cent of those made subject to ESOs identified as Māori.¹⁰⁵ This is significantly higher than Māori population rates. In 2018, the Māori population was 17 per cent of Aotearoa New Zealand's population.¹⁰⁶
- 2.64 The prison environment negatively affects physical and mental health generally.¹⁰⁷ The isolation, overcrowding, victimisation and poor physical environment of prisons likely contributes to the deterioration in the mental health of prisoners.¹⁰⁸ Prisons have been described as “toxic environments” in which antisocial behaviour is often reinforced by criminally minded peers.¹⁰⁹
- 2.65 The disproportionate rate of preventive detention means that the negative effects and impacts of imprisonment are disproportionately felt by Māori. The impacts of these rates of detention extend beyond those in custody. In the report on Māori reoffending rates,

¹⁰³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26.

¹⁰⁴ There have been too few people subject to PPOs for any meaningful analysis.

¹⁰⁵ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023). During this period, 47 of the 104 people sentenced to preventive detention identified as Māori. There were 329 ESOs imposed during this period, 138 of which were imposed on a person identifying as Māori.

¹⁰⁶ Statistics New Zealand “Māori population share projected to grow in all regions” (29 March 2022) <stats.govt.nz>. It should be noted that different methods of classification may have been used for the sources of data for this and other statistics cited in this definition, making it difficult to compare statistics accurately. In Moana Jackson *The Māori and the Criminal Justice System: A new Perspective – He Whaipaanga Hou* (Department of Justice, Study Series 18, February 1987) at 21, Moana Jackson noted that some processes use self-identification whereas others use an observer's estimation of whether a person is Māori.

¹⁰⁷ Hunga Kaititiro i te Hauora o te Tangata | National Health Committee *Health in Justice: Kia Piki te Ora, Kia Tika! Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau* (Manatū Hauora | Ministry of Health, Wellington, 2010) at 28.

¹⁰⁸ Andrew Carroll and others “No Involuntary Treatment of Mental Illness in Australian and New Zealand Prisons” (2020) 32 *The Journal of Forensic Psychiatry & Psychology* 1 at 3–4.

¹⁰⁹ Jeremy Skipworth “The Australian and New Zealand Prison Crisis: Cultural and Clinical Issues” (2019) 53 *Australian & New Zealand Journal of Psychiatry* 472 at 472.

the Tribunal noted that “whānau, hapū, and iwi of Māori serving sentences may be affected as victims of crime by losing financial and familial support from the person serving a sentence, and by the break-up of their whānau”.¹¹⁰

QUESTIONS

Q3

Do you think the law relating to preventive detention, ESOs and PPOs is failing to enable Māori to live in accordance with tikanga?

Q4

Do you think the law relating to preventive detention, ESOs and PPOs fails to give effect to the Crown’s obligations under the Treaty?

PRELIMINARY VIEWS

2.66 We consider there is a strong case for reform. The law should better enable Māori to engage with and live in accordance with tikanga should they wish to do so. The law should give better effect to obligations under the Treaty, in particular, by facilitating tino rangatiratanga. In this section, we set out some preliminary views relating to the reform of the law drawing on the analysis presented in this chapter.

The Crown and Māori have a mutual interest in ensuring community safety

2.67 We consider the Treaty provides a framework for addressing community safety and those considered at risk of serious reoffending. The Crown and Māori have a mutual interest in protecting the community from risks of serious reoffending that are posed by some people. In making laws to achieve this goal, the Crown should act in a manner consistent with its Treaty obligations. As noted above, the fact that Māori are likely to be overrepresented amongst victims of serious offending triggers the Crown’s duty of active protection. As to what preventive measures the law should provide, we suggest that the terms and principles of the Treaty indicate that achieving the social goal of protecting the community from serious reoffending requires the active support and participation of both the Crown and Māori.

The law should make greater provision for Māori-designed and Māori-led initiatives

2.68 In our preliminary view, the primary way the law should enable Māori to live in accordance with tikanga, and a way of facilitating tino rangatiratanga, is through Māori-designed and Māori-led initiatives for managing a person who is at risk of serious reoffending. We provide an overview of this proposal here but discuss it more fully throughout the Issues Paper, particularly in Chapters 8, 10 and 12.

2.69 As noted, we have discerned a clear desire among Māori to take greater responsibility for managing people who are at risk of serious reoffending. We note the imperative in tikanga for Māori whānau, hapū, iwi and marae to connect with people who require some

¹¹⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 25.

form of management.¹¹¹ We recognise that the priority of tikanga for the management of people at risk of serious reoffending is to work to restore their mana, protect their tapu and achieve ea.

2.70 Based on feedback we have heard in our preliminary engagement, we consider the promotion of Māori-designed and Māori-led initiatives to be the best way Māori can practise this tikanga and exercise tino rangatiratanga. In 1988, Jackson wrote that:¹¹²

It is one of the weaknesses of current thinking on biculturalism that many institutions appear to believe they can gain Maori perspectives or meet Maori needs without acknowledging the validity of Maori initiatives that may be contrary to their own.

2.71 Jackson also said that changes within the justice system need to be drawn from “a commitment to accord Maori ideas and strategies equal value with the Pakeha.”¹¹³ He said that this was a clear consequence of the partnership involved in the Treaty and a recognition of the authority of the community to participate in the procedures that monitor and control the conduct of its people.

2.72 In Chapter 10, we consider ways in which the law could better direct the court to consider Māori-designed and Māori-led initiatives to manage people subject to orders. In Chapter 12, we present these proposals in more detail for feedback as we develop options for reform in the next stage of this review. We also note in Chapter 12 that Māori-designed and Māori-led initiatives will require resourcing and development.

2.73 Ara Poutama has recognised that the way it manages Māori within its care is not working for Māori.¹¹⁴ In its strategy *Hōkai Rangī*, Ara Poutama accepts the need to make significant change.¹¹⁵ It has committed to make kaupapa Māori approaches the foundation of practice for managing Māori within its care.¹¹⁶ It has recognised it must “prioritise, embed and protect mātauranga Māori”. It will “proactively enable Māori” to strengthen and maintain their cultural identity, their connection to people and place and their sense of belonging.¹¹⁷

2.74 We consider greater provision for Māori-designed and Māori-led initiatives to be a continuation of reforms that are already occurring within the corrections system.¹¹⁸ In the criminal justice context, the Tribunal has said that rangatiratanga demands that Māori be

¹¹¹ Tai Ahu Tuia *te kaho me te kākaho, kia ahu mai ko te Tukutuku: Working Paper on Preventive Detention Commissioned by Te Aka Matua o te Ture* | Law Commission (Whāia Legal, 17 February 2023) at [94].

¹¹² Moana Jackson *The Māori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 206.

¹¹³ Moana Jackson *The Māori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 248.

¹¹⁴ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 16.

¹¹⁵ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 16–17, 24.

¹¹⁶ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 16–17, 24.

¹¹⁷ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 17.

¹¹⁸ We acknowledge the community and government initiatives that recommend the reform of Aotearoa New Zealand’s criminal justice system more generally to make tikanga Māori central – for example, Ināia Tonu Nei *Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) and *Turuki! Turuki! Move together! Transforming our Criminal Justice System: The Second Report of Te Uepū Hāpai i te Ora* | Safe and Effective Justice Advisory Group (Wellington, 2019).

substantially involved in maintaining the safety of their families and communities.¹¹⁹ Ara Poutama has committed to “have authentic shared decision-making at key levels — and design that with Māori”.¹²⁰ In *Hōkai Rangī*, Ara Poutama has said:¹²¹

We will proactively enable Māori in our care and management to strengthen and/or maintain their cultural identity, their connection to people and place, and their sense of belonging. We will partner with marae, hapū, iwi, and Māori service providers, and work with whānau to design, deliver, and expand support systems and our programmes.

- 2.75 Ara Poutama is developing several Māori pathway programmes using kaupapa Māori and whānau-centred approaches.¹²² Ara Poutama describes several of these planned initiatives are being “co-designed”,¹²³ although these initiatives remain within Ara Poutama.
- 2.76 It is for Māori to say what their interests are and how they might best be protected in this area. Throughout this Issues Paper we seek views, in particular Māori views, on:
- the nature and extent of the Māori rights and interests engaged by this review and how the active protection of these interests can be prioritised; and
 - how Māori participation in or responsibility for decision-making and management with preventive regimes can be facilitated.

QUESTION

Q5

Do you agree with our preliminary views about how the law can better enable Māori to live in accordance with tikanga and better facilitate the exercise of tino rangatiratanga?

¹¹⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26.

¹²⁰ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 16.

¹²¹ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 17.

¹²² See a list of pathway projects at Ara Poutama | Department of Corrections “About Māori Pathways” <www.corrections.govt.nz>; and Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 31–34.

¹²³ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 31–34. The planned initiatives include: Hawkes Bay Pathway – “A project to develop a prototype of a co-designed kaupapa Māori pathway so people in the care and management of Ara Poutama Aotearoa experience a kaupapa Māori-centred approach for their entire stay with us”; Northland Region Corrections Facility – “will be a kaupapa Māori facility with an operating model that will be co-designed. The process will be grounded in kaupapa Māori thinking and practice, and will be delivered within the context of whānau, hapū, iwi, and communities”; Waikeria Māori Model of Health – “A 100-bed mental health facility will be built at Waikeria Prison. The facility will operate a Māori model of care and be informed through co-design with Waikato District Health Board, whānau, hapū, iwi, and hāpori Māori, and other DHBs and community services.”

CHAPTER 3

Key human rights issues

IN THIS CHAPTER, WE CONSIDER:

- instances where the courts or international human rights bodies have found New Zealand law governing the preventive regimes to be inconsistent with human rights law; and
- whether the preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) can be justified for the purposes of human rights law.

INTRODUCTION

- 3.1 The three preventive regimes authorise some of the most coercive exercises of state power known to New Zealand law. As we explain in Chapter 1, a person sentenced to preventive detention is subject to an indeterminate prison sentence and, even following release, the indefinite possibility of recall for breach of parole conditions. PPOs also involve indeterminate detention – whether in a residence located in a prison precinct or in prison itself. Although ESOs do not ordinarily authorise detention, they authorise significant restrictions on a person’s freedoms that, at the top end, do not fall far short of detention. As with the other two regimes, a person can be subject to ESO conditions on an indefinite basis.
- 3.2 Given the coercive nature of these three regimes, the subjection of an individual to any one of them engages a host of human rights issues. We touch on some of these in later chapters. Here, we examine some key instances where the courts or international human rights bodies have found New Zealand law governing the preventive regimes to be inconsistent with human rights law. We also examine the important question of whether the human rights issues presented by the preventive regimes can be justified. We conclude the chapter with some preliminary views on whether reform is desirable to ensure greater compliance with human rights norms.
- 3.3 This chapter does not consider instances where a human rights breach has arisen from a misinterpretation of the law.¹ Nor does this chapter consider human rights issues that

¹ See for example *Te Whatu v Department of Corrections* [2017] NZHC 3233, [2018] 2 NZLR 822 in which a probation officer’s direction to a person on an ESO not to associate with their partner was held to be a failure to exercise the

have been argued in the case law but where the court or human rights body has not determined that a breach has occurred.² In Chapters 8 and 10, we consider whether the legislation governing the preventive regimes should provide greater direction so that they are applied consistently with human rights law.

ISSUES

- 3.4 There are two key instances in which the courts and human rights bodies have found the law governing preventive detention, ESOs and PPOs to be inconsistent with human rights protected by New Zealand and international law. The first is that the United Nations Human Rights Committee (UNHRC) has found that preventive detention in Aotearoa New Zealand breaches the protections against arbitrary detention under the International Covenant on Civil and Political Rights (ICCPR).³ The second is that the courts have found the ESO and PPO regimes to be inconsistent with the immunity from second punishment under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).

Preventive detention breaches the right to protection from arbitrary detention under the International Covenant on Civil and Political Rights

- 3.5 Section 22 of the NZ Bill of Rights and article 9 of the ICCPR affirm the right not to be arbitrarily detained. On several occasions, people have argued that their sentence to preventive detention under New Zealand law breaches this right. The courts and the UNHRC⁴ have developed an approach for determining whether ongoing detention to prevent reoffending constitutes arbitrary detention.
- 3.6 Even though preventive detention is imposed as a single sentence in place of a determinate sentence, the courts and the UNHRC view preventive detention as comprising two periods. The first is a period that has been referred to as the “tariff element”, “punitive period” or what might be regarded as the “just deserts” in respect of

legal power consistently with the freedom of association (discussed in Chapter 10); *Vincent v New Zealand Parole Board* [2020] NZHC 3316 in which the Kōti Matua o Aotearoa | High Court found the Parole Board had misapplied the statutory test for parole to a person in prison on preventive detention thereby breaching the person’s right to be free from arbitrary detention; *C v New Zealand Parole Board* [2021] NZHC 2567 in which the High Court found that requiring a person on an ESO to remain at a facility 24 hours a day for two years was not permitted by the Parole Act 2002 and constituted arbitrary detention; and *Douglas v Chief Executive of the Department of Corrections* [2022] NZHC 600 in which the chief executive accepted that a previous policy of not granting to people on PPOs leave from the Matawhāiti residence to interact with the community and undertake normal community activities was a misreading of the residence manager’s powers under s 26 of the Public Safety (Public Protection Orders) Act 2014.

² There have been instances where people subject to preventive measures have argued before the courts that the measures breach various human rights, but the courts have dealt with the proceeding without ruling on these arguments. See for example *Vincent v New Zealand Parole Board* [2020] NZHC 3316 in which a person argued that their 52-year imprisonment on preventive detention breached their right not to be subject to cruel, degrading or disproportionately severe treatment or punishment pursuant to s 9 of the New Zealand Bill of Rights Act 1990. The Court left the argument undetermined because it ordered that the person be released having found them to be arbitrarily detained for the purposes of s 22 of the New Zealand Bill of Rights Act 1990. We note too that the Kōti Mana Nui o Aotearoa | Supreme Court is currently considering arguments that the ESO and PPO regimes are inconsistent with ss 9, 22, 23(5), 25(a), (c) and (d), and 26(1) of the New Zealand Bill of Rights Act 1990 (*Attorney-General v Chisnall* [2022] NZSC 77) but it has not yet released its decision.

³ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

⁴ Under the Optional Protocol to the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee may receive and consider communications from individuals who claim to be victims of a violation by Aotearoa New Zealand of any rights provided for in the Covenant.

the qualifying offending.⁵ The second and subsequent period is the time when the person remains detained solely for preventive reasons.⁶ As discussed further below, it is difficult to identify the first and second periods in a sentence of preventive detention because the Sentencing Act 2002 does not distinguish between the two.

- 3.7 The courts and the UNHRC have said that, to avoid arbitrariness, ongoing detention during the second period must be justified on legitimate and compelling public protection grounds. Regular reviews by a court are needed to test this justification. In earlier decisions, the UNHRC and the courts were satisfied that the New Zealand Parole Board (Parole Board) reviews satisfied this requirement.⁷ More recently, the UNHRC has questioned whether the Parole Board can be considered a “court” for these purposes.⁸ We discuss this issue further in Chapter 11.
- 3.8 In the same decision, the UNHRC found that preventive detention can breach the ICCPR on additional grounds. In *Miller v New Zealand*, two people complained that their preventive detention constituted arbitrary detention.⁹ One had been detained in prison for 16 years and the other for 19 years. Most of their preventive detention had been spent in high security units.
- 3.9 Drawing on its previous decisions and statements, the UNHRC explained that arbitrary detention must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.¹⁰ The UNHRC said that, in order to meet those requirements, the cogency of the justification for detaining a person must increase with the length of the detention. We consider this justification aspect further in Chapter 11.
- 3.10 The UNHRC also said that, in order to be free from arbitrariness, the conditions of preventive detention must be distinct from the conditions for convicted prisoners serving punitive sentences and must be aimed at the detainee’s rehabilitation and reintegration into society.¹¹ In this case, the UNHRC was concerned that the protracted length of the sentences, and keeping the people subject to preventive detention in the same prison conditions as people serving punitive sentences, raised serious concerns as to whether requirements of reasonableness, necessity, proportionality and continued justification had been met.¹²

⁵ *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [71]; *Rameka v New Zealand* (2003) 7 HRNZ 663 (UNHRC); *Miller v New Zealand Parole Board* [2010] NZCA 600 at [30]; and *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [85].

⁶ *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [71]; *Miller v New Zealand Parole Board* [2010] NZCA 600 at [30]; and *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [85].

⁷ *Rameka v New Zealand* (2004) 7 HRNZ 663 at [7.3]; and *Miller v New Zealand Parole Board* [2010] NZCA 600 at [70].

⁸ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.15].

⁹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

¹⁰ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee *General Comment No. 35, Article 9 (Liberty and Security of the Person)* CCPR/C/GC/35 (16 December 2014) at [12].

¹¹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee *General Comment No. 35, Article 9 (Liberty and Security of the Person)* CCPR/C/GC/35 (16 December 2014) at [21].

¹² *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.4]. The UNHRC was also concerned that the Parole Board did not constitute a “court” as required by art 9(4) of the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). This issue is discussed further in Chapter 10.

- 3.11 To date, the New Zealand courts have continued to hold that preventive detention is not arbitrary under the NZ Bill of Rights if imposed by a sentencing court in accordance with the Sentencing Act and if the ongoing justification on the grounds of public safety is regularly reviewed by the Parole Board. That said, it is only fairly recently that the New Zealand courts have exercised a jurisdiction to review the consistency of legislation for breach of the NZ Bill of Rights, so the issue has never received close examination.
- 3.12 Similarly, there has been limited opportunity for the courts to consider the law in light of the *Miller* decision. To date, te Kōti Matua | High Court (High Court) has held that the conditions of a person's detention cannot make preventive detention arbitrary within the meaning of the NZ Bill of Rights.¹³ The courts have been clear, however, that the Parole Board must exercise its review responsibilities consistently with the NZ Bill of Rights. If the person subject to detention no longer constitutes an undue risk, the basis for preventive detention ends. If the person remains in prison beyond a reasonable time period to put in place necessary arrangements for release, the person's rights not to be arbitrarily detained under section 22 of the NZ Bill of Rights will be breached.¹⁴

Extended supervision orders and public protection orders breach the protection against second punishment

- 3.13 Human rights law guards against the state repeatedly punishing a person for the same crime. In *Chisnall v Attorney-General*, the full bench of te Kōti Pira | Court of Appeal (Court of Appeal) declared that the ESO and PPO regimes were inconsistent with the protection against second punishment under section 26(2) of the NZ Bill of Rights and that those inconsistencies had not been justified.¹⁵ The decision has been appealed to te Kōti Mana Nui | Supreme Court (Supreme Court) and a decision is awaited.
- 3.14 For the protection against second punishment to be engaged, ESOs and PPOs must constitute a penalty or punishment. In reaching its decision that, despite its protective focus, an ESO does constitute a penalty, the Court of Appeal referred to several relevant factors, including the following:¹⁶
- (a) The triggering event is a criminal conviction.
 - (b) The respondent to an ESO is termed an "offender".
 - (c) An application for an ESO is made to the "sentencing court".

¹³ *Miller v Attorney-General* [2022] NZHC 1832 at [82] citing *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [101].

¹⁴ As was the case in *Vincent v New Zealand Parole Board* [2020] NZHC 3316. Mr Vincent, aged 83 and suffering from severe dementia, had served preventive detention for 52 years following convictions for sexual offending on minors in the 1960s. The Parole Board denied Mr Vincent's applications for parole and applications for release on compassionate grounds. The Court found that the Parole Board was predominantly concerned that no facilities had been found that could manage Mr Vincent's dementia care rather than the risk that Mr Vincent would reoffend. The Board had therefore misapplied the statutory test, failed to take into account relevant considerations and its decisions were unreasonable. Mr Vincent's detention was arbitrary in breach of s 22 of the NZ Bill of Rights.

¹⁵ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484; and *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107.

¹⁶ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [115]-[138]. Not all factors are repeated here. Note, te Kōti Pira o Aotearoa | Court of Appeal relied heavily on its earlier decision in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

- (d) The ESO regime uses several procedures from the criminal law, such as rights of appeal and costs.
 - (e) The conditions of an ESO are in effect the same as some of the penalties that can be imposed on offenders as a sentence, including detention for up to 12 months.
 - (f) It is an offence to breach an ESO.
- 3.15 Having found ESOs were penalties, the Court was satisfied that PPOs, being much more restrictive, were also penalties.¹⁷ The Court was not persuaded by the attempt in the Public Safety (Public Protection Orders) Act 2014 (Public Safety Act) to avoid presenting PPOs as punitive, such as the terminology used (“respondent” rather than “offender”; “High Court” rather than “sentencing court”), the use of the High Court’s civil jurisdiction and the express statement that punishment was not an objective of the Act. Neither was the Court swayed by the Act’s direction that PPOs are to be applied in a way that respects the autonomy and dignity of the person subject to the PPO. The effect of a PPO remains that a person is detained against their will in a residence located on prison grounds.¹⁸ Their movements and who may visit them are controlled by the residence manager’s extensive powers.
- 3.16 The Court highlighted the qualified nature of the rights of people subject to PPOs to receive rehabilitative treatment as another factor indicating the punitive nature of PPOs. Section 36 of the Public Safety Act provides that PPO residents are entitled to receive rehabilitative treatment “if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident”. The Court compared this approach to a preventive regime centred on the provision of medical and therapeutic treatment such as the regime that now exists under German law.¹⁹ Significant amendments have been made to the preventive detention regime in Germany. This was in response to a 2011 decision of the Federal Constitutional Court which ruled that the German regime, as it then was, unjustifiably encroached on personal liberty and was unconstitutional.²⁰ The German Criminal Code now requires the following:²¹
- (a) Preventive detention must be carried out in wings or buildings that are separate to prisons. Those institutions must offer support to a detainee based on a comprehensive, individualised and intensive treatment plan that provides psychiatric, psychotherapeutic or socio-therapeutic treatment tailored to the detainee’s needs. If preventive detention is preceded by a term of imprisonment, treatment must be offered during the term of that imprisonment.
 - (b) The aim of the support and treatment plan for the detainee must be to minimise the detainee’s dangerousness to the public to a degree that the detainee may be placed on probation as soon as possible.
 - (c) Detention must burden the detainee as little as possible.

¹⁷ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [148].

¹⁸ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [161].

¹⁹ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [165].

²⁰ *B v R* 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011.

²¹ Strafgesetzbuch – StGB [German Criminal Code] 1998 (Germany), s 66c.

- 3.17 To implement these reforms, 12 new preventive detention centres were established across the country at a total cost exceeding 200 million euros.²² At these centres, detainees have cells that are larger than prison cells and usually include a kitchen and separate bathroom. There are other rooms at the centres for therapy, occupational and recreational activities.
- 3.18 Since these reforms, the European Court of Human Rights has held that the German regime is sufficiently aimed at rehabilitation and treatment of a person's "mental disorder" so as to avoid constituting a penalty in connection with the person's previous offending.²³
- 3.19 The Court of Appeal in *Chisnall* held that, in contrast to the German regime, treatment and rehabilitation are not presented as a "central focus" of the PPO regime.²⁴ The Court pointed to the way the right to treatment was qualified by the requirement that the treatment have a reasonable prospect of reducing the risk. This may, the Court said, result in indefinite detention in a residence or prison as a result of the respondent's personality characteristics, with no attempt being made by the state to treat those characteristics.²⁵ The Court concluded that "the legislative scheme must guarantee therapeutic and rehabilitative interventions by the state in order to avoid the conclusion that it is penal".²⁶
- 3.20 Having found that ESOs and PPOs were penalties that engaged section 26(2) of the NZ Bill of Rights, the Court considered whether the regimes were a justified limitation in terms of section 5 of the NZ Bill of Rights. Section 5 of the NZ Bill of Rights provides that the rights affirmed under the NZ Bill of Rights may be subject to reasonable limits prescribed by law that are "demonstrably justified in a free and democratic society". The Court observed that, while some rights affirmed in the NZ Bill of Rights could never be subject to reasonable limitations, the protection against second punishment was not one of those rights.²⁷ It is, however, clearly of fundamental importance, the Court said. Any departure from its protection required strong justification shown by appropriate affidavit evidence that the regimes are justified as a minimum and necessary response to the potential harm caused by those against whom such orders would be made.²⁸ Because the Attorney-General had not provided sufficient evidence, the Court declared that the ESO and PPO regimes' inconsistency with section 26(2) had not been justified.²⁹
- 3.21 Since the Court of Appeal's decision in *Chisnall*, the courts have considered how ESO applications should be approached in light of the judgment. The Court of Appeal has recently held that, if the statutory tests for an ESO are met, the court must take the additional step of balancing the right not to be subject to second punishment against the

²² *Ilseher v Germany* [2018] ECHR 991 (Grand Chamber) at [81].

²³ *Ilseher v Germany* [2018] ECHR 991 (Grand Chamber).

²⁴ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [175].

²⁵ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [164].

²⁶ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [176].

²⁷ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190].

²⁸ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190] and [219].

²⁹ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [223]-[226].

statutory purpose to protect the public from the risks of further offending.³⁰ Put simply, a “strong justification” is required.³¹

- 3.22 No other court or human rights body has specifically considered whether Aotearoa New Zealand’s ESO and PPO regimes infringe the ICCPR’s protections against second penalties. However, the UNHRC has held that Queensland’s legislation that enables further detention of sexual offenders beyond their determinate prison sentences for community protection infringes the ICCPR by imposing a second penalty.³²

Can the preventive regimes be justified?

- 3.23 This review raises an important question of whether the preventive regimes’ restrictions on human rights are justified in contemporary Aotearoa New Zealand.

- 3.24 As discussed, the preventive regimes engage several human rights. Some of these rights, by their nature, protect against an unjustified interference with a particular freedom. Of particular importance, the right to freedom from *arbitrary* detention requires detention to be justified in the sense it is reasonable, necessary and proportionate.³³ For other rights, section 5 of the NZ Bill of Rights requires that any limitation of a right affirmed in the NZ Bill of Rights must be demonstrably justified in a free and democratic society. Although the courts use different approaches to determine whether a limitation on a right is demonstrably justified, the test used most often asks whether the limiting measure:³⁴

- (a) serves a purpose sufficiently important to justify restrictions on the right or freedom; and
- (b) is rationally connected with its purpose, whether it impairs the right or freedom no more than reasonably necessary and whether the limit is in due proportion to the importance of the objective.

- 3.25 The Court of Appeal in *Chisnall* did not consider there was sufficient evidence before it to determine whether the ESO and PPO regimes’ limitation on the protection against second punishment was justified.³⁵ The Court did not accept an argument that the regimes themselves are justified because the courts have sufficient leeway to refuse to make an ESO or a PPO if one would not be justified in the circumstances of the particular case.³⁶ Rather, the Court explained, the central question is whether the provisions of the

³⁰ *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

³¹ *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

³² *Fardon v Australia*, CCPR/C/98/D/1629/2007 (18 March 2010) at [7.4(2)].

³³ In relation to the right to liberty and freedom from arbitrary detention under article 9 of the International Covenant on Civil and Political Rights see *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee *General Comment No. 35, Article 9 (Liberty and Security of the Person)* CCPR/C/GC/35 (16 December 2014) at [12]. As to the protection against arbitrary detention under s 22 of the New Zealand Bill of Rights Act 1990, see *Nielsen v Attorney-General* [2001] NZCA 143, [2001] 3 NZLR 433 at [33]–[34] and *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [100], which describe the touchstones of “arbitrariness” as inappropriateness, injustice, unpredictability and disproportionality.

³⁴ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103. The courts do not always apply these tests in such a formal and formulaic way. See *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [100], in which members of the Supreme Court preferred a “simpler proportionality analysis”.

³⁵ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [226].

³⁶ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [220].

Parole Act 2002 and Public Safety Act delineate regimes that limit rights in a way that has been demonstrably justified.³⁷

- 3.26 Consequently, this review should consider whether the ways in which the preventive regimes restrict human rights can be justified. We consider this question throughout this Issues Paper. At this point, we offer some preliminary observations.

Stage one: importance of underlying objective

- 3.27 The purpose of the preventive detention, ESO and PPO regimes is to protect the community from serious reoffending. In our view, this an important purpose. Because the harm caused by serious sexual and violent offending is of such severity, the state should take steps to prevent it and the community should be entitled to expect the state to do so. What those measures should be is the focus of much of this Issues Paper. At this point, we simply express a preliminary view that the regimes' aim of promoting community safety by preventing serious reoffending is a legitimate one.
- 3.28 Protecting the community by preventing reoffending has long been a key purpose of sentencing and of the corrections system in Aotearoa New Zealand.³⁸ The Court of Appeal in *Chisnall* described the prevention of serious sexual and violent offending as a "very important objective".³⁹ Many international human rights law instruments to which Aotearoa New Zealand is a party require the state to implement measures to protect individuals in the community from serious harm, including from sexual and violent offending.⁴⁰
- 3.29 Further, in Chapter 2, we note how serious offending engages obligations under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty). Māori are overrepresented as victims of intimate partner violence and sexual violence compared with the general population. This may trigger the Crown's duty of active protection to protect Māori as groups and individuals.

Stage two: rational connection, minimal impairment and overall proportionality

- 3.30 In our preliminary view, the preventive regimes are rationally connected to their purpose of protecting the community from serious reoffending in the sense that they do advance that purpose in some way. The Court of Appeal in *Chisnall* reached this conclusion in connection with the ESO and PPO regimes, noting the more important questions were whether the regimes impair the right no more than reasonably necessary for achieving the purpose and are proportionate.⁴¹

³⁷ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [220].

³⁸ Sentencing Act 2002, s 7(1)(g); and Corrections Act 2004, s 6(1)(a).

³⁹ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [195].

⁴⁰ See for example the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 19 and 34; United Nations Human Rights Committee *General Comment No. 36, Article 6 (Right to Life)* CCPR/C/GC/36 (3 September 2019) at [22]–[25]; *Convention on the Elimination of All Forms of Discrimination Against Women General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19* CEDAW/C/GC/35 (26 July 2017) at [31]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2* CAT/C/GC/2 (24 January 2008) at [18] and [22]; and United Nations Human Rights Committee *General Comment No. 28, Article 3 (the Equality of Rights Between Men and Women)* CCPR/C/21/Rev.1/Add.10 (29 March 2000) at [11].

⁴¹ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [217].

- 3.31 Turning to the question of whether the three preventive regimes impair relevant rights no more than is reasonably necessary, the human rights cases discussed above suggest a number of relevant inquiries. These include whether the regimes are sufficiently rehabilitative and whether persons subject to detention are accommodated in conditions that are sufficiently distinct from prison. We consider those questions further below.
- 3.32 As well, in addressing this question of minimal impairment, we will need to consider whether the three preventive regimes are necessary at all. There are several other measures within New Zealand law also aimed at protecting the community from reoffending. These include:
- (a) community-based sentences imposed at sentencing for up to two years to reduce the likelihood of further offending through rehabilitation and reintegration or through restricting a person’s behaviour and movements;⁴²
 - (b) determinate prison sentences;⁴³
 - (c) extended minimum periods of imprisonment before a person becomes eligible for parole;⁴⁴
 - (d) parole conditions that can last up to six months beyond the expiry date of a sentence of imprisonment;⁴⁵
 - (e) detention in a hospital or secure facility where a person has been found unfit to stand trial or acquitted on account of insanity and detention is necessary in the interests of the public or any person;⁴⁶
 - (f) registration of child sex offenders which allows for some monitoring of people in the community who have been convicted of child sex offences beyond their sentence;⁴⁷
 - (g) police safety orders which police can impose on a person for up to 10 days if necessary to help keep another person safe from family violence;⁴⁸ and
 - (h) protection orders which can be imposed by the court if a person has inflicted or is inflicting family harm and the order is necessary to protect a person and/or their children from family violence.⁴⁹

⁴² Sentencing Act 2002, ss 46 (supervision), 54C (intensive supervision), 69C (community detention), and 80D(2) (special conditions of home detention). Intensive supervision may be imposed for up to two years: Sentencing Act 2002, s 54B(2).

⁴³ Section 7 of the Sentencing Act 2002 lists the purposes for which a court may sentence or otherwise deal with an offender. Section 7(1)(g) includes “to protect the community from the offender”. In some cases, the courts have imposed determinate sentences of greater severity for community protective reasons than would otherwise have been justified: Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at [SA74.06], citing *R v Leitch* [1998] 1 NZLR 420, (1997) 15 CRNZ 321 (CA); *D (CA197/14) v R* [2014] NZCA 373; and *Bell v R* [2017] NZCA 90.

⁴⁴ Under the Sentencing Act 2002, s 86(2), the court can also impose an MPI if satisfied that the usual parole eligibility period is insufficient for the purpose of holding the offender accountable for the harm done by the offending, denouncing the conduct in which the offender was involved or deterring the offender or others from committing the same or a similar offence.

⁴⁵ Parole Act 2002, s 18(2).

⁴⁶ Criminal Procedure (Mentally Impaired Persons) Act 2003, s 24(1)(c).

⁴⁷ Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

⁴⁸ Family Violence Act 2018, pt 3.

⁴⁹ Family Violence Act 2018, s 79.

- 3.33 In addition, there are other laws at other parts of the criminal justice process aimed at keeping the community safe from reoffending more generally.⁵⁰
- 3.34 Preventive detention, ESOs and PPOs seek to address reoffending risks that are not sufficiently addressed by these other measures — because these other measures only apply at a particular stage in the criminal justice process, because they are limited to relatively short periods of time or because they do not provide for sufficiently comprehensive monitoring or management. From a human rights perspective, key questions include:
- (a) whether these other mechanisms are in fact sufficient; and
 - (b) whether it might be possible to design other mechanisms to manage reoffending risk that are less intrusive than the three regimes.
- 3.35 The legislative materials we have viewed in connection with the enactment of the preventive detention, ESO and PPO regimes and subsequent reforms disclose very little consideration of the minimal impairment question.
- 3.36 The question of the overall proportionality of the three regimes is closely related. The question requires consideration of whether the nature and extent of the problem that the preventive regimes seek to address is sufficient to justify such significant intrusions on fundamental rights.
- 3.37 In making the relevant assessments in relation to both minimal impairment and overall proportionality, it is necessary to consider the nature and extent of serious reoffending in Aotearoa New Zealand.
- 3.38 Some data is available in Aotearoa New Zealand on criminal recidivism. For example, Ara Poutama | Department of Corrections (Ara Poutama) tracks reoffending rates generally and in relation to people who attend specific programmes.⁵¹
- 3.39 The general research on recidivism is, however, difficult to apply when considering serious violent and sexual reoffending in relation to the preventive regimes. That is mainly because most high-risk people will not be reflected in recidivism data. People who pose a high risk of serious reoffending are likely to be subject already to preventive detention, ESOs or PPOs, thereby restricting their opportunities to reoffend. Obvious practical and ethical obstacles prevent researching what offending may occur if the person were not subject to these restrictions. In addition, general data on recidivism offers limited insight when reviewing the preventive regimes because it offers little individualised information about the people who went on to reoffend and why.

⁵⁰ For example: (i) offences that criminalise behaviour on the basis of the risk presented to the community — such as attempts to commit offences, threats to kill or harm others and doing dangerous acts with reckless disregard for the safety of others (Crimes Act 1961, ss 72, 306 and 198(2)); (ii) bail conditions or remand in custody to address risks of offending before trial or sentencing (Bail Act 2000); and (iii) terrorism suppression control orders that impose prohibitions and restrictions on eligible people who pose a real risk of engaging in terrorism-related activities (Terrorism Suppression (Control Orders) Act 2019).

⁵¹ For example, according to Ara Poutama | Department of Corrections reporting on recidivism from the July 2021 – June 2022 year, nine per cent of people convicted of sexual assault were re-sentenced within 12 months of being released from prison and six per cent were re-imprisoned. For those convicted of “acts intended to cause injury”, 33.5 per cent were re-sentenced within 12 months and 20.4 per cent were re-imprisoned. See Ara Poutama | Department of Corrections *Annual Report 1 July 2021 – 30 June 2022* (E.61, 2022) at 175.

- 3.40 Given the limited evidence available, there are three main considerations that may provide some evidence of the need for preventive detention, ESOs and PPOs.

Imposition of preventive detention, extended supervision orders and public protection orders

- 3.41 As we note in Chapter 1, as at 30 June 2022, there were 310 people subject to preventive detention, 205 people subject to ESOs and two people subject to PPOs.⁵² These orders have been imposed because a court, having considered expert psychological evidence (including any evidence elicited in cross-examination and any competing expert evidence presented by the defence), has determined that the person presents risks of serious sexual or violent reoffending. In the cases where preventive detention and PPOs have been imposed, the courts will have determined that the person's risk could not have been managed adequately on an ESO (we discuss this requirement further in Chapter 8). There are cases where the courts will decline to impose preventive detention, an ESO or a PPO if the evidence does not justify an order.
- 3.42 While there are criticisms about the legislative tests and the evidence on which decisions are made (we consider these criticisms in Chapters 8 and 9), these judicial determinations and the evidence on which they were based suggest there are certain people who, if not under some form of preventive measure, pose real risks of committing further serious sexual or violent offences.

Reasons given in support of extended supervision orders and public protection orders at the time of enactment

- 3.43 The materials supporting the introduction of the ESO and PPO regimes illustrate the problems the orders were intended to solve. However, the empirical evidence presented to support the ESO and PPO regimes was limited.
- 3.44 As we note in Chapter 1, the introduction of the ESO regime in 2004 was prompted by concerns about several people who had received finite sentences for child sex offending and were considered at risk of future offending on release.⁵³ Some of those individuals had previously been detained in psychiatric institutions. Ara Poutama had assessed people within its care and identified 107 people for whom an application for an ESO could potentially be made.⁵⁴
- 3.45 For PPOs, Ara Poutama held concerns arising from several incidents where people on ESOs had committed offences despite being subject to residential restrictions and intensive monitoring conditions.⁵⁵ Those offences included an instance where the person had sexually offended against a 16-year-old girl.⁵⁶ Other offences included arson, assault, damaging property and theft. Ara Poutama noted, however, that these offences were

⁵² Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

⁵³ Justice and Electoral Committee *Parole (Extended Supervision) and Sentencing Amendment Bill 88-2* (14 June 2004) at 3.

⁵⁴ Justice and Electoral Committee *Parole (Extended Supervision) and Sentencing Amendment Bill 88-2* (14 June 2004) at 2.

⁵⁵ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [17].

⁵⁶ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [17].

mainly against the employees or property of the organisations supervising the offender. These offences are not offences that ESOs and PPOs are aimed at preventing. Little detail was provided around the offending against the 16-year-old, and it appears this may have been an isolated incident.

- 3.46 The expansion of the ESO regime in 2014 was supported by little empirical evidence. The Regulatory Impact Statement supporting the reforms merely noted that public safety is jeopardised by the lack of long-term options for managing these individuals after they complete a determinate prison sentence.⁵⁷ No other evidence of the problem was provided.

Instances of serious sexual and violent reoffending

- 3.47 While serious sexual and violent offending is relatively rare, there have been isolated instances of individuals who, having completed determinate prison sentences for serious sexual and violent offending, have gone on to commit further serious offences.⁵⁸ Some of these instances have been influential in policy decisions to retain preventive detention⁵⁹ and introduce ESOs.⁶⁰

Concluding observation

- 3.48 Considering the limited evidence, it is difficult to draw conclusions at this stage as to the extent of the need for the preventive regimes. It appears there are people who, unless detained or properly supervised after a determinate prison sentence, will pose risks to the community of serious reoffending. The number of those people and the nature and duration of restrictive measures needed to keep the community safe are matters that are difficult to assess at this stage. We are interested in feedback on this point.

⁵⁷ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014) at [15].

⁵⁸ In a recent example *R v Brider* [2023] NZHC 56, Mr Brider was sentenced to preventive detention. He had been released on parole from a determinate sentence for rape, abduction for sexual connection, injuring with reckless disregard and unlawful sexual connection. Less than three months later, Mr Brider sexually abducted and murdered his female neighbour. In an independent review of the New Zealand Parole Board's decision to grant parole, it was suggested that Mr Brider may have met the standard for an ESO. However, the review suggested that because of the absence of a calibrated risk instrument for serious violence towards intimate partners, and the risk assessments that had been performed on Mr Brider did not suggest Mr Brider met the threshold, an application for an ESO may have been unsuccessful: Devon Polaschek *Independent Review Commissioned by NZ Parole Board Relating to Decision Made 21 October 2021, to Release Mr Joseph James Brider on Parole* (21 August 2022) at 10.

⁵⁹ In 1983, Ian Donaldson was charged with attempted burglary and assault having been caught trying the door of a house and having a metal bar and a bottle of chloroform in his possession. He was granted bail. While on bail, he befriended a man who had a young daughter, apparently with a plan to offend against the daughter. He killed the man. While serving a prison sentence for previous convictions of sexual offending, Mr Donaldson had written to the Prison Superintendent expressing an intention to torture and murder a child. A Commission of Inquiry into Mr Donaldson's offending referred to a recent recommendation by a Penal Policy Review Committee that preventive detention be abolished. The Commission of Inquiry said that, in light of the experience of Mr Donaldson, great caution should be exercised before deciding to abolish preventive detention: "Report of the Commission of Inquiry into the Circumstances of the Release of Ian David Donaldson from a Psychiatric Hospital and of His Subsequent Arrest and Release on Bail" (1983) AJHR H4 at 83–84.

⁶⁰ In the second reading of the Public Safety (Public Protection Orders) Bill and the Parole (Extended Supervision Orders) Amendment Bill 2013, the Hon Phil Goff explained that his decision as Minister in 2003 to introduce the legislation that would create the ESO regime was prompted by the offending of Lloyd McIntosh: (26 November 2014) 702 NZPD 874. Mr McIntosh had served a determinate sentence for the rape of a 23-month-old baby. Three months after release on parole, he sexually offended against an intellectually disabled female.

PRELIMINARY VIEWS

3.49 We consider there is a strong case for reform to align the preventive regimes with human rights standards. In this section, we discuss the implications arising from human rights issues discussed above and what they may mean for possible reforms.

Justification is required

3.50 As we go on to develop possible reforms to the law in this review, human rights law requires that any preventive measures that provide for detention or limit human rights in any other way be justified. As noted above, on the limited evidence and analysis supporting the current law, it is difficult at this stage to reach conclusions.

3.51 In the next stage of this review, we will use the feedback we receive on this Issues Paper and further research to consider the justification of preventive measures. The Supreme Court's pending decision in the *Chisnall* proceeding will also be relevant to this issue.

3.52 For the purposes of this Issues Paper, we proceed on the basis that New Zealand law will continue to provide some form of preventive measures to address real risks of serious reoffending beyond a determinate sentence. To which individuals those measures apply and what those measures should be are questions we raise throughout this Issues Paper.

QUESTION

Q6

Do you think the law is justified in providing for preventive measures that may breach human rights? If so, what types of measures are justified and why?

The law should clearly demarcate the punitive period and community protection period of preventive detention

3.53 The view of the courts and the UNHRC that preventive detention should comprise distinct periods — first, a punitive period and, second, a subsequent period during which a person remains detained for community safety — is not reflected in the provisions of the Sentencing Act and Parole Act. The legislation does not clearly distinguish between the two periods. All sentences may involve a blend of the retributive and community protection purposes listed under sections 7–8 of the Sentencing Act. The minimum period of imprisonment (MPI) a court must set for preventive detention under section 89 of the Sentencing Act blurs the distinction further by providing the MPI must be set to reflect *either* the gravity of the qualifying offence *or* to provide for the safety of the community, whichever period is the longer. The lack of clear distinction between the two periods, and the confusion it may cause in practice, is evidenced by the fact that, in each of three UNHRC decisions that have considered preventive detention in Aotearoa New Zealand, the UNHRC identified a different period as the first punitive period.⁶¹

⁶¹ *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC): the determinate sentence the offender would have been sentenced to allowing for an early guilty plea; *Dean v New Zealand* CCPR/C/95/D/1512/2006 (17 March 2009): the maximum sentence provided for the qualifying offence under the Crimes Act 1961; and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC): the 10 year MPI then applying to preventive detention.

- 3.54 The distinction between an initial punitive period and a second period requiring ongoing community safety justification is, however, now an established element of a rights-consistent approach to preventive detention. If the law is to continue to provide for preventive detention, it is desirable for the law to distinguish more clearly the criminal sentence that responds to past offending and any subsequent period during which a person is required to remain detained on the grounds of community safety. In Chapter 12, we present proposals for reform that set out how a clearer distinction might be achieved.
- 3.55 Relatedly, the courts have required that the test for parole in the Parole Act be interpreted in a way that recognises that, if the community safety justification for the ongoing preventive detention of a person no longer exists, they must be released. However, rather than recognise a person's right to liberty during the second period, section 28(1AA) of the Parole Act expressly states that nothing in the Act, nor any other enactment, confers an entitlement to be released on parole. We discuss this issue further in Chapter 11.

QUESTION

Q7

If the law is to continue to provide for preventive detention, do you agree the law should be reformed to demarcate more clearly the first and second periods of preventive detention to align with human rights law?

People detained for preventive reasons after a determinate sentence should be managed in different conditions to prison

- 3.56 The practice under New Zealand law of keeping people subject to preventive detention in the same prison conditions as other offenders should be reconsidered in the light of the UNHRC's decision in *Miller v New Zealand*.
- 3.57 In our preliminary view, there is merit to the requirement to manage people under separate conditions when they are detained for community safety beyond their punitive prison sentence. Imprisonment is a severe form of criminal sanction because of the restrictions it places on every aspect of a person's life and the physical, psychological and social detriments it imposes.⁶² These detriments are heightened for people serving indeterminate sentences because they are exposed to the harmful effects of prison for longer.
- 3.58 A recent report on indeterminate sentences of imprisonment for public protection, which formerly operated in England and Wales, explains how the indefinite nature of the sentence contributed to feelings of hopelessness and despair resulting in high levels of self-harm and some suicides within the population subject to the sentence.⁶³ These

⁶² Studies that show the adverse physical and mental health impacts on prisoners include Hunga Kaititiro i te Hauora o te Tangata | National Health Committee *Health in Justice: Kia Piki te Ora, Kia Tika! Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau* (Manatū Hauora | Ministry of Health, Wellington, 2010); and Ian Lambie *What Were They Thinking? A Discussion Paper on Brain and Behaviour in Relation to the Justice System in New Zealand* (Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia | Office of the Prime Minister's Chief Science Advisor, PMCSA-20-2, 29 January 2020).

⁶³ Justice Committee *IPP Sentences: Third Report of Session 2022-23* (House of Commons, HC 266, 28 September 2022) at [58] and 58.

findings echo feedback we have received in preliminary engagement that those subject to indeterminate imprisonment through preventive detention feel hopelessness and lose confidence in their eventual release.

- 3.59 We are mindful too that the Matawhāiti PPO residence (while subject to other issues discussed in this Issues Paper) demonstrates an alternative means of securely detaining high-risk individuals.
- 3.60 In Chapter 12, we present proposals for how people detained beyond a determinate prison sentence might be managed in different conditions.

QUESTION

Q8

Do you think that people who are detained after completing what may be regarded as their punitive prison sentence should be managed in different conditions to prison?

The law should have a greater focus on rehabilitation

- 3.61 In light of the Court of Appeal's decision in *Chisnall*, this review should consider how post-sentence orders might achieve their community protection aims without constituting an unjustified limitation on the protection against second punishment. One clear consideration arising from the *Chisnall* decision is whether rehabilitative and therapeutic treatment should be a central aim of the regimes, accompanied by stronger obligations to provide treatment to people who are detained for preventive reasons.
- 3.62 Aside from the Court of Appeal's views in *Chisnall*, our preliminary view is that the preventive regimes should have a greater therapeutic and rehabilitative focus. The humane treatment of people subject to preventive measures, and the aim to reintegrate them into communities, is a desirable policy goal in its own right. In addition, there are other considerations that support the contention that the therapeutic and rehabilitative treatment should be a central focus of the preventive regimes.

The preventive regimes capture people with different brain and behavioural functioning

- 3.63 From our preliminary research and engagement, it appears that preventive detention, ESOs and PPOs are often imposed on people who present with both diagnosed and undiagnosed brain, behavioural or mental health issues. This raises the question of whether preventive regimes in their current form are appropriate measures to achieve community protection.
- 3.64 Common presentations of people subject to a preventive regime include autism spectrum disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, traumatic brain injury, and what the case law often describes as “low levels of intellectual functioning”. In some cases, a person's condition has been an important factor in why the court has considered the person to pose risks to community safety.⁶⁴ This is not surprising

⁶⁴ See for example, for preventive detention: *R v Smith* [2020] NZHC 2793; *R v Rapana* [2021] NZHC 3407. For ESOs, see for example: *Chief Executive of the Dept of Corrections v Waiti* [2019] NZHC 3256; *Chief Executive of Dept of Corrections v Salmon* [2021] NZHC 118; *Chief Executive, Department of Corrections v Te Pania* [2022] NZHC 2086. For PPOs, see for example *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305.

given that at least some of these conditions may affect a person's ability to regulate their behaviour and appreciate the consequences of their actions.⁶⁵ In the case of ESOs and PPOs, the traits and behavioural characteristics identified in the statutes as prerequisites to the imposition of an order may actually target people with cognitive impairments and mental health issues (we discuss this further in Chapter 8).⁶⁶

- 3.65 As a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Aotearoa New Zealand has obligations to ensure persons with disabilities enjoy or exercise on an equal basis with others all human rights and fundamental freedoms.⁶⁷ It requires states to take appropriate steps to provide reasonable accommodations to meet that objective.⁶⁸
- 3.66 There is limited research available directly on this issue.⁶⁹ We are unable to analyse comprehensively how the preventive regimes capture and treat people who have disabilities for the purposes of the CRPD. Nevertheless, our preliminary view is that the fact that preventive detention, ESOs and PPOs are imposed on people with brain, behavioural and mental health issues adds weight to the argument, discussed above, that the preventive regimes should be predominantly therapeutic and rehabilitative.

The preventive regimes do not recognise offenders as victims

- 3.67 People within the criminal justice system have often experienced potentially traumatising events that may be a cause of recidivist behaviour.⁷⁰ For example, a 2016 study of a representative sample of New Zealand prisoners found that:⁷¹
- (a) over three-quarters had experienced some type of violence (including family violence, sexual violence or other community violence);
 - (b) 57 per cent had experienced sexual and/or family violence (63 per cent for Māori); and

⁶⁵ For example, a 2017 study found that 46 per cent of people starting a prison sentence had a prior recorded traumatic brain injury, meaning the injury had resulted in hospitalisation or an ACC claim was accepted. The study found that offenders with a traumatic brain injury have higher reoffending rates, have a higher number of re-offences and are more likely to have a conviction for a violent or sexual offences: Natalie Horspool, Laura Crawford & Louise Rutherford *Traumatic Brain Injury and the Criminal Justice System* (Justice Sector – Crime and Justice Insights, December 2017).

⁶⁶ It is telling that of the few PPOs that have been made to date, all people subject to orders have significant conditions, such as autism spectrum disorders, ADHD or neurocognitive disorders resulting from brain trauma. In *Deputy Chief Executive of Department of Corrections v McCorkindale* [2020] NZHC 2484 at [24], the Court received evidence from an expert forensic psychologist that the traits and behavioural characteristics set out in s 13(2) of the Public Safety (Public Protection Orders) Act 2014 will always be met when “a person has a clinical presentation of intellectual abilities that function in the borderline range and has autism spectrum issues”.

⁶⁷ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

⁶⁸ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 2, 5, and 14.

⁶⁹ For a general discussion of how related brain and behaviour issues are overrepresented in the justice system, see Ian Lambie *What Were They Thinking? A Discussion Paper on Brain and Behaviour in Relation to the Justice System in New Zealand* (Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia | Office of the Prime Minister's Chief Science Advisor, PMCSA-20-2, 29 January 2020).

⁷⁰ Theresa Goddard and Julie Ann Pooley “The Impact of Childhood Abuse on Adult Male Prisoners: a Systematic Review” (2018) 34 *Journal of Police and Criminal Psychology* 215.

⁷¹ Marianne Bevan “New Zealand Prisoners' Prior Exposure to Trauma” (2017) 5 *Practice: The New Zealand Corrections Journal* 8.

- (c) nearly one in five had experienced sexual assault (including rape).
- 3.68 The study concluded that more work is needed to explore the relationship between victimisation and offending patterns. It also emphasised the need for prisoners to access victim services and trauma-informed practice. Follow up studies have noted that effective treatment focuses on understanding and addressing trauma.⁷²
- 3.69 During our research, we have been struck by the prevalence of cases where the individual against whom preventive detention, an ESO or a PPO is sought has been a victim of adverse experiences, particularly sexual abuse and violence. This prevalence underscores the point that often the risks a person poses are in part a product of adverse traumatic experiences and complex psychological factors. Again, these considerations reinforce our preliminary view that therapeutic treatment should be a central focus of the preventive regimes.

Further observations on rehabilitative treatment

- 3.70 In Chapter 12, we present proposals for how the law could provide a stronger focus on rehabilitative treatment. There are, however, some further observations that may be helpful.
- 3.71 First, the Court of Appeal's decision in *Chisnall* suggests that appropriate focus on therapeutic and rehabilitative interventions may avoid a conclusion that a preventive measure is penal and a form of second punishment. We note the possibility, however, that, despite a greater focus on and stronger rights to rehabilitative treatment, preventive measures may still be considered punitive because of the severity of restrictions they impose.
- 3.72 Second, a stronger focus on treatment is likely to be relevant to whether the preventive regimes can be demonstrably justified for the purposes of section 5 of the NZ Bill of Rights. Part of the inquiry is to show that the measure impairs the right no more than is reasonably necessary to achieve its purpose.⁷³ A regime that gave greater priority to rehabilitative treatment than the current preventive regimes would likely constitute a lesser impairment of a person's rights. That will also be relevant to the final inquiry of whether the extent of the limit is in proportion to the objective.
- 3.73 Third, we note the comments raised to us several times in preliminary engagement that some people may not respond to rehabilitative treatment. It is possible, some people said, that full rehabilitation and reintegration into the community may be an unrealistic goal for some people at risk of serious reoffending. In reality, a person subject to a preventive measure would be "managed" rather than "rehabilitated". Alternatively, some people may refuse treatment meaning that, despite the regime's focus, it would not have a rehabilitative effect. While these comments are likely to describe accurately the experience of some people on preventive orders, they do not, in our preliminary view,

⁷² Bronwyn Morrison, Marianne Bevan and Phil Meredith "I Can't Change my Past, But I Can Change my Future": Perpetrator Perspectives on What Helps to Stop Family Violence" (2021) 8 *The New Zealand Corrections Journal* 6. See too *Turuki! Turuki! Move Together! Transforming our Criminal Justice System: The Second Report of Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group* (Wellington, 2019) at 46.

⁷³ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

detract from the reasons for strengthening the focus on and rights to rehabilitative and therapeutic treatment.

QUESTION

Q9

Do you think the preventive regimes should have a stronger focus on therapeutic and rehabilitative treatment and provide stronger rights to treatment for people detained?

Preventive detention versus post-sentence orders

- 3.74 We conclude this chapter by identifying a conundrum that we think is posed by the human rights jurisprudence. While ESOs and PPOs constitute a second punishment, they provide some benefits over preventive detention.
- 3.75 The Court of Appeal in *Chisnall* held that the protection from second punishment is of “fundamental importance” and any limitation of the right requires “strong justification”.⁷⁴ During our preliminary engagement, we have heard anecdotally that people serving determinate prison sentences are often disappointed to find at the end of their sentence that they will be subject to further severe restrictions in the form of an ESO or a PPO.
- 3.76 One way to avoid engaging the protection from second punishment is to insist that any risk of reoffending is managed at the point of sentence rather than in post-sentence orders. This would be to prefer, in other words, preventive detention to ESOs and PPOs.
- 3.77 It is by no means clear, however, that this would be in the interests of offenders. Preventive detention requires an assessment at sentencing of the likelihood that the person will reoffend if released at the sentence expiry date of a determinate sentence. In Chapter 8, we explain that, because that assessment calls for a prediction of risk several years into the future, it is likely to be less accurate than assessments undertaken at the end of a sentence when a person is due to be released into the community. Another disadvantage of preventive detention is that the sentence remains in place even after the safety concerns have diminished, resulting in the imposition of parole conditions and risk of recall for the remainder of the offender’s life.
- 3.78 In the High Court judgment of *Chisnall*, the Court found that ESOs were partly justified because of the benefits they provided over preventive detention. The Court explained:⁷⁵

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. 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.

⁷⁴ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190].

⁷⁵ *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 at [98].

3.79 In the light of this conundrum, in Chapter 12, we set out a range of proposals to encourage feedback on the most appropriate time to impose a preventive measure given the trade-offs involved.

CHAPTER 4

Fragmentation of the law

IN THIS CHAPTER, WE CONSIDER:

- the way in which the law governing preventive detention, extended supervision orders (ESOs) public protection orders (PPOs) is spread across three different statutes; and
- issues with having the law fragmented in this way.

INTRODUCTION

4.1 While preventive detention, ESOs and PPOs share the same community safety objective, they are governed by independent but interrelated statutory regimes. As a result, there are ways in which the law does not fit together coherently. This chapter examines the issues resulting from this fragmentation.

BACKGROUND — HOW THE FRAGMENTATION AROSE

4.2 As we set out in Chapter 1, the preventive detention, ESO and PPO regimes developed largely independently. This background shows how ESOs and PPOs were devised as standalone preventive measures to address perceived “gaps” within the existing law. New regimes appear to have been favoured over reform to existing measures.

4.3 The Public Safety (Public Protection Orders) Act 2014 (Public Safety Act), in particular, was designed to be separate from preventive detention and ESOs and distanced from criminal proceedings.¹ One of the main points of difference is its presentation as a “civil” regime. The Act states “it is not an objective of this Act to punish persons”.² Applications for PPOs are made by originating application to te Kōti Matua | High Court (High Court).³

¹ It is likely that the framing of the Public Safety (Public Protection Orders) Act 2014 as a form of “civil” detention was an attempt to avoid a finding that PPOs were a form of punishment. This was probably in response to te Kōti Pira o Aotearoa | Court of Appeal’s findings in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) that ESOs were penalties and infringed the protection against second penalties under s 26(2) of the New Zealand Bill of Rights Act 1990.

² Public Safety (Public Protection Orders) Act 2014, s 4(2).

³ Public Safety (Public Protection Orders) Act 2014, s 104.

A person against whom an order is sought is called a “respondent” (rather than an “offender” as with ESOs).

- 4.4 The background demonstrates, too, how the development of the law has been reactive. As we discuss in Chapter 1, it appears that ESOs and PPOs were enacted to provide management options for specific individuals who were shortly to be released into the community and who were not eligible for existing regimes.

ISSUES

Difficulties imposing the least restrictive preventive measure

- 4.5 Despite the separation of preventive detention, ESOs and PPOs into separate statutory regimes, the courts have attempted to apply the three regimes together in a cohesive way. In particular, to administer the law consistently with human rights, the courts have held that preventive detention or a PPO should not be imposed when less restrictive options would adequately address the risk a person will reoffend. We discuss this further in Chapter 8. In summary, when considering whether to impose preventive detention, the courts will consider the availability of an ESO and whether it would provide adequate protection for the public.⁴ Similarly, the courts will not impose a PPO unless the risks posed by the respondent cannot be adequately managed under an ESO.⁵
- 4.6 In several ways, however, the fragmentation of the law hinders the courts’ ability to impose an ESO when it would provide an effective and less restrictive option than preventive detention or a PPO.
- 4.7 First, preventive detention, ESOs and PPOs are siloed into different regimes at different points of the criminal justice process. Preventive detention is part of the criminal sentencing process, whereas ESOs and PPOs are post-sentence orders. When considering preventive detention, the court must undertake the task of assessing the likely effectiveness of an ESO if it is imposed at the end of a determinate sentence. That might be several years in the future.
- 4.8 Second, in some instances, there are express legislative prohibitions preventing the court from imposing the least restrictive option. In particular:
- (a) A person subject to preventive detention cannot be considered for an ESO.⁶ It is possible that a person subject to preventive detention who did not satisfy the test for release on parole could be safely managed in the community subject to an ESO. The availability of an ESO could, therefore, mean that the person could spend less time imprisoned. The legislation, however, precludes this option.
 - (b) The Public Safety Act provides that, when a court is considering whether to impose preventive detention, the court must not take into account its jurisdiction under the Public Safety Act to impose orders.⁷ Consequently, to the extent a PPO may

⁴ *R v Mist* [2005] 2 NZLR 791 (CA) at [100]–[101]; and *T (CA502/2018) v R* [2022] NZCA 83 at [30].

⁵ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [40] per Elias CJ; *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [42].

⁶ Section 107C(1)(a) of the Parole Act 2002 defines an “eligible offender” as an offender who “is not subject to an indeterminate sentence”.

⁷ Public Safety (Public Protection Orders) Act 2014, s 138.

constitute a less restrictive option than preventive detention, the Public Safety Act prevents the court from considering a PPO as an alternative.

- 4.9 Third, the legislation, as written, does not require that the court impose the least restrictive order. Rather, courts have imposed this restriction themselves through case law.
- 4.10 In our preliminary view, the law governing preventive detention, ESOs and PPOs should require the court to impose the least restrictive order needed to address the reoffending risks in each case. As we discuss more fully in Chapter 8, we consider that it may be preferable for the legislation to state as comprehensively as possible the full tests the court will apply when considering whether to impose preventive measures. This approach is integral to the reasonableness and proportionality of a preventive measure, which must be satisfied to be consistent with human rights standards.⁸ The obstacles imposed by the law appear to be a key issue that should be addressed by reform. In Chapter 12 we present proposals for reform to address the issues.

Procedural inefficiencies

- 4.11 Procedural issues arising from fragmentation of the regimes may cause inefficiencies. Two aspects in particular warrant attention.
- 4.12 First, when the chief executive of Ara Poutama | Department of Corrections (chief executive) applies for a PPO at the same time as applying for an ESO in the alternative, section 107GAA(2) of the Parole Act 2002 provides that the court “must not hear” the ESO application until the PPO application has been determined or withdrawn. This may result in double-handling. Because the court will consider whether an ESO should be imposed in the alternative to a PPO, to determine a PPO application it will receive evidence and submissions on whether an ESO could and should be granted and with what conditions. If the court does not grant the PPO, section 107GAA seems to require the court to hear the ESO application separately, potentially repeating the evidence and submissions presented at the PPO hearing.
- 4.13 In the recent case *Chisnall v Chief Executive of the Department of Corrections*, te Kōti Pīra | Court of Appeal (Court of Appeal) expressed dissatisfaction with section 107GAA, saying:⁹
- Given the need for the Court to always consider less restrictive alternatives before making a PPO, in our view, that approach may, notwithstanding the express words of the statute, be somewhat artificial.
- 4.14 Nevertheless, the Court of Appeal accepted that it could not determine the PPO and ESO applications at the same time. The Court cancelled the PPO and remitted the ESO application to the High Court to be dealt with separately.
- 4.15 Second, section 104 of the Public Safety Act requires applications for PPOs to be made by originating application to the High Court. It is a civil rather than criminal process. During preliminary engagement, we heard some concerns relating to the civil procedural context of PPOs:

⁸ These standards are embodied in s 5 of the New Zealand Bill of Rights Act 1990 (the general limitations clause) as well as in some key rights (such as the right not to be arbitrarily detained).

⁹ *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402 at [15].

- (a) Lawyers who work in this area, including the Public Defence Service, are most likely to be approved legal aid providers for criminal and Parole Board matters. They are unlikely to be approved legal aid providers for civil services. A lawyer who has represented a client in other aspects of the criminal process, including ESOs, may be unable to act in respect of the PPO application notwithstanding the advantages that come from the lawyer's familiarity with the client. This may be a particular problem for Māori. It may be important for Māori to be represented by counsel with whom they have a relationship or to be represented by a Māori lawyer.
- (b) Lawyers who do act on PPO matters usually practise in the criminal and parole jurisdictions. They may be unfamiliar with civil law process, again giving rise to inefficiencies.

QUESTION

Q10

Do you agree with the issues we have identified regarding the fragmentation of the law? Are there other issues we should consider?

Part Three:

Eligibility

CHAPTER 5

Preventive detention and young adults

IN THIS CHAPTER, WE CONSIDER:

- the age of eligibility for preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs);
- research on brain development in young adults (aged 18 to 25);
- human rights law relating to young adults in the criminal justice system; and
- issues arising from the eligibility of young adults for preventive detention.

INTRODUCTION

- 5.1 In this chapter, we discuss whether, having regard to research on brain development, it is appropriate to sentence young adults to preventive detention or whether any risk of reoffending could be adequately addressed by post-sentence orders.
- 5.2 We use the term “young adult” to include people aged 18 up to their 25th birthday.¹ Cognitive and emotional development varies between individuals, and there is not one age of maturity that will be appropriate for all people.² However, we use this age range because it appears to be one of the more common definitions of young adulthood in the criminal justice context and reflects the scientific evidence indicating that the brain continues to develop into the mid to late 20s.³

¹ We also use the term “young people” to include people of or over 14 years of age up to their 18th birthday and “children” to refer to people under the age of 14 years. This reflects the usage of these terms in Aotearoa New Zealand’s youth justice system: Oranga Tamariki Act 1989, s 2.

² See Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 1.

³ For example, the Young Adult List (discussed below) applies to people aged 18 to 25, and the Scottish Sentencing Council’s guideline for sentencing young people (discussed below) applies to people under the age of 25. See Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 1; Prime Minister’s Chief Science Advisor *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (May 2011) at 5.

THE LAW

Age of eligibility for preventive detention

5.3 A person can be sentenced to preventive detention if they were 18 years of age or over at the time of committing a qualifying offence.⁴

5.4 The minimum age of eligibility for preventive detention has differed under former legislation. Between 1954 and 1987, the minimum age was 25 years. In 1987, the minimum age was lowered to 21 years at the same time as the qualifying offences were broadened to include violent offences. In introducing the 1987 Sentencing and Parole Reform Bill, the Minister of Justice Rt Hon Geoffrey Palmer said the Bill was a measure to “deal with the immediate problem of violence”.⁵ The concern met by the Bill was said to arise “not so much from particular offences ... but from particular types of offenders”:⁶

Like other violent offenders, rapists tend to be young, with 69 percent of those convicted of that offence being under 25.

5.5 The minimum age of eligibility was lowered further to the current age of 18 years by the 2002 sentencing reforms.⁷ As we discuss in Chapter 1, these reforms were a response to a 1999 law and order referendum.

5.6 During the parliamentary debates on the 2002 sentencing reforms, the Minister of Justice Hon Phil Goff said that lowering the age was just one of three ways that preventive detention was to be expanded (along with further broadening the range of qualifying offences and removing the prerequisite of a previous conviction for a serious offence). The stated rationale was that:⁸

... regrettably, people [as young as 18] are capable of committing offences and being a huge risk to the community. They should not have to wait until they are 21 to get preventive detention. Preventive detention should apply from age 18.

Age of eligibility for extended supervision orders and public protection orders

5.7 There is no minimum age of eligibility for ESOs. To be eligible for a PPO, a person must be aged 18 years or older at the time of the application.

5.8 Unlike for preventive detention, there is no minimum age requirement on when the qualifying offending was committed for ESOs and PPOs. For both, the qualifying offending could have been committed when the person was under 18 years old.⁹

5.9 In practice, however, the number of people who would qualify for an ESO or a PPO on the basis of offending committed when they were under 18 years old is likely to be extremely small. This is because, to be eligible, the person must have been convicted and sentenced to imprisonment for the triggering offence, and there are very limited

⁴ Sentencing Act 2002, s 87(2)(b).

⁵ (18 December 1986) 477 NZPD 6522.

⁶ (18 December 1986) 477 NZPD 6522–6523.

⁷ Sentencing Act 2002, s 87(2)(b).

⁸ (17 April 2002) 599 NZPD (Sentencing and Parole Reform Bill – Instruction to Committee, Phil Goff).

⁹ Technically, a young person could be eligible for an ESO or a PPO on the basis of certain triggering offences committed when they were aged 10 or over.

circumstances in which a young person can be sentenced to imprisonment.¹⁰ We are aware of one case where the court imposed an ESO on a person on the basis of offending committed when they were a young person.¹¹

STATISTICS ON THE USE OF PREVENTIVE DETENTION, EXTENDED SUPERVISION ORDERS AND PUBLIC PROTECTION ORDERS IN RELATION TO YOUNG ADULTS

- 5.10 Between the year ending 30 June 2013 and the year ending 30 June 2022, 104 people were sentenced to preventive detention. Of these, five were young adults at the time of sentencing, but none were under the age of 20.¹² As far as we have been able to ascertain, two were 19 years old at the time of committing the qualifying offending.¹³
- 5.11 During the same period, 308 ESOs were ordered. Of these, 19 were made in respect of young adults, including two ESOs that were made in respect of people under 20 years old at the time the order was made.¹⁴
- 5.12 As far as we are aware, no PPOs have been made in respect of young adults.

OUR APPROACH TO THE LAW ON THE AGE OF ELIGIBILITY

- 5.13 We propose that, as the legislation allows heavy restrictions to be imposed on the rights and freedoms of young adults, the law in this area should be guided by up-to-date research on young adults and brain development and human rights law.¹⁵

¹⁰ Most young people (under 18) fall within the jurisdiction of te Kōti Taiohi o Aotearoa | Youth Court, which does not generally enter convictions. Section 283(o) of the Oranga Tamariki Act 1989 allows the Youth Court to enter a conviction against a young person and transfer them to te Kōti ā Rohe | District Court (or in some circumstances, te Kōti Matua o Aotearoa | High Court) where an offence is proved and (a) the young person is of or over the age of 15 years, or (b) the young person is of or over the age of 14 years and the charge is either a category 4 offence or a category 3 offence for which the maximum penalty is or includes imprisonment for life or for at least 14 years. Categories of offences are set out in s 6 of the Criminal Procedure Act 2011.

Section 275 of the Oranga Tamariki Act states that proceedings can be transferred out of the Youth Court (meaning the young person is liable to conviction if the offence is proved) if the young person is charged with a category 3 or 4 offence and elects to be tried by jury.

Under s 18 of the Sentencing Act 2002, no court can impose a sentence of imprisonment if the offender was under 18 years of age at the time of committing the offence, other than for a category 4 offence or a category 3 offence for which the maximum penalty is or includes imprisonment for life or for at least 14 years.

¹¹ In *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 2366, the appellant had been subject to an ESO since he was 17 or 18 years old on the basis of triggering offending committed when he was 15 years old.

¹² Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

¹³ We do not have general data on age at the time of the offending, as opposed to age at the time of sentencing or an order being imposed. We have located two cases where a person was sentenced to preventive detention on the basis of offending committed when they were under 20 years old: *R v Stroobant* [2017] NZHC 1122 (19 years at time of offending); and *R v Walter* HC Wellington CRI-2006-032-3079, 15 February 2007.

¹⁴ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

¹⁵ The commentary to the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* GA Res 40/33 (1985) states that research is an important mechanism for keeping practices up to date with advances in knowledge and that mutual feedback between research and policy is especially important in juvenile justice.

Research on young adults and brain development

- 5.14 There is considerable evidence suggesting that the brain continues to develop until the mid-20s. This means young adults (as well as young people aged 14 to 18) are at increased risk of engaging in anti-social behaviour.¹⁶ This is reflected in criminal justice statistics. In general, while young people and young adults only make up about 14 per cent of the New Zealand population, they comprise about 40 per cent of criminal justice apprehensions.¹⁷
- 5.15 Currently, a person generally becomes subject to the adult criminal justice system at age 18. However, it has been noted that there “is no particular logic to setting the upper age of the youth justice system at 18” and that the age of majority was traditionally set at 21.¹⁸
- 5.16 There has been increasing recognition that the human brain continues to develop, in significant ways, “long after the period normally considered to define adolescence” and into a person’s 20s.¹⁹
- 5.17 During adolescence, there is an imbalance in the development of the regions of the brain.²⁰ The brain regions involved in mood and development reach biological maturity before the frontal cortices, which are involved with controlling emotions, resisting temptations and considering consequences. The frontal cortices are some of the last regions of the brain to fully mature, with the prefrontal cortex reaching biological maturity at around 25 years or older.²¹ This imbalance is thought to underline “some of the characteristic behaviours seen in adolescence, such as impulsivity, risk taking and reward driven behaviours” as well as “emotionally driven decision-making and psychopathy”.²²
- 5.18 Characteristics and behaviours exhibited in young adults that correlate with risk of offending — for example, impulsivity and instability — may reflect the developmental stage of the brain rather than indicating long-term risk.²³
- 5.19 Young adulthood is also “a stage of life where behaviour change is more readily possible” and where “reintegrative and rehabilitative programmes show better results when

The Beijing Rules are not legally binding. However, the Youth Court commonly refers to the Rules and has stated that they provide helpful guidance when determining what is required to respect and uphold rights under the United Nations Convention on the Rights of the Child (UNCROC): for example *Police v AN* [2020] NZYC 609 at [73]; *Police v AZ* [2019] NZYC 88 at [43].

¹⁶ See Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020).

¹⁷ Peter Gluckman *It’s Never Too Early, Never Too Late: A Discussion Paper on Preventing Youth Offending in New Zealand* (Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia | Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at [3].

¹⁸ Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand: A Principled Framework for Reform* (Michael and Suzanne Borrin Foundation, April 2022) at 23.

¹⁹ Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 16.

²⁰ Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 1.

²¹ Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 7–8.

²² Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 6–7.

²³ Suzanne O’Rourke and others *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (Scottish Sentencing Council, January 2020) at 58.

compared with fully functioning adults”.²⁴ It has been suggested that the same neurobiological factors that contribute to risk-taking and sensation-seeking behaviour in adolescents may also make adolescents “more amenable to rehabilitation”.²⁵

- 5.20 However, imprisonment may have a particularly negative effect on young adults. A report by the United Kingdom House of Commons Justice Committee stated:²⁶

... [t]he brain can heal to an extent up to the age of 25 if taken out of adverse circumstances, for example, separation from family and friends and exposure to punitive conditions; while the brain is continuing to develop there is a risk that problems will be compounded by involvement in the criminal justice system itself ...

Human rights law

- 5.21 There are a number of international human rights instruments relating to youth justice and the protections required for children and young people in the criminal justice system.²⁷ These international instruments apply to people up to age 18. However, there has long been a view that similar protections should extend to young adults.

- 5.22 In 1985, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) provided that “efforts shall also be made to extend the principles embodied in the Rules to young adult offenders”.²⁸ The Committee on the Rights of the Child recently urged states to increase their minimum ages of criminal responsibility on the basis that “the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making”.²⁹

- 5.23 In relation to the application of the youth justice system, the Committee said:³⁰

The Committee commends States parties that allow the application of the child system to persons aged 18 and older whether as a general rule or by way of exception. This approach is

²⁴ Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand: A Principled Framework for Reform* (Michael and Suzanne Borrin Foundation, April 2022) at 19.

²⁵ Beatriz Luna “The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation” (2012) 63 *Hastings Law J* 1469 at 1485.

²⁶ Justice Committee *Young Adults in the Criminal Justice System: Eighth Report of Session 2017–2019* (House of Commons, HC 419, 12 June 2018) at [48].

²⁷ For example the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules)* GA Res 45/113 (1990), and the *United Nations Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), which Aotearoa New Zealand ratified in 1993.

²⁸ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* GA Res 40/33 (1985) at 3. The Beijing Rules are not legally binding. However, the Youth Court commonly refers to the Rules and has stated that they provide helpful guidance when determining what is required to respect and uphold rights under the *United Nations Convention on the Rights of the Child* (UNCROC): for example *Police v AN* [2020] NZYC 609 at [73]; *Police v AZ* [2019] NZYC 88 at [43].

²⁹ *United Nations Committee on the Rights of the Child General Comment No. 24 on Children’s Rights in the Child Justice System* CRC/C/GC/24 (18 September 2019) at [22]. See also *Committee of Ministers of the Council of Europe Recommendation of the Committee of Ministers to Member States on the European Rules for Juvenile Offenders Subject to Sanctions and Measures* CM/Rec (2018) 11 (5 November 2008) at [17]; and resolutions of the 17th World Congress of the International Congress on Criminal Law as cited in *The Transition to Adulthood (T2A) Alliance Young Adults and Criminal Justice: International Norms and Practices* (King’s College London International Centre for Prison Studies, September 2011) at [10].

³⁰ *United Nations Committee on the Rights of the Child General Comment No. 24 on Children’s Rights in the Child Justice System* CRC/C/GC/24 (18 September 2019) at [32].

in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties.

- 5.24 Dr Nessa Lynch, Research Fellow at the Faculty of Law at Victoria University of Wellington, has commented “it may be said that there is a developing norm of international human rights law that young adults should have special consideration in the criminal justice system”.³¹
- 5.25 There has been a shift in Aotearoa New Zealand and in other jurisdictions towards extending youth justice principles to young adults in accordance with the research.³² For example, in Aotearoa New Zealand:
- (a) young adults have received sentencing discounts recognising their youth and related rehabilitation potential even in cases involving serious offending and sexual offending;³³
 - (b) the Prime Minister’s Chief Science Advisor has recommended extending youth justice principles where appropriate for people up to age 25;³⁴ and
 - (c) since 2020, a Young Adult Court has been trialled in Porirua District Court, which separates defendants aged between 18 and 25 years old from older adults on the basis that they will all have the cognitive shortcomings explained in the neurological science.³⁵

ISSUES

Preventive detention may be inappropriate for young adults

- 5.26 Given that a large proportion of offending, including sexual and violent offending, is committed by young adults, we proceed on the basis that there are some young adults who would pose significant risks of committing serious sexual or violent offences if

³¹ Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand: A Principled Framework for Reform* (Michael and Suzanne Borrin Foundation, April 2022) at 27.

³² For example, in November 2021 the Scottish High Court approved a sentencing guideline that applies to the sentencing of any person who is under the age of 25 at the date of their guilty plea or finding of guilt: *Sentencing Young People: Sentencing Guideline* (Scottish Sentencing Council, effective from 26 January 2022). The guideline notes at [3] that young people generally have a greater capacity for change and rehabilitation. When assessing culpability, the guideline notes at [10] that young people are generally less able to exercise good judgement when making decisions, are more vulnerable to negative influences, may take more risks and may be less able to think about the impact of their actions, including the impact on victims and others.

³³ For example *Tran v R* [2021] NZCA 464, where the 25-year-old defendant pleaded guilty to possessing 109.6 kg of methamphetamine for supply; *R v Makoare* [2020] NZHC 2289 where the 25-year-old defendant pleaded guilty to one charge of manslaughter and five of dangerous driving causing injury; and *Shimmin v R* [2022] NZCA 434 where the almost-25-year-old defendant was sentenced for sexual violation by rape and sexual violation by unlawful sexual connection.

³⁴ Peter Gluckman *It’s Never Too Early, Never Too Late: A Discussion Paper on Preventing Youth Offending in New Zealand* (Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia | Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 7.

³⁵ Jan-Marie Doogue and John Walker *Proposal for a Trial of Young Adult List in Porirua District Court: Procedural Fairness for the Young and the Vulnerable* (Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand, 29 August 2019) at 9.

released into the community on parole at the end of a determinate sentence.³⁶ This group, although likely to be small, may require some form of preventive measures to address these risks.

- 5.27 In our preliminary engagement, we have heard that preventive detention in its current form may not be an appropriate method of addressing this problem. This is for reasons particular to preventive detention, and the issues do not apply, or do not apply to the same extent, to ESOs or PPOs.
- 5.28 There are two primary issues with the preventive detention regime that relate to:
- (a) the accuracy of assessing long-term risk posed by young adults; and
 - (b) the impact of indeterminate sentences on young adults.

Risk assessment in young adults

- 5.29 Studies suggest that “[g]iven the enormous developmental changes that occur during adolescence, juveniles’ risk may be seen as particularly dynamic”.³⁷ It has been suggested that, when using risk assessments for young people for the purposes of preventive measures:³⁸

... the results do not allow for a distinction, within a group of at-risk youth, between those who will have minor behavioural problems over a fairly short period of time, and those who will adopt a life trajectory oriented toward more serious and chronic crimes.

- 5.30 Risk assessment measures have “limited temporal validity and moderate predictive accuracy” during adolescence.³⁹ While it is possible to estimate risk over the short term with some degree of accuracy, “estimates of long-term risk are more problematic.”⁴⁰ This “might be a result of the unstable nature of attitudes, behaviour, and relationships in this versatile age period”.⁴¹ Given the ongoing development of the brain, the same concerns are likely to apply to young adults.
- 5.31 This may raise a particular problem for preventive detention because a sentencing judge must consider the risk that the person will pose if released at the end of a hypothetical sentence of imprisonment (that is, the sentence they would receive if not sentenced to preventive detention), which could be many years away. A young person’s risk profile may change over this period.

³⁶ Between 2012/2013 and 2018/2019, on average, 32.3 per cent of people convicted of violent offences were aged between 17 and 25 (up to their 25th birthday): Tahū o te Ture | Ministry of Justice “Violence Offences Data Table” (2022). In the same period, on average, 27.1 per cent of people convicted of sexual offences were aged between 17 and 25 years: Tahū o te Ture | Ministry of Justice “Sexual Offences Data Table” (2022).

³⁷ Jodi Viljoen, Kaitlyn McLachlan and Gina Vincent “Assessing Violence Risk and Psychopathy in Juvenile and Adult Offenders: A Survey of Clinical Practices” (2010) 17 *Assessment* 377 at 389.

³⁸ Julie Savignac *Tools to Identify and Assess the Risk of Offending Among Youth* (National Crime Prevention Centre, Public Safety Canada, 2010) at 9.

³⁹ Anneke Kleeven and others “Risk Assessment in Juvenile and Young Adult Offenders: Predictive Validity of the SAVRY and SAPROF-YV” (2022) 29 *Assessment* 181 at 183.

⁴⁰ Roy O’Shaughnessy and Holly Andrade “Forensic Psychiatry and Violent Adolescents” (2008) 8 *Brief Treatment and Crisis Intervention* 27 at 35.

⁴¹ Anneke Kleeven and others “Risk Assessment in Juvenile and Young Adult Offenders: Predictive Validity of the SAVRY and SAPROF-YV” (2022) 29 *Assessment* 181 at 183.

- 5.32 The consequences of the initial risk assessment are enduring because, even if the person's risk reduces and they are granted parole when eligible, they remain subject to recall and to parole conditions for life. We discuss the impacts of this on young adults in the next section.
- 5.33 This aspect of risk assessment is less problematic for ESOs and PPOs because the risk assessment takes place much closer to the time that the order takes effect. As we discuss in Chapter 8, assessments of risk at the time of release from custody should take place as close as possible to the actual time of that release.⁴²
- 5.34 An analysis of the case law suggests that courts are aware of this issue and take the limitations of risk assessment into account when determining whether to impose preventive detention on young adults.⁴³
- 5.35 For example, in *Grant v R*, te Kōti Pira | Court of Appeal (Court of Appeal) quashed a sentence of preventive detention that was imposed for offending that the appellant committed when he was 18 and 19 years old.⁴⁴ The Court considered that the developmental context of the appellant's offending, along with the availability of an ESO at the end of a determinate sentence, tipped the balance against imposing preventive detention. This was despite two health assessors' reports concluding that the appellant posed a significant or very high risk of violent reoffending. On appeal, there was a further report before the Court that confirmed the appellant's risk of reoffending was very high but also included information about young adults' development. Consistent with the research discussed above, it said that the prefrontal cortex, which "provides for logic and understanding of consequences, and governs impulsivity, aggression, the ability to organise thoughts, and to plan for the future", continues to "undergo significant changes during adolescence and youth, and is not fully developed until the early to mid-20's."⁴⁵ In relation to offending behaviour, the report noted that:⁴⁶
- ... As the age-crime curve shows, young people will typically be identified as being higher risk than older people. As such, it is of critical importance to consider age, development, and context when considering the level of risk that an individual poses for reoffending
- 5.36 In granting the appeal, the Court of Appeal accepted that, as the appellant matured, his behaviour would likely become more stable and he would likely become more receptive to participating in treatment and rehabilitation.

⁴² Lucy Moore *Literature Review — Risk Assessment of Serious Reoffending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 23.

⁴³ See *R v McGregor* [2017] NZHC 2150, where the sentencing judge noted at [21(3)] that the health assessors had expressed caution in assessing the risk posed by the 20-year-old defendant because of his age and his potential to change; and *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 2366 where the High Court declined to make a PPO in respect of the 25-year-old respondent and instead imposed a further ESO. The qualifying offending had occurred when the respondent was 15 years old. While the mandatory risk factors were met, the High Court noted at [80] the limitations with the risk assessment tools given the respondent's relative youth.

⁴⁴ *Grant v R* [2017] NZCA 614. At the time of the offending, the appellant was serving a sentence of imprisonment for offending committed when he was 16 years old.

⁴⁵ *Grant v R* [2017] NZCA 614 at [32].

⁴⁶ *Grant v R* [2017] NZCA 614 at [32].

Impact of indeterminate sentences on young adults

5.37 There is evidence that indeterminate sentences of imprisonment are harmful for those subject to them. For example, in a report on sentences of imprisonment for public protection (IPP) – an indeterminate sentence similar to preventive detention – the House of Commons Justice Committee reported that the sentence and conditions attached to it caused psychological harm.⁴⁷ The Committee stated:⁴⁸

The indefinite nature of the sentence has contributed to feelings of hopelessness and despair that has resulted in high levels of self-harm and some suicides within the IPP population.

5.38 While there is limited direct research on the experiences of young adults subject to preventive detention or indeterminate sentences, there is reason to think that indeterminate sentences may be more harmful for young adults.

5.39 In England, a forensic psychologist conducted interviews with a small number of young adults aged 18 to 21 who were serving indeterminate sentences at a young offenders' institute.⁴⁹ One of the main frustrations for the interviewees was the indeterminate nature of the sentence and not knowing when they would be released. All felt they would cope better with a significantly longer, but determinate, sentence as long as they knew when they would be released.⁵⁰ Some felt that not knowing when they would be released led them to give up trying.⁵¹ The United Nations Committee on the Rights of the Child has “strongly recommended” that states abolish indeterminate sentences “for all offences committed by persons who were below the age of 18 at the time of commission of the offence”.⁵² In making the recommendation, the Committee referred to the 2015 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Report stated that life sentences “have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment”.⁵³ In Aotearoa New Zealand in 2022, the Office of the Children's Commissioner recommended that the Government prohibit the use of life sentences – another form of indeterminate sentence – for young people convicted of serious offences.⁵⁴ While these recommendations relate to young people, the same considerations may apply to young adults.

⁴⁷ House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (2022) at [49].

⁴⁸ House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (2022) at [58].

⁴⁹ Melanie Merola “Young Offenders’ Experiences of an Indeterminate Sentence” (2015) 17 *Journal of Forensic Practice* 55. The young adults were all serving sentences of imprisonment for public protection – a now-repealed indeterminate sentence of imprisonment.

⁵⁰ Melanie Merola “Young Offenders’ Experiences of an Indeterminate Sentence” (2015) 17 *Journal of Forensic Practice* 55 at 59. Due to the sample size, the findings may not apply more generally.

⁵¹ Melanie Merola “Young Offenders’ Experiences of an Indeterminate Sentence” (2015) 17 *Journal of Forensic Practice* 55 at 59–60.

⁵² United Nations Committee on the Rights of the Child *General Comment No. 24 on Children's Rights in the Child Justice System* CRC/C/GC/24 (18 September 2019) at [81].

⁵³ Juan E. Méndez *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* A/HRC/28/68 (5 March 2015) at [74].

⁵⁴ *The New Zealand Children's Commissioner's Report to the United Nations Committee on the Rights of the Child: New Zealand's Sixth Periodic Review under the United Nations Convention of the Rights of the Child* (Manaakitia ā tātou Tamariki | The Children's Commissioner, 15 August 2022) at 75.

- 5.40 As we discuss in Chapter 2, the criminal justice system disproportionately impacts Māori. Lynch has noted that “[b]ecause the Māori population is proportionately younger, the criminal justice system has an even more disproportionate impact on young adult Māori”.⁵⁵ It is likely that the negative impacts of indeterminate sentences also fall disproportionately on Māori.
- 5.41 While there has not been legislative change in Aotearoa New Zealand, the Court of Appeal recognised the detrimental impact of indeterminate sentences in a recent appeal concerning sentences of life imprisonment imposed on young adults and young people.⁵⁶
- 5.42 The Court concluded that a life sentence may have a disproportionate effect on young adults and young people through a combination of the following factors:⁵⁷
- (a) The indeterminacy of a life sentence is difficult for a young offender to grasp and may be harmful in itself.
 - (b) Longer periods in prison exacerbate the adverse effects of imprisonment.
 - (c) Once granted parole, the standard parole conditions are onerous and may be experienced as punitive. Even though a person subject to an indeterminate sentence may apply to have release conditions discharged, they are likely to remain subject to conditions for some years.
 - (d) Even when recall to prison is not likely, the risk of recall always hangs over the person.
- 5.43 While a long term of imprisonment as an alternative to a life sentence would not avoid all of these effects, the Court considered that it would mitigate them.⁵⁸

Preliminary view

- 5.44 Our preliminary view is that preventive detention is unlikely to be demonstrably justified as a necessary and proportionate response when imposed on young adults. This is because of the particular impacts of indeterminate sentences on young adults and the issues with risk assessment in young adults over the long term. Where a young adult is sentenced to imprisonment for serious offending and continues to pose a significant risk of reoffending at the end of the sentence, post-sentence orders could adequately respond to meet this risk. The advantage of post-sentence orders are:
- (a) the person has had an opportunity to mature neurologically and to engage in rehabilitation;
 - (b) the particular adverse impacts of indeterminate imprisonment and parole for life are avoided; and
 - (c) the risk assessment is more accurate as it addresses current risk, rather than risk at the end of a hypothetical sentence of imprisonment.

⁵⁵ Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand: A Principled Framework for Reform* (Michael and Suzanne Borrin Foundation, April 2022) at 25.

⁵⁶ *R v Dickey* [2023] NZCA 2.

⁵⁷ *R v Dickey* [2023] NZCA 2 at [181]–[190].

⁵⁸ *R v Dickey* [2023] NZCA 2 at [180].

QUESTION**Q11**

Do you agree that preventive detention is not an appropriate measure for responding to risks of serious reoffending by young adults who have been convicted of serious sexual or violent offending?

CHAPTER 6

Qualifying offences

IN THIS CHAPTER, WE CONSIDER:

- the qualifying offences for preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs);
- the role of qualifying offences;
- issues relating to inconsistencies among the qualifying offences in the legislation governing preventive detention, ESOs and PPOs; and
- issues relating to qualifying offences that may be unnecessary or ineffective for the purpose of protecting community safety.

INTRODUCTION

- 6.1 Generally, a person must have been convicted of a serious sexual or violent offence to be eligible for preventive detention, an ESO or a PPO.¹ The offences that trigger the preventive regimes are defined in the relevant legislation. We will call these qualifying offences. The qualifying offences are mostly the same across the three regimes with some differences. They are set out in a table at the beginning of this chapter.
- 6.2 As well as determining eligibility for a preventive regime, qualifying offences are relevant to the tests for imposing preventive detention, an ESO or a PPO. The court must be satisfied that the person poses a certain level of risk of committing *further* qualifying offences in the future. We discuss this in Chapter 8.

THE LAW

- 6.3 The following table sets out the relevant qualifying offences for preventive detention, ESOs and PPOs.
- 6.4 Currently, the qualifying offences for each regime are all sexual and violent offences. As we note in Chapter 1, this has not always been the case.

¹ In addition, a person can qualify for an ESO if subpart 3 of Part 2 of the Returning Offenders (Management and Information) Act 2015 applies to them, which does not require a conviction for a serious sexual or violent offence. We discuss this in Chapter 7.

KEY TO TABLE 1	
✓	Is a qualifying offence
✗	Is not a qualifying offence
*	An offence committed overseas that would come within the description of this offence is a qualifying offence
^	A conspiracy to commit this offence is also a qualifying offence
#	An attempt to commit this offence is also a qualifying offence

TABLE 1: QUALIFYING OFFENCES

Qualifying offence	Preventive detention	ESOs	PPOs
Sexual offences – Crimes Act 1961			
128B: sexual violation by rape or unlawful sexual connection	✓	✓*^#	✓*
129(1) and (2): attempted sexual violation and assault with intent to commit sexual violation	✓	✓*^#	✓*
129A(1): sexual connection with consent induced by threats	✓	✓*^#	✓*
129A(2): indecent act with consent induced by threats, but only if the victim is under 16	✗	✓*^#	✗
130: incest	✓	✓*^#	✓*
131(1) and (2): sexual connection or attempted sexual connection with a dependent family member under 18	✓	✓*^#	✓*
131(3): indecent act on dependent family member, but only if the victim is under 16	✗	✓*^#	✗
131B: meeting young person following sexual grooming	✓	✓*^#	✓*
132(1), (2) and (3): sexual connection, attempted sexual connection, or indecent act on a child under 12	✓*#	✓*^#	✓*#
134(1), (2) and (3): sexual connection, attempted sexual connection, or indecent act on a young person under 16	✓*#	✓*^#	✓*#
135: indecent assault	✓#	✓*^#	✓*#
138(1) and (2): exploitative sexual connection or attempted exploitative sexual connection with person with a significant impairment	✓	✓*^#	✓*

138(4): exploitative indecent act on a person with a significant impairment	✗	✓*^#	✗
142A: compelling indecent act with animal	✓	✓*^#	✓*
143: bestiality	✓	✓*^#	✓*
144C: organising or promoting child sex tours	✓	✓*^#	✓*
208: abduction for purposes of marriage or civil union or sexual connection	✓	✓*^#	✓*
Sexual offences – Prostitution Reform Act 2003			
23(1): offences relating to use in prostitution of persons under 18 years	*	*	*
Sexual offences – Films, Videos and Publications Classification Act 1993			
23: an offence punishable by imprisonment where the publication is objectionable because it: (a) promotes, supports, or tends to promote or support, the exploitation of children and/or young persons for sexual purposes; (b) describes, depicts or deals with sexual conduct with or by children and/or young persons; (c) exploits the nudity of children and/or young persons	✗	✓*	✗
Violent offences – Crimes Act 1961			
171 or 177: manslaughter	✓	✓*^#	✓*
172: murder	✗	✓*^#	✓*
173: attempt to murder	✓	✓*^#	✓*
174: counselling or attempting to procure murder	✓	✓*^#	✓*
175: conspiracy to murder	✓	✓*^#	✓*
176: accessory after the fact to murder	✓	✓*^#	✓*
188(1) and (2): causing grievous bodily harm with intent or reckless disregard for safety	✓	✓*^#	✓*
189(1): injuring with intent to cause grievous bodily harm	✓	✓*^#	✓*
191(1) and (2): aggravated wounding or injury	✓	✓*^#	✓*
198(1) and (2): discharging firearm or doing dangerous act with intent or reckless disregard for safety	✓	✓*^#	✓*

198A(1) and (2): using firearm against law enforcement officer or to resist arrest	✓	✓*^#	✓*
198B: commission of crime with firearm	✓	✓*^#	✓*
199: acid throwing	✓	✓*^#	✓*
209: kidnapping	✓	✓*^#	✓*
210: abduction of young person under 16	✓	✗	✓*
234: robbery	✓	✓*^#	✓*
235: aggravated robbery	✓	✓*^#	✓*
236: assault with intent to rob	✓#	✓*^#	✓*#

ISSUES

- 6.5 Our initial research and engagement has not uncovered any major difficulties — conceptually or in practice — with the qualifying offences. Our preliminary view is that, overall, the regimes appropriately target a relatively small number of serious sexual and violent offences.
- 6.6 The issues raised in this section relate to:
- concern that some qualifying offences are insufficiently serious;
 - inconsistencies in the legislation governing preventive detention, ESOs and PPOs;
 - the omission of offences that are similar to qualifying offences or should be regarded as serious offending; and
 - specific offences that are arguably unnecessary or ineffective for the purpose of protecting community safety.

Concern that some qualifying offences are insufficiently serious

- 6.7 In our preliminary engagement, we heard concern that indecent assault is not serious enough to justify making a person eligible for a preventive regime, because the consequences of preventive detention, an ESO or a PPO are out of proportion to the offending.
- 6.8 To respond to this concern, it is important to recognise the role and limits of qualifying offences. We suggest qualifying offences have two primary roles of:
- identifying potential candidates for a preventive regime; and
 - contributing to ensuring that the regimes target sufficiently serious offending.
- 6.9 A conviction for a qualifying offence is a practical way of identifying those who have committed serious sexual or violent offending and may warrant further assessment or consideration for preventive detention or an ESO or a PPO.
- 6.10 Because the preventive regimes impose restrictions on people's rights and freedoms, it is important that the legislation properly defines when someone is eligible for an order. A list of qualifying offences clearly conveys to a person whether they will meet the eligibility criteria for a preventive regime.

- 6.11 It is important also that:
- (a) to the extent possible and while maintaining sufficient flexibility, qualifying offences should be sufficiently serious to justify making a person eligible for an order; and
 - (b) qualifying offences should be rationally connected to a risk of committing similar offences in the future.
- 6.12 A conviction for a qualifying offence only renders a person eligible for preventive detention, an ESO or a PPO — it does not, on its own, justify their imposition. We consider that the primary mechanism for ensuring that the regimes are appropriately imposed is the application of the legislative tests. For example, a court considering preventive detention must take into account factors such as any pattern of serious offending disclosed by the person’s history, the seriousness of the harm to the community caused by the offending and information indicating a tendency to commit serious offences in the future. We discuss these tests in Chapter 8.
- 6.13 We recognise that a list of qualifying offences is, on its own, a blunt tool for capturing the most serious offenders. A conviction for a particular offence is not necessarily an accurate indicator of the seriousness of a person’s offending — even admitted offending — due to the way offences are framed in our law and because of the impact of charging decisions and plea arrangements.
- 6.14 Many offences may be committed in a variety of ways with different levels of seriousness. There can be significant overlap between the offences that appear to be less serious (with lower maximum penalties) and more serious (with higher maximum penalties). Relatedly, whether a person is convicted of one offence or another can be influenced by the charge chosen by the prosecutor and by plea arrangements — there are principled reasons why, even when there is sufficient evidence to prove that a defendant has committed the elements of a particular offence, the prosecutor and defence might agree that the defendant will plead guilty to a lesser charge.
- 6.15 Indecent assault is an example of an offence that can vary significantly in terms of seriousness. It has a maximum penalty of seven years’ imprisonment.² In most instances, an indecent assault will not involve sufficiently serious harm to justify the imposition of a preventive regime. From our analysis of case law, it appears that the courts are applying the legislative tests and only imposing a preventive regime when a qualifying offence is serious enough to justify it. For example, in one case, the Court declined an application for an ESO where the qualifying offending involved indecent assaults. The judge said:³
- I do not wish to minimise how unpleasant [the] sexually indecent acts have been for the victims and others who have observed them but s 107IAA is concerned with the sort of serious sexual offending which would justify the severe restrictions on many aspects of an offender’s life ... I do not consider the indecent acts ... are of such seriousness.
- 6.16 On the other hand, there may be indecent assaults that are capable of being sufficiently serious to make a person eligible for a preventive regime. For example, in another case, a person was sentenced to preventive detention on two charges of indecent assault.⁴ The offending involved following and grabbing the victim, forcefully removing her clothing

² Crimes Act 1961, s 135.

³ *Chief Executive, Department of Corrections v Maindonald* [2018] NZHC 946 at [17].

⁴ *Hofmann v Department of Corrections* [2021] NZCA 256.

and underwear, sucking on her breast and placing the victim's hand on the perpetrator's penis. The offender also punched the victim in the face when she tried to fight him off and yelled at him to stop. The offender had previous convictions for sexual offending including rape, attempted sexual violation and abduction for the purposes of sexual connection. He had been subject to an ESO at the time of the indecent assaults.

- 6.17 We are interested in views on whether indecent assault or other qualifying offences are serious enough to justify making a person eligible for a preventive regime.

QUESTION

Q12

Do you think the qualifying offences are serious enough to justify making a person eligible for a preventive regime?

Inconsistencies across the regimes

- 6.18 For the most part, the same offences are qualifying offences for preventive detention, ESOs and PPOs. However, there are some offences that are not qualifying under all three regimes, without any apparent rationale.⁵ The inconsistencies are outlined in the table below.

TABLE 2: INCONSISTENCIES IN QUALIFYING OFFENCES

Qualifying offence	Preventive detention	ESOs	PPOs
An attempt or conspiracy to commit a qualifying offence	Only attempts and conspiracies that are separate offences ⁶	✓	✓
Indecent act with consent induced by threat, where the victim is under 16 years old at the time of the offence ⁷	x	✓	x
Indecent act on a dependent family member, where the	x	✓	x

⁵ Additionally, for ESOs and PPOs, an offence committed overseas that would come within the definition of a qualifying offence will also count as a qualifying offence for the purpose of eligibility. This is not the case for preventive detention, where the only qualifying offence that may be committed outside of Aotearoa New Zealand is an offence under s 144A of the Crimes Act 1961 that relates to sexual conduct with children and young people outside of Aotearoa New Zealand. However, in this case, there is a clear rationale for the inconsistency. Section 6 of the Crimes Act 1961 states that no act done outside Aotearoa New Zealand is an offence, unless by virtue of any provision of the Act. Therefore, a sentence, such as preventive detention, cannot be imposed.

⁶ These offences under the Crimes Act 1961 are attempted sexual violation (s 129(1)), attempted sexual connection with a dependent family member under 18 (s 131(2)), attempted sexual connection with a child under 12 (132(2)), attempted sexual connection with a young person under 16 (s 134(2)), attempted exploitative sexual connection with a person with significant impairment (s 138(2)), attempt to murder (s 173), attempting to procure murder (s 174) and conspiracy to murder (s 175).

⁷ Crimes Act 1961, s 129A(2): maximum penalty five years' imprisonment.

victim is under 16 years old at the time of the offence ⁸			
Exploitatively doing an indecent act on a person with a significant impairment ⁹	x	✓	x
Murder ¹⁰	x	✓	✓
Abduction of a young person under 16	✓	x	✓
Films, Videos and Publications Classification Act 1993 offences	x	✓	x

- 6.19 Our preliminary view is that there are advantages if preventive orders fit together as a coherent regime.
- 6.20 For example, the courts consider the availability of an ESO when deciding whether to sentence a person to preventive detention, and being subject to an ESO is one of the ways that a person becomes eligible for a PPO.¹¹ Utilising the same list of qualifying offences for all regimes would enable clarity and consistency and better enable people to be managed in the least restrictive manner possible. It would also reflect that the regimes all target the same policy problem.
- 6.21 It is arguable that the more restrictive regimes (preventive detention and PPOs) should require a higher threshold of eligibility and therefore a narrower range of offences should be qualifying offences for these regimes than for ESOs.
- 6.22 However, our preliminary view is that it is preferable that the same offences are qualifying offences for all regimes and that the legislative test should bear the primary responsibility for ensuring an order is necessary and appropriate.
- 6.23 If the preventive regimes were to use the same qualifying offences, there is a question as to which offences from the current lists should be omitted or incorporated to ensure consistency.
- 6.24 Of particular importance is the ESO regime's inclusion of certain offences in the Films, Videos, and Publications Classification Act 1993 (FVPC Act). The commission of one of these offences will make a person eligible for an ESO, but an ESO cannot be imposed on

⁸ Crimes Act 1961, s 131(3): maximum penalty three years' imprisonment.

⁹ Crimes Act 1961, s 138(4): maximum penalty five years' imprisonment.

¹⁰ Potentially, this is because murder is punishable by life imprisonment (an indeterminate sentence) and there is a statutory presumption that a person convicted of murder must be sentenced to life imprisonment unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust: Sentencing Act 2002, s 102.

While manslaughter is also punishable by life imprisonment and *is* a qualifying offence for preventive detention, there is no presumption that life imprisonment will be imposed.

¹¹ Public Safety (Public Protection Order) Act 2014, s 7(1)(b).

the basis that a person poses a risk of committing an FVPC Act offence in the future — they must pose a risk of committing another serious sexual or violent offence.

- 6.25 The FVPC Act offences that are qualifying offences for an ESO are those that are punishable by imprisonment and where any publication that is the subject of the offence is objectionable because it does any or all of the following:¹²
- (a) promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes;
 - (b) describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both;
 - (c) exploits the nudity of children, or young persons, or both.
- 6.26 This includes offences such as:
- (a) making an objectionable publication, knowing or having reasonable cause to believe that the publication is objectionable;¹³
 - (b) possessing an objectionable publication without lawful authority or excuse, knowing or having reasonable cause to believe that the publication is objectionable;¹⁴ and
 - (c) live streaming content knowing or having reasonable cause to believe that it is objectionable, or sharing livestreamed content or information about how to access livestreamed content, knowing or having reasonable cause to believe that it is objectionable and with the intent of promoting or encouraging criminal acts.¹⁵
- 6.27 These offences are all non-contact offences. Any sexual offending against a child or young person that involved actual contact with the child or young person would be captured by a Crimes Act 1961 offence and is likely to be a qualifying offence.
- 6.28 In our initial research, it appears that the commission of FVPC Act offences is not inevitably indicative of a risk of committing contact sexual offences in the future. Some research suggests that there is a distinct group of child pornography offenders who do not intend to commit a contact sexual offence and that a very low number of these people in fact reoffend by committing a contact offence.¹⁶ On the other hand, there are people who engage in both non-contact child pornography offending and contact sexual offending.¹⁷ Consequently, in some instances there is a rational connection between the commission of an FVPC Act offence and a risk of committing a qualifying offence. As with other qualifying offences, it is highly dependent on the particular circumstances. Te Kōti Pīra | Court of Appeal (Court of Appeal) has said that not every case of possessing or creating objectionable material will necessarily be regarded as serious offending for the purposes of the ESO legislation — the offending will be assessed on the particular

¹² Parole Act 2002, s 107B(3).

¹³ Films, Videos, and Publications Classification Act 1993, ss 123 and 124: maximum penalty 14 years' imprisonment.

¹⁴ Films, Videos, and Publications Classification Act 1993, s 131A: maximum penalty 10 years' imprisonment.

¹⁵ Films, Videos, and Publications Classification Act 1993, s 132C: maximum penalty 14 years' imprisonment.

¹⁶ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (Scotland, December 2018) at 67–72.

¹⁷ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (Scotland, December 2018) at 44.

circumstances of the case.¹⁸ In practice, it appears that, where an ESO has been made on the basis of FVPC Act offences, that person has had a history of contact offending against children.¹⁹

6.29 We are particularly interested in feedback on this point.

QUESTION

Q13

Should the same offences be qualifying offences for all preventive regimes? If so, which offences should qualify?

Omission of offences that are similar to qualifying offences

6.30 First, there are a number of offences that we consider to be similar to current qualifying offences — in nature and seriousness — but that are not currently qualifying offences. Second, there is one serious offence that we consider is currently excluded without good reason.

6.31 We seek feedback on whether these offences should also be qualifying offences for preventive detention, ESOs and PPOs.

6.32 On one hand, it is arguably arbitrary if a person can be eligible for a preventive regime on the basis of some offences indicating a risk of causing serious harm to the community, but not others that entail equally serious harm.

6.33 On the other hand, we consider that caution should be exercised in expanding the scope of the regimes without sufficient justification. We are not aware of any issues arising from the fact that these offences are not qualifying offences.

6.34 We consider that these offences are similar to current qualifying offences:

(a) **Dealing in people under 18 for sexual exploitation, removal of body parts or engagement in forced labour:**²⁰

Given that this offence may involve sexual exploitation of a young person, it would appear to fit with the existing qualifying offences. At least two people who have been sentenced to preventive detention have been sentenced for this offence at the same time as preventive detention was imposed.²¹

(b) **Wilfully infecting with disease:**²²

Like acid throwing, which is a qualifying offence, this offence is capable of causing serious physical harm.

¹⁸ *Holland v Chief Executive, Department of Corrections* [2016] NZCA 504 at [48].

¹⁹ For example *Williamson v Department of Corrections* [2014] NZHC 98; and *Clark v Chief Executive of Department of Corrections* [2016] NZCA 119.

²⁰ Crimes Act 1961, s 98AA: maximum penalty 14 years' imprisonment.

²¹ *Ellmers v R* [2013] NZCA 676; and *Nelson v R* [2017] NZCA 407.

²² Crimes Act 1961, s 201: maximum penalty 14 years' imprisonment.

- (c) Preventing or impeding a person who is attempting to save his or her own life or the life of another, without lawful justification or excuse.²³
- (d) Female genital mutilation.²⁴
- (e) Inciting, counselling or procuring suicide, where the victim then commits or attempts to commit suicide.²⁵
- (f) Killing an unborn child in such a manner that the offender would have been guilty of murder if the child had legally become a human being.²⁶
- (g) Ill-treatment or neglect of a child or vulnerable adult in a manner likely to cause suffering, injury or adverse effects.²⁷
- (h) Failure to protect a child or vulnerable adult from a risk of death, grievous bodily harm or sexual assault.²⁸
- (i) Other FVPC Act offences punishable by imprisonment:²⁹

This includes offences not already captured by the ESO regime, where the material is objectionable because it promotes or supports, or tends to promote or support (a) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct, (b) bestiality, or (c) acts of torture or the infliction of extreme violence or extreme cruelty.

These other categories of objectionable material under the FVPC Act reflect some of the other currently qualifying offences. It is arguable that the arguments that are made for the inclusion of FVPC Act offences relating to sexual exploitation of children could be extended to these other categories.³⁰

- (j) Contracting a person under 18 for commercial sexual services, causing or encouraging a person under 18 to provide commercial sexual services or receiving payment derived from commercial sexual services provided by a person under 18;³¹

These offences are not qualifying offences for any of the preventive regimes if they are committed in Aotearoa New Zealand, but they *are* qualifying offences if committed outside Aotearoa New Zealand.³² This seems inconsistent, and it could

²³ Crimes Act 1961, s 204: maximum penalty 10 years' imprisonment.

²⁴ Crimes Act 1961, s 204A(2): maximum penalty seven years' imprisonment.

²⁵ Crimes Act 1961, s 179(1): maximum penalty 14 years' imprisonment.

²⁶ Crimes Act 1961, s 182: maximum penalty 14 years' imprisonment.

²⁷ Crimes Act 1961, s 195: maximum penalty 10 years' imprisonment.

²⁸ Crimes Act 1961, s 195A(1): maximum penalty 10 years' imprisonment.

²⁹ Films, Videos and Publications Classification Act 1993, ss 3, 124, 127, 129, 131A and 132C: maximum penalties from one to 14 years' imprisonment.

³⁰ Noting that certain offences under the FVPC Act where the publication is objectionable because it promotes or encourages terrorism are qualifying offences for the purposes of control orders under the Terrorism Suppression (Control Orders) Act 2019.

³¹ Prostitution Reform Act 2003, s 23(1): maximum penalty seven years' imprisonment.

³² Offences under s 144A(1) of the Crimes Act 1961 are qualifying offences for all three preventive regimes. This section states that a New Zealand citizen or person ordinarily resident in Aotearoa New Zealand commits an offence under New Zealand law if they commit certain offences — including these Prostitution Reform Act offences — outside Aotearoa New Zealand.

be argued that these offences should also be qualifying offences if committed in Aotearoa New Zealand.

QUESTION

Q14

Do you consider any of the offences we discuss that are omitted should be qualifying offences for preventive detention, ESOs and PPOs?

Omission of strangulation or suffocation offence

- 6.35 The offence of strangulation or suffocation is not a qualifying offence for any of the preventive regimes. Our preliminary view is that it should be a qualifying offence.
- 6.36 The offence of strangulation or suffocation was enacted in 2018.³³ Before the offence was created, the act of strangulation or suffocation was charged using the assault provisions of the Crimes Act. Prior to 2018, preventive detention was imposed on the basis of offending that factually amounted to strangulation and that was charged as a qualifying offence, such as wounding with intent to cause grievous bodily harm.³⁴ If the same behaviour was now charged under the new strangulation provision, the person would not be eligible for preventive detention.

QUESTION

Q15

Do you agree that strangulation should be a qualifying offence for preventive detention, ESOs and PPOs?

Specific offences ineffective or unnecessary to protect community from serious reoffending

- 6.37 Some qualifying offences may not be effective or necessary to address the policy problem of keeping the community safe from serious reoffending. We discuss these offences below. As far as we are aware, these offences have never, on their own, formed the basis for imposing preventive detention, an ESO or a PPO. On the other hand, we acknowledge that there is no case law to suggest that the inclusion of these offences as qualifying offences is causing any difficulties with the preventive regimes in practice.

Incest

- 6.38 The offence of incest, as defined in New Zealand law, involves sexual connection between two people whose relationship is that of parent and child, siblings, half-siblings or grandparent and grandchild.³⁵ The person charged must know of the relationship.

³³ Crimes Act 1961, s 189A: maximum penalty seven years' imprisonment.

³⁴ For example *Greathead v R* [2014] NZCA 49.

³⁵ Crimes Act 1961, s 130: maximum penalty 10 years' imprisonment.

- 6.39 We question whether incest as a qualifying offence is necessary to achieve the objective of community safety and whether incest offending is sufficiently predictive of future offending.
- 6.40 Incest differs from the other qualifying sexual offences in that lack of consent is not an element of the offence. The Court of Appeal has stated that, when sentencing for charges of incest, the court must proceed on the basis that the offending involved consensual sexual behaviour and that the consent involved “was true consent, freely given by a person who was in a position to make a rational decision”.³⁶
- 6.41 Other (qualifying) offences are available where sexual offending against a family member is non-consensual or involves a particularly vulnerable victim or a victim is too young to consent.³⁷
- 6.42 For these reasons, incest was omitted from the scope of the now-repealed three strikes legislation. It was originally included but removed on recommendation from the Select Committee, which was satisfied that the charge of incest is generally only used for consensual sexual connection and, in circumstances where sexual offending between family members is not consensual, other charges (that did qualify under the three strikes legislation) were available.³⁸
- 6.43 In practice, we are not aware of any cases where preventive detention, an ESO or a PPO has been imposed on the basis of incest charges.³⁹ There are cases where preventive detention has been imposed for sexual connection with a family member such as a daughter or granddaughter, but in those cases, the convictions were for sexual offending rather than incest.⁴⁰ We are aware of one case where preventive detention was considered for, but not imposed on, a person who had convictions for incest.⁴¹ The person was eligible for preventive detention on one charge of incest and also three charges of rape, four charges of sexual violation by unlawful sexual connection, three charges of doing an indecent act on a young person and one charge of doing an indecent act on a child.
- 6.44 There is also some evidence that incest offending has lower rates of recidivism than other kinds of sexual offending. In *R v J*, a health assessor’s report said that J scored in the low category on an actuarial test for recidivism and that the low score reflected the fact that J belonged to “the group of sexual offenders with the lowest recidivism risk: heterosexual

³⁶ *B (CA 817/2011) v R* [2012] NZCA 260 at [13].

³⁷ We note that in te ao Māori, incest may be seen as a serious offence, transgressing the mana of the victim: Leonie Pihama and others “Māori Cultural Definitions of Sexual Violence” (2016) 7 *Sexual Abuse in Australian and New Zealand: An Interdisciplinary Journal* 43. Our preliminary view is that these other offences are available to cover serious instances of incest.

³⁸ Law and Order Committee Sentencing and Parole Reform Bill 2010 (17-2) (commentary) at 5.

³⁹ In *R v G* [2021] NZHC 3527, preventive detention was imposed on a number of charges including one of incest. Overall, Mr G’s sexual offending spanned from when he was 13 to 51 years old and included male and female victims who were family members and non-family members. The sentence of preventive detention was subsequently cancelled on the incest charge because Mr G was not eligible at the time it was committed. The sentence of preventive detention on other charges remained: *R v G* [2022] NZHC 1519.

⁴⁰ For example *P v R* [2021] NZCA 198 and *R v Poa* [2021] NZHC 770.

⁴¹ *R v V* [2017] NZHC 2605.

incest perpetrators”.⁴² This is also relevant to whether a conviction for incest is sufficiently indicative of a risk of committing similar crimes in the future.

- 6.45 It seems likely that, if a person was at a high risk of committing incest offending in the future, this could be addressed by measures short of preventive detention, an ESO or a PPO — by definition, the victims of such offending must be close family members who are likely known to the state. The person would be unlikely to present a risk to the community at large.
- 6.46 Our preliminary view is that incest should not be a qualifying offence for preventive detention, ESOs and PPOs.

QUESTION

Q16

Do you agree that incest should be removed as a qualifying offence for preventive detention, ESOs and PPOs?

Bestiality

- 6.47 Bestiality, as defined in New Zealand law, involves a person engaging in penetrative sexual activity with an animal.⁴³ It is rarely charged,⁴⁴ and Parliament has previously considered a proposal to abolish bestiality as a crime.⁴⁵
- 6.48 Including bestiality as a qualifying offence arguably does not address the policy problem of protecting members of the community from harm caused by serious offending. The offence of bestiality does not involve any harm or threat of harm to another person. Bestiality does not involve forcing or compelling another person to engage in sexual or indecent activity with an animal, which is covered by a separate (qualifying) offence.⁴⁶ While bestiality may cause harm to an animal or a degree of psychological distress to any person aware of the offending, it is questionable whether the risk of such harms is sufficiently serious to warrant that person being subject to a preventive regime. Indecency with an animal — that is, any other sexual behaviour with an animal short of penetration — is not a qualifying offence.⁴⁷ Bestiality was excluded from the now repealed three strikes regime because it does not involve a human victim.⁴⁸
- 6.49 We are aware of only one case where a person convicted of bestiality has been considered for a preventive regime. In *R v Marshall*,⁴⁹ Mr Marshall appeared for sentencing on representative charges of sexual violation, sexual conduct with a child under 12,

⁴² *R v J* HC Auckland CRI-2006-092-16336, CRI-2006-092-16337, 1 April 2008 at [59].

⁴³ Crimes Act 1961, s 143: maximum penalty seven years' imprisonment.

⁴⁴ We were able to locate only three cases where a person had been convicted of bestiality between 1991 and 2020. In the 1991 case, the sentencing judge noted that the Court had only been able to locate one precedent, from 1890: *Police v Sheary* (1991) 7 CRNZ 107.

⁴⁵ Crimes Bill 1989 (152-1).

⁴⁶ Crimes Act 1961, s 142A: maximum penalty 14 years' imprisonment.

⁴⁷ Crimes Act 1961, s 144: maximum penalty three years' imprisonment.

⁴⁸ Law and Order Committee “Sentencing and Parole Reform Bill – Initial Briefing” (29 April 2009) at [32].

⁴⁹ *R v Marshall* [2020] NZHC 1271.

knowingly making objectionable publications and bestiality. The offences of sexual violation and sexual conduct with a child were also qualifying offences for the purposes of preventive detention. The bestiality offending took place separately from the other offending and did not involve any children. The sentencing judge considered there was evidence indicating a significant risk of reoffending but did not impose preventive detention as Mr Marshall had never previously had the opportunity to undergo rehabilitation.

6.50 There is “a dearth of scientific research” on bestiality.⁵⁰ As far as we have been able to determine from our preliminary research, there is not an established link between bestiality and risk of sexual or violent offending against humans.⁵¹

6.51 Our preliminary view is that bestiality should not be a qualifying offence for preventive detention, ESOs and PPOs.

QUESTION

Q17

Do you agree that bestiality should be removed as a qualifying offence for preventive detention, ESOs and PPOs?

Other issues

6.52 Finally, we are interested in your views on whether there are any other issues with the qualifying offences for preventive detention, ESOs or PPOs.

QUESTION

Q18

Are there any other issues with the qualifying offences for preventive detention, ESOs or PPOs?

⁵⁰ Brian Holoyda, Ravipreet Gosal and K Welch “Bestiality Among Sexually Violent Predators” (2020) 48 American Academy of Psychiatry and the Law 358 at 358.

⁵¹ Brian Holoyda, Ravipreet Gosal and K Welch “Bestiality Among Sexually Violent Predators” (2020) 48 American Academy of Psychiatry and the Law 358.

CHAPTER 7

Overseas offending

IN THIS CHAPTER, WE CONSIDER:

- eligibility for extended supervision orders (ESOs) and public protection orders (PPOs) on the basis of offending committed overseas.

INTRODUCTION

- 7.1 A person may be eligible for an ESO or a PPO on the basis of offending committed overseas.¹
- 7.2 This chapter addresses issues relating to eligibility for ESOs and PPOs on the basis of:
- (a) a person's status as a returning offender under the Returning Offenders (Management and Information) Act 2015 (the Returning Offenders Act); or
 - (b) an overseas sentence for offending.

RETURNING OFFENDERS ACT

- 7.3 The Returning Offenders Act was enacted under urgency in November 2015 in response to a law change in Australia that made non-Australian citizens liable to have their visas cancelled if they were sentenced to one year or more of imprisonment. This law change meant that the number of New Zealand citizens deported or removed from Australia to Aotearoa New Zealand increased five-fold, from about five per month to about 25 per month.²
- 7.4 One of the purposes of the Returning Offenders Act is to impose a supervision regime on people returning to Aotearoa New Zealand that is similar to that imposed on people

¹ The discussion in this section is focused on the ESO and PPO regimes because preventive detention can only be imposed in relation to qualifying offences under New Zealand law. Generally, acts done outside Aotearoa New Zealand are not offences under New Zealand law and so a person cannot be sentenced for them in Aotearoa New Zealand: Crimes Act 1961, s 6. One of the few exceptions to this rule is s 144A of the Crimes Act 1961, which states that everyone who, being a New Zealand citizen or ordinarily resident in Aotearoa New Zealand, commits an offence under New Zealand law if they do certain acts *outside* Aotearoa New Zealand that involve sexual offending against children and young persons. Offences charged under s 144A are qualifying offences for preventive detention.

² Justice Committee "Review of the Operation of the Returning Offenders (Management and Information) Act 2015" (New Zealand House of Representatives, 1.7B, September 2019.)

released from New Zealand prisons. Te Kōti Pira | Court of Appeal has recently considered how the Returning Offenders Act should be interpreted in light of the New Zealand Bill of Rights Act 1990's protections against retrospective and double penalties.³ In this chapter, however, we do not comment on issues concerning the Act as it applies generally but rather focus our discussion on issues relating to the preventive regimes.

Returning prisoners

- 7.5 The Returning Offenders Act imposes mandatory standard release conditions and provides for further special conditions to be imposed on any person who is determined to be a “returning prisoner”.
- 7.6 Under section 17 of the Returning Offenders Act, the Commissioner of Police must determine that a person is a returning prisoner if satisfied that the person:
- (a) has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand; and
 - (b) has, in respect of that conviction, been sentenced to—
 - (i) a term of imprisonment of more than 1 year; or
 - (ii) 2 or more terms of imprisonment that are cumulative, the total term of which is more than 1 year; and
 - (c) is returning or has returned to New Zealand within 6 months after his or her release from custody during or at the end of the sentence.
- 7.7 A determination that a person is a returning prisoner must be made within six months of the person's arrival in Aotearoa New Zealand.⁴
- 7.8 A returning prisoner will be subject to mandatory standard release conditions for a period of between six months and five years, depending on the term of imprisonment to which they were sentenced for the offence.⁵ The standard release conditions are the standard release conditions that apply to parole in the Parole Act 2002.⁶
- 7.9 A returning prisoner may also be subject to special conditions imposed by the court upon application by the chief executive of Ara Poutama | Department of Corrections (chief executive).⁷ The special conditions that may be imposed are the same as those that may be imposed on a person subject to parole, and the same test applies to the imposition of special conditions — a special condition must not be imposed unless it is designed to:⁸
- (a) reduce the risk of reoffending;
 - (b) facilitate or promote the person's rehabilitation and reintegration; or
 - (c) provide for the reasonable concerns of victims.

³ *Commissioner of Police v G* [2023] NZCA 93.

⁴ Returning Offenders (Management and Information) Act 2015, s 18.

⁵ Returning Offenders (Management and Information) Act 2015, s 24(2).

⁶ Returning Offenders (Management and Information) Act 2015, s 25. The standard release conditions are those found in s 14 of the Parole Act 2002, except that the parole condition requiring the person to report to a probation officer as soon as practicable, and not later than 72 hours, after release on parole is replaced with a condition to report to a probation officer as soon as practicable, and not later than 72 hours, after being served a determination notice.

⁷ Returning Offenders (Management and Information) Act 2015, s 26.

⁸ Returning Offenders (Management and Information) Act 2015, s 26(3).

7.10 Special conditions must not last longer than the standard release conditions.⁹

Eligibility for extended supervision order or public protection order

7.11 A person will be eligible to have an ESO or a PPO imposed on them if they have been determined to be a returning prisoner in respect of a qualifying offence committed overseas and they are still subject to standard release conditions or special conditions imposed under the Returning Offenders Act.¹⁰

Person who returns to Aotearoa New Zealand more than six months after release from custody

7.12 Under section 32 of the Returning Offenders Act, if a person meets the above criteria to be a returning prisoner, except that they are returning or have returned to Aotearoa New Zealand *more* than six months after their release from custody, they may nevertheless be treated as a returning prisoner if, immediately before their return to Aotearoa New Zealand, they were subject to:

- (a) monitoring, supervision or other conditions for the relevant sentence; or
- (b) conditions imposed under an order in the nature of an ESO or a PPO.

7.13 In these circumstances, the standard release conditions do not apply automatically, but the court may impose any conditions on such a person if satisfied that the conditions are necessary to facilitate the person's rehabilitation and reintegration or to reduce the risk of reoffending.¹¹

Eligibility for extended supervision order or public protection order

7.14 A person will be eligible to have an ESO imposed on them if they are treated as a returning prisoner under section 32 because of offending committed overseas that would constitute an imprisonable offence if committed in Aotearoa New Zealand, whether or not the offending would be qualifying offending under the ESO regime, and they are still subject to conditions imposed under the Returning Offenders Act.¹²

7.15 A person will be eligible to have a PPO imposed on them if they are treated as a returning prisoner under this section, but only if the offending committed overseas would be a qualifying offence under the PPO regime and if they are still subject to conditions imposed under the Returning Offenders Act.¹³

⁹ Returning Offenders (Management and Information) Act 2015, s 26(2).

¹⁰ Parole Act 2002, ss 107C(1)(c) and 107F(1)(d); Public Safety (Public Protection Orders) Act 2014, s 7(1)(e).

¹¹ Returning Offenders (Management and Information) Act 2015, s 33(2).

¹² Parole Act 2002, ss 107C(1)(d) and 107F(1)(d).

¹³ Returning Offenders (Management and Information) Act 2015, s 7(b).

Other eligibility on the basis of overseas offending

- 7.16 A person will also be eligible for an ESO or a PPO to be imposed on them if they committed a qualifying offence overseas and they:¹⁴
- (a) were subject to a sentence, supervision conditions, or order for the qualifying offence;
 - (b) arrived in Aotearoa New Zealand within six months of ceasing to be subject to that sentence, supervision conditions or order;
 - (c) reside or intend to reside in Aotearoa New Zealand; and
 - (d) have been in Aotearoa New Zealand for less than six months.
- 7.17 It is likely that, if a person meets these criteria, they would also meet the criteria to be determined a returning prisoner. This category of eligibility was in place before the Returning Offenders Act was enacted.

ISSUES

- 7.18 There is very limited case law on the imposition of ESOs or PPOs on returning offenders and other people who have been sentenced overseas. Based on our preliminary engagement and research, we have identified the following issues:
- (a) An ESO can be imposed for offending committed overseas which would not be a qualifying offence for an ESO if committed within Aotearoa New Zealand.
 - (b) Procedural problems including the timing of applications and difficulty obtaining information from overseas jurisdictions.

Availability of an ESO for non-qualifying offending

- 7.19 Most of the pathways to eligibility for an ESO or PPO require the person to have been convicted of an offence overseas that, if it had been committed in Aotearoa New Zealand, would come within the description of a qualifying offence for that regime.
- 7.20 However, as discussed above, an ESO may also be imposed on the basis of overseas offending that is *not* a qualifying offence if all the following criteria are met:¹⁵
- (a) the person has been convicted of an offence overseas that would be an imprisonable offence in Aotearoa New Zealand;
 - (b) the person was sentenced to more than one year of imprisonment for that offence;
 - (c) the person is returning or has returned to Aotearoa New Zealand more than six months after release from custody; and
 - (d) immediately before their return to Aotearoa New Zealand, the person was subject to monitoring, supervision or other conditions for the offence, or to conditions imposed under an order in the nature of an ESO or a PPO.

¹⁴ Parole Act 2002 s 107C(1)(b) and Public Safety (Public Protection Order) Act 2014, s 7(1)(d). The offence must be a qualifying offence for the relevant regime — for example, a person will only be eligible for a PPO if the overseas offence is a qualifying offence under the PPO legislation.

¹⁵ Parole Act 2002, s 107C(1)(c) and Returning Offenders (Management and Information) Act 2015, s 32.

- 7.21 We have been unable to find any policy or legislative materials that explain the reason for this provision.
- 7.22 A possible rationale is that, if a person was subject to monitoring or supervision for an offence overseas, the overseas jurisdiction must have determined that the person presented a risk of serious offending.
- 7.23 However, there are issues with this reasoning because overseas jurisdictions may impose monitoring, supervision or post-detention orders in circumstances that would not be justified under Aotearoa New Zealand law. For example, they may be imposed on offending that is less serious or the risk threshold could be lower.
- 7.24 On the other hand, this provision only makes a person *eligible* to have an ESO imposed on them. An ESO would only be imposed if the court was satisfied that the usual legislative test was met.
- 7.25 We also note that there is an inconsistency because a person who meets the above criteria for a non-qualifying offence is only eligible for an ESO if they return to Aotearoa New Zealand more than six months after their release from custody. If they return *within* six months of release from custody, they would not be eligible for an ESO.
- 7.26 We are not aware of any issues arising with this provision in practice, but we seek feedback on the point as it appears to be anomalous and a departure from the other eligibility criteria.

QUESTION

Q19

Should a person be eligible for an ESO on the basis of overseas offending that would not come within the description of a qualifying offence if committed in Aotearoa New Zealand, if:

- a. the person has been convicted of an offence overseas that would constitute an imprisonable offence in Aotearoa New Zealand;
- b. the person was sentenced to more than one year of imprisonment for that offence;
- c. the person is returning or has returned to Aotearoa New Zealand more than six months after release from custody; and
- d. immediately before the person's return to Aotearoa New Zealand, the person was subject to monitoring, supervision, or other conditions for the offence, or to conditions imposed under an order in the nature of an ESO or a PPO.

Procedural problems with timing and difficulty obtaining information

- 7.27 An application for an ESO for a returning offender must be made within six months of the person arriving in Aotearoa New Zealand. In our preliminary engagement, we have heard that it can be difficult to access the information needed from overseas jurisdictions, particularly within this timeframe.
- 7.28 Extending the timeframe could make it easier for Ara Poutama | Department of Corrections to access relevant information and make applications where necessary for

community safety. On the other hand, extending the timeframe would create uncertainty for people about whether they would be subject to a restrictive order.

7.29 The vast majority of returning offenders under the Returning Offenders Act arrive from Australia.¹⁶ Currently, New Zealand government departments and agencies have information-sharing agreements with their Australian equivalents.

7.30 Our initial view is that it is appropriate that the sharing of information is dealt with through such arrangements rather than primary legislation, but we are interested in any other feedback.

QUESTION

Q20

Are there any issues arising with the timing of ESO applications for overseas offenders, or with accessing information that require legislative reform?

Other issues

7.31 Due to the lack of case law or commentary on this aspect of the regimes, we are interested in feedback on whether there are any issues we have not addressed in this chapter.

QUESTION

Q21

Are there any other issues relating to the application of the ESO and PPO regime to returning offenders or people who have committed offences overseas?

¹⁶ Between 18 November 2015 and 18 May 2017, 98 per cent of offenders who returned to Aotearoa New Zealand were returned from Australia: Letter from Rachel Crawley (Policy Manager – Sentencing and Rehabilitation, Te Tāhū o te Ture | Ministry of Justice) to Sarah Dowie (Chairperson, Justice and Electoral Committee) regarding Statutory Review of the Returning Offenders (Management and Information) Act 2015) (4 July 2017) at [28].

Part Four:

Imposing preventive detention, extended supervision orders and public protection orders

CHAPTER 8

The legislative tests for imposing preventive detention, extended supervision orders and public protection orders

IN THIS CHAPTER, WE CONSIDER:

- the legislative tests the courts apply when determining whether to impose preventive detention, an extended supervision order (ESO) or a public protection order (PPO).

INTRODUCTION

8.1 Central to this Issues Paper is the question whether the preventive regimes strike the right balance between keeping the community safe and not unduly restricting a person's rights and freedoms. The legislative tests on which the court determines whether to impose preventive detention, ESOs and PPOs need to be properly calibrated to achieve this balance. This chapter examines issues with the legislative tests, particularly in the light of this overall balancing exercise.

THE LEGISLATIVE TESTS**Preventive detention**

8.2 Section 87(2)(c) of the Sentencing Act 2002 provides that, to impose preventive detention, the court must be satisfied that “the person is likely to commit another

qualifying sexual or violent offence” if the person is released at the sentence expiry date of their determinate sentence.

- 8.3 Section 87(4) sets out matters the court must take into account when considering whether to impose preventive detention, which are:
- (a) any pattern of serious offending disclosed by the offender’s history;
 - (b) the seriousness of the harm to the community caused by the offending;
 - (c) information indicating a tendency to commit serious offences in future;
 - (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
 - (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.
- 8.4 While not expressly referred to in section 87(4), when taking account of the principle that a lengthy determinate sentence is preferable, the courts will also consider the availability of an ESO and whether it would provide adequate protection for the public.¹ Te Kōti Pira I Court of Appeal (Court of Appeal) has recently explained that those seeking preventive detention must demonstrate why less restrictive options are insufficient.² If the court considers that a lengthy determinate sentence is not adequate or appropriate, the reasons should be based on evidence and given in the judgment.³

Extended supervision orders

- 8.5 The test for imposing an ESO is different to the test for imposing preventive detention. Section 107I(2) of the Parole Act 2002 provides the court must be satisfied that:
- (a) the person 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 person will in future commit a relevant sexual offence;
 - (ii) there is a very high risk that the person will in future commit a relevant violent offence.
- 8.6 Section 107IAA provides that the court may determine that a person is at a high risk of sexual offending or a very high risk of violent offending “only if it is satisfied” the person displays certain traits and behavioural characteristics. The characteristics in respect of sexual offending are that the person:⁴
- (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 their sexual offending on actual or potential victims.

¹ *R v Mist* [2005] 2 NZLR 791 (CA) at [100]–[101]; *T (CA502/2018) v R* [2022] NZCA 83 at [30].

² *T (CA502/2018) v R* [2022] NZCA 83 at [30]–[31].

³ *T (CA502/2018) v R* [2022] NZCA 83 at [30]–[31].

⁴ Parole Act 2002, s 107IAA(1).

- 8.7 The characteristics in respect of violent offending are that the person:⁵
- (a) has a severe disturbance in behavioural functioning established by evidence of each of following characteristics:
 - (i) intense drive, desires, or urges to commit acts of violence;
 - (ii) extreme aggressive volatility; and
 - (iii) persistent harbouring of vengeful intentions towards one 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 their violence on actual or potential victims.
- 8.8 The courts have revisited how they apply the legislative test for deciding whether to impose an ESO in the light of the Court of Appeal’s judgment in *Chisnall v Attorney-General* (we discuss this further in Chapter 3).⁶ The Court of Appeal in *R (CA586/2021) v Chief Executive of the Department of Corrections* and *Mosen v Chief Executive of the Department of Corrections* has confirmed that, when the statutory criteria for an ESO are met, the court must balance the right not to be subject to a second penalty against the statutory purpose of protecting the public from the risk the person will commit a relevant offence.⁷ The Court said, put more simply, a “strong justification” is needed for an ESO.

Public protection orders

- 8.9 Section 13(1) of the Public Safety (Public Protection Orders) Act 2014 (Public Safety Act) provides the court may make a PPO if it is satisfied “there is a very high risk of imminent serious sexual or violent offending” when the person is released from prison into the community or, in any other case, is left unsupervised. The Act defines “imminent” to mean the person is expected to commit an offence as soon as they have a suitable opportunity to do so.⁸
- 8.10 Like an ESO, a PPO can only be imposed if the person displays certain traits and behavioural characteristics. The Public Safety Act directs that the court may not make a finding that the person presents a very high risk of imminent serious sexual or violent offending unless the court is satisfied the person “exhibits a severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics”:⁹
- (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;

⁵ Parole Act 2002, s 107IAA(2).

⁶ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484; *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107.

⁷ *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53]; *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

⁸ Public Safety (Public Protection Orders) Act 2014, s 3.

⁹ Public Safety (Public Protection Orders) Act 2014, s 13(2).

- (c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims;
 - (d) poor interpersonal relationships or social isolation or both.
- 8.11 Like preventive detention, the courts have taken the approach that a PPO should not be imposed unless the risks posed by the respondent cannot be adequately managed under an ESO.¹⁰

ISSUES

The legislative tests may not target the appropriate level of risk

- 8.12 As explained above, the preventive regimes should strike the right balance between keeping the community safe and not unduly restricting a person's rights and freedoms. At this point, we raise for feedback the question whether, as part of this balance, the legislative tests focus on possible future reoffending at the right level of likelihood.
- 8.13 We do not yet have a developed view on this issue. As we note in Chapter 3, there is limited evidence regarding the reoffending harm the preventive regimes are intended to guard against. This is partly because people who are deemed to be at considerable risk of serious reoffending should, in the most part, already be subject to preventive detention, an ESO or a PPO. It is difficult to test whether they would have reoffended had they not been within the preventive regimes. Further, there is little case law or commentary on whether the legislative tests target serious reoffending at the right level of likelihood. Recent case law has focused on whether the restrictions on human rights inherent in preventive detention, ESOS and PPOs are a proportionate response to the risks the person poses to community safety. There is, however, little comment on whether the tests themselves are directed to the appropriate severity and likelihood. Nevertheless, we raise some observations for feedback.

The preventive regimes require different levels of likelihood

- 8.14 First, it may appear anomalous that the test to impose preventive detention — a more restrictive and punitive measure than ESOS and PPOs — has the lowest threshold. While the tests for ESOS and PPO require the risk that the person will reoffend to be “high” or “very high”, for preventive detention the person must simply be “likely” to commit a further qualifying offence. On the other hand, the courts have explained that the way ESOS and PPOs infringe the protection against second penalties is a serious intrusion on human rights. In the context of PPOs, *te Kōti Matua | High Court* (High Court) has explained that the likelihood must almost border on the inevitability of imminent serious reoffending for a PPO to be justified in terms of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).¹¹

The test for ESOS has a lower threshold for sexual offending

- 8.15 Secondly, the tests for ESOS set different thresholds for sexual and violent offending. To impose an ESO, the court must be satisfied there is a “high risk” the person will in future

¹⁰ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [40] per Elias CJ; *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [42].

¹¹ *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [150].

commit a relevant sexual offence, whereas for violent offending, the risk must be “very high”. These thresholds were introduced in the 2014 reforms. The Regulatory Impact Statement relating to the reforms explained that setting the threshold at the same “high risk” level would lead to the “inclusion of large numbers of violent offenders, some of whom may not otherwise go on to re-offend in a seriously violent manner”.¹² It noted that simply widening the regime without raising the risk threshold was unlikely to significantly improve public safety, and it would incur very significant extra costs because of the increase in the number of people who would be managed on an order.¹³

- 8.16 The different thresholds within the legislative tests probably accounts, in part, for why a high proportion of ESOs are imposed in relation to sexual offending.¹⁴ As we discuss in Chapter 1, the qualifying offending in respect of 95 per cent of the 205 people subject to ESOs as at 30 June 2022 was sexual offending.¹⁵
- 8.17 The different thresholds for ESOs suggest that society has less tolerance for sexual reoffending than violent reoffending. The implication is that the harm to the community from sexual reoffending is worth protecting against through ESOs, even if there is a greater likelihood that people subject to ESOs would not commit further sexual offences. Conversely, society appears more willing for people with higher chances of violent recidivism to live in the community without extended supervision.

The legislative tests for ESOs and PPOs tie the likelihood of reoffending to whether the person displays certain traits and behavioural characteristics

- 8.18 Lastly, there are issues with whether the focus on traits and behavioural characteristics under the tests for ESOs and PPOs adequately target people who are at risk of reoffending. The legislation prohibits a court from finding there is a high/very high risk of a person reoffending unless they display the relevant traits and characteristics. There are concerns evident in the case law that, among other things, this approach does not always target the people most at risk of reoffending. We discuss these concerns separately below.

QUESTION

Q22

Do the legislative tests for preventive detention, ESOs and PPOs focus on the right level of likelihood of possible future reoffending?

¹² Ara Poutama | Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014) at [33].

¹³ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014) at [33].

¹⁴ The other key reason is that, prior to 2014, violent offending did not qualify for an ESO.

¹⁵ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

The legislative tests do not work together coherently

- 8.19 As we discuss in Chapter 4, while preventive detention, ESOS and PPOs are aimed at the same policy objective, they do not fit together coherently. This is also seen when the elements of the different legislative tests are compared. In particular:
- (a) The tests for ESOS and PPOs require the court to be satisfied that the person displays specific traits and behavioural characteristics. This differs markedly from the test for preventive detention.
 - (b) As noted above, the tests take different approaches to the likelihood the person will reoffend, with preventive detention being the lowest threshold despite being the most restrictive measure.

Scope of qualifying offences too broad

- 8.20 As we discuss in Chapter 6, to be eligible for preventive detention, an ESO or a PPO, a person must have been convicted of a qualifying offence (certain serious sexual or violent offences). To impose preventive detention, an ESO or a PPO, the court must be satisfied that the person is at risk of committing a *further* qualifying offence in the future.
- 8.21 In our preliminary engagement, we have heard that some currently qualifying offences may not be serious enough to justify imposing preventive detention, an ESO or a PPO when a person is at risk of committing them in the future. In particular:
- (a) As we discuss in Chapter 6, indecent assault can be committed in a variety of ways that are often at the less serious end of the scale of sexual offending, but can include serious offending that causes harm to the community.
 - (b) For the reasons given in Chapter 6, incest and bestiality may not be rationally connected to the purpose of protecting the public from serious offending that causes harm to the community. Where there is a risk of incestuous sexual offending that is non-consensual or involves a vulnerable victim, or where there is a risk of compelling another person to engage in sexual activity with an animal, other qualifying offences would cover this behaviour.
 - (c) Attempts or conspiracies to commit qualifying offences are themselves qualifying offences for ESOS (but not for preventive detention or PPOs). We question whether this is rationally connected to the purpose of the regimes. Attempts and conspiracies to commit offences do not themselves entail the same level of harm to the community — the main harm results if the offence is in fact committed. Preventive detention, ESOS and PPOs are designed to prevent the substantive offending. Relatedly, meeting a young person following sexual grooming is a qualifying offence for all three regimes. This offence is a type of attempted offence — the person must intend to commit a sexual offence against the young person. We question whether this offence is necessary as a qualifying offence when the intended offences are themselves qualifying.

QUESTION

Q23

Do you think there are any issues with the qualifying offences that a person must pose a risk of committing for the court to impose preventive detention, an ESO or a PPO?

Requirements of human rights law are not expressed in the legislative tests

- 8.22 The courts have recognised that they must interpret and apply the legislative tests consistently with the NZ Bill of Rights. This has caused the courts to weigh considerations arising from human rights law that are not explicitly expressed by the legislative tests. The courts appear to regard two considerations as particularly important.
- 8.23 First, the courts will generally only impose a preventive measure if it is the least restrictive measure necessary to adequately manage the risks the person will reoffend. For preventive detention, international human rights jurisprudence under the International Covenant on Civil and Political Rights provides that preventive detention should only be imposed as a “last resort” to address reoffending risk.¹⁶ Although the domestic courts have been clear that preventive detention is not a sentence of last resort,¹⁷ they will not impose preventive detention when they consider the risks can be adequately managed through a determinate sentence and an ESO.¹⁸ The Sentencing Act, however, does not expressly state that an ESO is preferable to preventive detention if it can adequately manage a person’s risk — the Act only says a lengthy determinate sentence is preferable.¹⁹
- 8.24 In respect of PPOs, in *Chisnall v Chief Executive of the Department of Corrections* (an appeal against an interim detention order imposed on Mr Chisnall under the Public Safety Act), Elias CJ explained that, if conditions can be put in place without detention that would address the very high risk of imminent offending, a PPO ought not be made.²⁰ Her Honour explained this approach was consistent with protections contained in the NZ Bill of Rights, citing sections 22 (protection against arbitrary detention) and 26 (protections against retrospective and second penalties). This additional requirement is not expressed in the Public Safety Act.²¹

¹⁶ United Nations Human Rights Committee *General Comment No. 35, Article 9 (Liberty and Security of the Person)* CCPR/C/GC/35 (16 December 2014) at [21]; *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

¹⁷ *R v C* [2003] 1 NZLR 30 (CA) at [6].

¹⁸ *R v Mist* [2005] 2 NZLR 791 (CA) at [100]–[101]; *T (CA502/2018) v R* [2022] NZCA 83 at [30].

¹⁹ Sentencing Act 2002, s 87(4)(e).

²⁰ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [40]. The Chief Justice’s approach was affirmed by te Kōti Pira | Court of Appeal in *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [42].

²¹ During the passage of the Public Safety (Public Protection Orders) Bill, the Law Society and the Legislation Advisory Committee submitted to the Justice and Electoral Committee that the legislation should explicitly require the court to consider less restrictive options before making a PPO. Ara Poutama | Department of Corrections advised the Committee not to accept this recommendation because the principles of the proposed legislation required the court to only impose a PPO where the risk justifies the imposition of an order: Ara Poutama | Department of Corrections *Public Safety (Public Protection Orders) Bill – Departmental Report* (25 February 2014) at [35] and [40].

- 8.25 Second, in light of the Court of Appeal's declaration in *Chisnall* that ESOs and PPOs breach the NZ Bill of Rights' protection against second punishment, the courts have recognised that an ESO or a PPO should only be imposed when it is a justified limit on the right in each case. Several cases have now established that the court should undertake a simple proportionality analysis requiring it to balance the right not to be subject to second punishment against the statutory purpose to protect the community from reoffending.²² This additional proportionality test is not referred to in the Parole Act or the Public Safety Act.
- 8.26 As a general principle, the law should be comprehensive, clear and accessible, particularly if it involves coercive power that can limit human rights.²³ The legislation governing the preventive regimes is not, however, a complete expression of the considerations the court will weigh and needs to weigh to ensure human rights consistency. A question that arises is whether it is preferable for the legislative tests to state more comprehensively the law the court is to apply. We are interested in feedback on this question and present three possible approaches to prompt discussion.
- 8.27 The first approach is to retain the status quo pursuant to which the human rights considerations are not expressed in the primary legislation governing the preventive regimes. This approach recognises that it is already clear that the NZ Bill of Rights applies to the judiciary as well as any person exercising a public function prescribed by law.²⁴ It will therefore apply when a court makes orders that might limit a person's rights. It may be considered unnecessary for the Sentencing Act, Parole Act and Public Safety Act to repeat that the NZ Bill of Rights will apply. The main disadvantage of this approach, as noted, is that the primary legislative tests do not refer to key matters that govern whether a measure should be imposed.
- 8.28 The second approach is to attempt to state within the primary legislation the standards the court must apply in order to ensure a preventive measure is a justified limit on human rights. As discussed throughout this Issues Paper, there are several matters that render a preventive measure rights-compliant or not. For example, in Chapter 3, we note that the preventive regimes could be predominantly therapeutic and rehabilitative. There are also other components of the legislative tests that must be properly calibrated to be rights-compliant, such as the eligibility criteria and likelihood of the person committing a further qualifying offence. In addition to these matters, this second approach would draw on the case law discussed above and state within the legislation that the court must only impose a preventive measure if:
- (a) the measure is the least restrictive necessary to address the risks the person will commit a further qualifying offence; and

²² For ESOs see *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225; *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289; *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [30]. For PPOs see *Chief Executive, Department of Corrections v Porj* [2022] NZHC 3581 at [40] (a prison detention order case) and *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [24].

²³ Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at 8. This principle is exemplified in the NZ Bill of Rights itself: see New Zealand Bill of Rights Act 1990, ss 5 and 6.

²⁴ New Zealand Bill of Rights Act 1990, s 3(a).

- (b) the nature and extent of the risk the person poses to community safety justifies the limits the preventive measure would impose on their rights.
- 8.29 As noted, on one view, this approach may be considered unnecessary because the courts already appear to be applying the NZ Bill of Rights in this way to the legislative tests. There is also the difficulty that the matters identified in the primary legislation may not be an exhaustive list of the considerations the court should weigh when deciding whether a preventive measure is justified. On the other hand, this second approach would provide a more comprehensive legislative statement of the matters the courts are currently considering. As well as providing guidance to judges, it would also provide assurance to international bodies that human rights methodologies are appropriately built into the legislative test.
- 8.30 The third approach (which might be either additional or in the alternative to the second) is to simply flag in the primary legislation that the NZ Bill of Rights applies. Some recent legislation takes this approach. For example, the Terrorism Suppression (Control Orders) Act 2019 empowers a court to make a control order to prevent a person from engaging in terrorism-related activities. A control order provides “requirements” that prohibit or restrict the person subject to the order from certain activities. When determining the requirements of an order, the court must consider whether the requirements are justified limits on rights and freedoms in the NZ Bill of Rights.²⁵ In the COVID-19 Public Health Response Act 2020, the Minister is empowered to make COVID-19 orders that can affect people’s freedoms such as requiring a person to isolate themselves. When making orders, the Minister must be satisfied that “the order does not limit or is a justified limit” on the rights and freedoms in the NZ Bill of Rights.²⁶
- 8.31 It is likely that the primary purpose of these types of provisions is to alert the courts and decision-makers, such as those responsible for applying for orders, to consider human rights implications, including whether orders are justified for the purposes of the NZ Bill of Rights. The provisions do not provide any further guidance as to how orders may be made rights-compliant.
- 8.32 In Chapter 12, we present these approaches as proposals for reform to seek feedback from submitters. At this point, we raise the question as to whether the fact that human rights considerations are not expressed in the primary legislation is an issue that may require reform.

QUESTION

Q24

Do you think that it is an issue that the human rights considerations the courts apply when imposing a preventive measure are not referred to in the primary legislative tests?

²⁵ Terrorism Suppression (Control Orders) Act 2019, s 12(3)(b).

²⁶ COVID-19 Public Health Response Act 2020, s 9(1)(ba).

Issues relating to the traits and behavioural characteristics in the legislative tests

- 8.33 To impose an ESO or a PPO, the court must be satisfied the person displays certain traits and behavioural characteristics. The purpose of including the traits and behavioural characteristics in the legislative tests for ESOs and PPOs appears to be to identify the people who are at highest risk of reoffending. The policy and legislative materials indicate that the inclusion of the traits and behavioural characteristics was to ensure only the highest-risk offenders would become subject to orders.²⁷
- 8.34 For the reasons that follow, we are unsure whether the focus on the traits and behavioural characteristics achieve the intended purpose.

The traits and behavioural characteristics may not indicate reoffending risk

- 8.35 We are concerned that some of the traits and behavioural characteristics appear to exclude people who pose significant risks to community safety.
- 8.36 We have struggled to find any authoritative material in the policy and legislative history as to why the characteristics were thought to identify the highest-risk people. The relevant Cabinet papers and regulatory impact analysis simply make the assertion and do not refer to any evidential basis.²⁸
- 8.37 As a matter of legislative design, we have reservations regarding the extent to which the court should be directed to specific characteristics as being demonstrative of reoffending risk. This is for two main reasons:
- (a) First, while there may be traits in individuals that compel them to reoffend, undue focus on these traits fails to recognise the complex interactions between psychological and situational factors that result in offending.²⁹ Acute risk factors relating to the circumstances of offending are equally important to reoffending risk, such as intoxication, peer association and proximity to potential victims.³⁰ Consequently, the predominant focus of the legislative tests should not be the existence or non-existence of traits and behavioural characteristics but rather a broader inquiry as to whether a preventive order is necessary to address the situational factors and the triggers for reoffending.

²⁷ Parole (Extended Supervision Orders) Amendment Bill 2014 (195-1) (explanatory note) at 2; Letter from Jo Field (Deputy Chief Executive, Service Development, Ara Poutama | Department of Corrections) to Mike Sabin MP (Chairperson, Law and Order Committee) regarding Parole (Extended Supervision Orders) Amendment Bill – Initial Briefing (24 October 2014) at [14]; Ara Poutama | Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014) at [70].

²⁸ There is some suggestion the PPO legislation attempts to capture many of the attributes associated with psychopathy that are listed in the psychopathy checklist (PCL-R) and associated with anti-social personality disorder (ASPD): Jeanne Snelling and John McMillan “Antisocial Personality Disorders and Public Protection Orders in New Zealand” in Luca Malatesti, John McMillan and Predrag Šustar (eds) *Psychopathy: Its Uses, Validity and Status* (Springer, Cham, 2022) at 50–51. However, in *Chief Executive of Department of Corrections v Waiti* [2019] NZHC 3256 at [38], health assessors gave advice to the court that they were not aware of any clinical foundation for the requirement that the person has a “persistent harbouring of vengeful intentions towards 1 or more persons”. The Court noted it could not be identified as psychopathy and thus the list of traits and characteristics in s 107IAA(2) is the statute’s own construct.

²⁹ See discussion in *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [52]; and *Report of the Committee on Serious Violent and Sexual Offenders* (Scottish Executive, SE/2000/68, June 2000) at [2.4].

³⁰ Lucy Moore *Literature Review — Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 9.

- (b) Risk assessment and psychological practice is regularly updated in light of new research. What may have been considered important factors at the time the legislative tests were enacted may become outdated. It is unwise for a set of characteristics to be cemented in legislation when regular revision may be required. Instead, traits and behavioural characteristics that accurately indicate risks could be identified in expert evidence.
- 8.38 Concerns have emerged in relation to particular characteristics. The issue is that there may be a high risk that a person will commit a relevant sexual offence or a very high risk they will commit a relevant violent offence despite not having the following traits or behavioural characteristics:
- (a) **Absence of understanding or concern about the effects of their offending.** Section 107IAA(1)(d) of the Parole Act requires that the person must display (i) “a lack of acceptance or responsibility for past offending” and/or (ii) “an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims”. Section 13(2)(c) of the Public Safety Act requires that the person must have an “absence of understanding or concern for the impact of the respondent’s offending on actual or potential victims”. A potential issue is that a person may have some understanding of the effects of their offending but remain a high risk. In response, the Court of Appeal has held that this wording should be interpreted to include a materiality threshold so that the person’s acceptance of responsibility, remorse, understanding or concern is only relevant if it actually mitigates their risk.³¹ The Court held that Parliament cannot have intended that the presence of any understanding or concern should preclude a person from being assessed as high risk.
- (b) **Persistent vengeful intentions.** Section 107IAA(2)(a)(iii) of the Parole Act requires that the person must have “persistent harbouring of vengeful intentions towards 1 or more other persons”. This factor may not be present even when a person in fact poses a high risk of committing a violent offence. The Court of Appeal in *Mosen* considered that, based on the evidence, there was a very high risk that Mr Mosen would commit a relevant violent offence and that an ESO would have been strongly justified.³² Nevertheless, the evidence showed that Mr Mosen’s risk of violent offending was “reactive” and “impulsive”. It would emerge in particular circumstances, such as if he relapsed into drug use or if he perceived to be threatened by a peer. The Court held that a “persistent harbouring of vengeful intention” was not shown. Consequently, it cancelled the ESO despite its concerns about Mr Mosen’s risk.³³
- 8.39 In addition, we have heard in preliminary engagement that the requirement in section 107I(2)(a) of the Parole Act that the person must have, or have had, a “pervasive pattern of sexual or violent offending” may be problematic. The concern is the way the section separates sexual and violent offending. A person’s conviction history may reveal a

³¹ *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [23]. See also *Chief Executive of Department of Corrections v Douglas* [2016] NZHC 3184 at [83] in respect of PPOs.

³² *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507.

³³ See also the difficulties in interpreting and applying s 107IAA(2)(a)(iii) expressed by te Kōti Matua o Aotearoa | High Court in *Chief Executive of the Department of Corrections v Waiti* [2019] NZHC 3256 at [36]–[39].

mixture of serious sexual and violent offending. While the offending in totality might demonstrate a pattern that demonstrates reoffending risk, separating out the sexual and violent offending may not reveal a “pervasive pattern”. In *Chief Executive of the Department of Corrections v Ihimaera*, the High Court recognised that often a wide range of offending may need to be taken into account to discern patterns of behaviour indicating reoffending risk:³⁴

Identifying a pattern in offending does not require that an offender’s previous offences be the same, or even very similar. Each case will turn on its own facts, but a unifying theme or pattern may be apparent even if the actual offences committed are quite different. For example, family violence offending often involves a very wide range of different types of offending (physical violence, sexual violence, stalking, arson, theft, burglary, destruction of property, revenge porn, and threatening text messages). If such offending is viewed without reference to the underlying relationship between the offender and victim, no pattern may be discernible. Once the offending is viewed in its wider context, however, a pattern may well emerge. For example, widely disparate offences may all be manifestations of a coercive control relationship.

Language used to describe the traits and behavioural characteristics is difficult to interpret

- 8.40 The language used in the legislative tests to describe the traits and behavioural characteristics is difficult to understand. The legislation uses phrases like “pervasive pattern of serious sexual or violent offending”, “a predilection or proclivity for serious sexual offending”, “a severe disturbance in behavioural functioning” and “persistent harbouring of vengeful intentions”. It is not apparent from our research that these terms have a recognised clinical meaning. Some of the phrases repeat similar concepts but in different language. For example, the Court of Appeal has commented that it is not easy to discern what the “proclivity for serious sexual offending” adds to the requirement that the person have a “pervasive pattern of sexual offending”.³⁵
- 8.41 In addition, the Parole Act and the Public Safety Act use some of the same terms but in different ways. For example, the Parole Act requires that a person displays “a severe disturbance of behavioural functioning” only to demonstrate they are at risk of further relevant violent offending, whereas the same characteristic is relevant to both serious sexual and violent offending under the Public Safety Act. The intended meaning is therefore obscure.
- 8.42 In the cases, counsel and the courts have struggled to interpret the legislation and have contested the proper meaning.³⁶ While the interpretation of the traits and behavioural characteristics is gradually being established by the case law, the legislation, in our view, remains unclear and inaccessible to most readers.

The focus on traits and behavioural characteristics may breach human rights law

- 8.43 The traits and behavioural characteristics may be more likely to describe people who have a disability. As we note in Chapter 3, it appears that preventive detention, ESOS and PPOs are often imposed on people who present with both diagnosed and undiagnosed brain, behavioural or mental health issues. Common presentations include autism

³⁴ *Chief Executive of Department of Corrections v Ihimaera* [2019] NZHC 19 at [34].

³⁵ *W (CA716/2018) v Chief Executive of Department of Corrections* [2019] NZCA 460 at [36].

³⁶ See for example *Chief Executive of the Department of Corrections v Waiti* [2019] NZHC 3256 at [36]–[39].

spectrum disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, traumatic brain injury, and what the cases sometimes describe as “low levels of intellectual functioning”. These types of conditions can prevent people regulating their behaviour or appreciating the consequences of their actions, which closely resemble the traits and behavioural characteristics listed in the legislation.³⁷ For example, the legislation directs the court to inquire whether the person has “limited self-regulatory capacity”,³⁸ a “lack of acceptance of responsibility or remorse for past offending”,³⁹ an “absence of understanding or concern for the impact of ... offending”⁴⁰ and “poor interpersonal relationships or social isolation or both”.⁴¹

- 8.44 A particular concern is that section 107IAA of the Parole Act and section 13(2) of the Public Safety Act require that a court may not make a finding that a person is of the sufficient risk level to impose an ESO or a PPO unless it is satisfied the person also exhibits the relevant traits and behavioural characteristics. In other words, independent of whether a person is at high risk or very high risk of committing a qualifying offence, the legislation requires the person to present the additional traits and behavioural characteristics. This could lead to a situation where a person meets the relevant risk thresholds under section 107I(2) of the Parole Act and section 13(1) of the Public Safety Act, but because they do not exhibit the traits and behavioural criteria, the court cannot make an ESO or a PPO.⁴² However, for a person who presents the same risks and, because of their disability, exhibits the traits and behavioural characteristics, the court could make an ESO or a PPO.
- 8.45 It is possible that the independent focus on the traits and behavioural characteristics may have a discriminatory effect in breach of section 19 of the NZ Bill of Rights. In addition, the focus may contravene article 14(1)(b) of the United Nations Convention on the Rights of Persons with Disabilities, which provides that the existence of a disability should not be a ground to justify a deprivation of liberty.⁴³
- 8.46 People with certain disabilities may pose risks to community safety because they may have difficulty adhering to criminal prohibitions, and some form of preventive measure may be required.⁴⁴ Human rights law, however, requires that the existence of a disability should not, of itself, be a determining factor. In our preliminary view, the primary determinant on whether the court should impose preventive measures should be the risks

³⁷ In the Cabinet Social Policy Committee Paper “Public Protection Orders: Establishing a Civil Detention Regime” (Cabinet Office Wellington, SOC (12) 16, 23 March 2012) at [108], the Ministers of Justice and Corrections recognised “[i]t is probable that [the proposed PPO regime] would primarily affect offenders of low intelligence and with intellectual disabilities”. In *Deputy Chief Executive of Department of Corrections v McCorkindale* [2020] NZHC 2484 at [24], the Court received evidence from an expert forensic psychologist that the traits and behavioural characteristics set out in s 13(2) of the Public Safety (Public Protection Orders) Act 2014 will always be met when a person has a clinical presentation of intellectual abilities that function in the borderline range and has autism spectrum issues.

³⁸ Parole Act 2002, ss 107IAA(1)(c) and 107IAA(2)(b)(ii); Public Safety (Public Protection Orders) Act 2014, s 13(2)(b).

³⁹ Parole Act 2002, s 107IAA(1)(d)(i).

⁴⁰ Public Safety (Public Protection Orders) Act 2014, s 13(2)(c).

⁴¹ Public Safety (Public Protection Orders) Act 2014, s 13(2)(d).

⁴² As, for example, was the case in *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507.

⁴³ United Nations Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

⁴⁴ Christopher Slobogin “Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law” (2015) 40 *International Journal of Law and Psychiatry* 36 at 36.

the person poses to community safety. It should not rely on an independent inquiry as to the existence or non-existence of particular traits and behavioural characteristics.

QUESTION

Q25

Do you agree with the issues we have raised concerning the traits and behavioural characteristics in the legislative tests for ESOs and PPOs?

Issues relating to the temporal elements of the legislative tests

- 8.47 The tests for preventive detention and PPOs incorporate a temporal element. For preventive detention, the court must be satisfied the person's risk of reoffending will exist if they are released at the sentence expiry date. For PPOs, the court must be satisfied that there is a very high risk of "imminent" serious sexual or violent offending if the person is released from prison or otherwise left unsupervised. The Parole Act expresses no temporal element for ESOs, although the Court of Appeal has observed that the fact an ESO may be made for up to 10 years contemplates the risk may relate to offending within that timeframe.⁴⁵
- 8.48 Studies on recidivism identify time periods in which most people who are at risk of reoffending can be expected to have reoffended. We understand that most literature considers that a period of five to seven years is most appropriate for sexual offending and two to five years for violent offending.⁴⁶ Risk assessments and tools devised for this purpose are based on these periods. They are not suited to assess risk beyond the relevant periods.
- 8.49 In our preliminary view, legislative tests that call for an assessment of whether someone poses risks of reoffending well into the future are problematic. It may be preferable for the inquiry, and the resulting term of a preventive order, to better reflect risk assessment best practice.
- 8.50 In addition, the Public Safety Act's definition of "imminent" is not purely temporal but also circumstantial. It is defined to mean the person is expected to offend as soon as they have a "suitable opportunity". We are unsure what "suitable opportunity" means in practice. As noted, the triggers for reoffending can involve complex interactions between psychological and situational factors. We are unsure whether this conception of imminence accurately reflects reoffending patterns and risk.

QUESTION

Q26

Do you agree with the issues we have identified with the legislative tests a court will apply to decide whether to impose preventive detention, an ESO or a PPO?

⁴⁵ *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [26].

⁴⁶ *Lucy Moore Literature Review – Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 15.

QUESTION**Q27**

Are there other issues relating to the legislative tests that we should consider?

CHAPTER 9

Evidence of reoffending risk

IN THIS CHAPTER, WE CONSIDER:

- matters relating to the evidence on which a court will determine whether to impose preventive detention, an extended supervision order (ESO) or a public protection order (PPO);
- issues relating to evidential matters.

INTRODUCTION

9.1 A court's decision to impose preventive detention, an ESO or a PPO is based on the likelihood the person will commit further serious sexual or violent offences. The evidence on which a court evaluates the risks a person will reoffend is therefore of central importance. Much has been written, both in Aotearoa New Zealand and overseas, on the limits of accurately predicting future offending.

THE LAW

Health assessor reports

9.2 Health assessors reports are the principal evidence on which a court will make its determination whether to impose preventive detention, an ESO or a PPO. The legislation requires these reports to be provided to the court when preventive detention is sought at sentencing,¹ or when the chief executive of Ara Poutama | Department of Corrections (chief executive) applies for an ESO² or PPO.³ The court must consider the reports.⁴

¹ Sentencing Act 2002, s 88(1)(b).

² Parole Act 2002, s 107F(2).

³ Public Safety (Public Protection Order) Act 2014, s 9.

⁴ Sentencing Act 2002, s 88(1)(b); Parole Act 2002, s 107I(2); and Public Safety (Public Protection Orders) Act 2014, s 13(1).

- 9.3 The legislation defines a “health assessor” as a registered and practising psychiatrist or psychologist.⁵
- 9.4 The Sentencing Act 2002 provides that the court must not impose preventive detention unless it has considered reports from two health assessors about the “likelihood of the offender committing a further qualifying sexual or violent offence”.⁶
- 9.5 The New Zealand Parole Board will consider reports from psychologists and psychiatrists on the risks to the community presented by a person sentenced to preventive detention when deciding whether to direct their release on parole.
- 9.6 For ESOs, the Parole Act 2002 requires the chief executive to accompany an ESO application with only one health assessor report (although, in practice, more than one is often provided).⁷ The report must address:⁸
- (a) whether the person displays each of the traits and behavioural characteristics set out in section 107IAA; and
 - (b) whether there is a high risk that the person will in future commit a relevant sexual offence or a very high risk they will commit a relevant violent offence.
- 9.7 For PPOs, the Public Safety (Public Protection Orders) Act 2014 (Public Safety Act), like the Parole Act, requires the chief executive to accompany an application for a PPO with two reports from health assessors, one of whom must be a registered psychologist.⁹ The reports must address whether the person exhibits the traits and behavioural characteristics described in section 13(2) and whether there is a very high risk of imminent serious sexual or violent offending by the person.¹⁰
- 9.8 For the purposes of ESO and PPO proceedings, a court may receive any evidence, whether or not it would be admissible in a court of law.¹¹ Rules relating to privilege and confidentiality, however, remain for PPO proceedings.¹²

Health assessment in practice

- 9.9 Health assessors use a mixture of risk assessment tools and clinical judgement to provide an individualised formulation of risk.¹³
- 9.10 Actuarial risk assessment tools have been developed from statistical analysis identifying a list of risk factors linked with offending. Those factors may be “static” or “dynamic” depending on whether they are amenable to change. Clinicians use the tools to create a risk score based on the extent to which the individual displays the risk factors identified in the tool. Some tools are specifically focused on sexual recidivism risk or violent

⁵ Sentencing Act 2002, s 4; Parole Act 2002, s 107F(2); and Public Safety (Public Protection Orders) Act 2014, s 3.

⁶ Sentencing Act 2002, s 88(1)(b).

⁷ Parole Act 2002, s 107F(2).

⁸ Parole Act 2002, s 107F(2A).

⁹ Public Safety (Public Protection Orders) Act 2014, s 9(a).

¹⁰ Public Safety (Public Protection Orders) Act 2014, s 9(b).

¹¹ Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108(1).

¹² Public Safety (Public Protection Orders) Act 2014, s 108(2).

¹³ *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [50]–[54]. See also “Risk Assessment Methodology and Best Practice” in Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [PA1071.05].

recidivism risk respectively. Other tools are focused more on personality traits and characteristics and can be used to add additional context to an individual's risk profile. The following table sets out common risk assessment tools and the acronyms by which they are often referred.¹⁴

ACTUARIAL RISK ASSESSMENT TOOLS			
Risk assessment tools for sexual offending	Risk assessment tools for violent offending	General recidivism	Risk assessment tools focused on personality traits
Automated Sexual Recidivism Scale – Revised (ASRS-R) Static-99-R Violence Recidivism Scale – Sex Offender Version (VRS:SO)	Violence Risk Scale (VRS)	Risk of Conviction [multiplied by] Risk of Imprisonment (RoC*RoI) Dynamic Risk Assessment of Offender Re-entry (DRAOR)	Psychopathy Checklist – Revised (PCL)

- 9.11 Clinical judgement will draw on additional individual factors relevant to reoffending.¹⁵ Those factors may be based on evidence obtained from validated sources and sometimes based on clinical experience. They may address situational and environmental factors relevant to the individual.¹⁶ Clinical judgement is particularly important for evaluations about the nature, severity and imminence of likely reoffending because, as noted below, these are matters that actuarial risk assessment tools cannot predict.¹⁷ Clinical judgement is also predominantly used to address whether a person displays the traits and behavioural characteristics required to impose an ESO or a PPO.
- 9.12 Empirically validated actuarial tools form the foundation of risk assessment for health assessor reports. They have proven to be more accurate than non-structured clinical assessments.¹⁸ Yet, as we discuss below, there are several limitations with risk assessment tools. An overall individualised formulation of risk should be based on the results from actuarial tools integrated with clinical judgement on additional factors.

¹⁴ Armon Tamatea, Nick Lascelles and Suzanne Blackwell “Psychological Reports for the Courts on Persons Convicted of Criminal Offending” in Fred Seymour, Suzanne Blackwell and Armon Tamatea (eds) *Psychology and the Law in Aotearoa New Zealand* (4th ed, Rōpū Mātai Hinengaro o Aotearoa | New Zealand Psychological Society, Wellington, 2022) 201 at 213 (Table 1); and Lucy Moore *Literature Review – Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 13.

¹⁵ Lucy Moore *Literature Review – Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 18.

¹⁶ Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 98–99.

¹⁷ Lucy Moore *Literature Review – Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 18.

¹⁸ *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [16]. For an overview of the transition of the criminal justice and correction system from psychological professional judgement to evidence-based tools for predicting reoffending, see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005) at 24–26 and 33–38.

ISSUES

Limitations of risk assessment tools

9.13 Criticism of risk assessment features strongly in the commentary on preventive detention, ESOs and PPOs. In particular, there are objections that risk assessment is inaccurate because of the limitations of risk assessment tools. In the following paragraphs, we set out some of the main concerns about risk assessment tools as they are described in the case law and commentary before providing a preliminary view on the issues.

Risk assessment tools do not assess individualised risk

9.14 Actuarial risk assessment tools are based on the reoffending outcomes for a group sharing the characteristics of a particular offender. A risk score is a categorisation of a person based on the extent to which they share characteristics with similar offenders. It does not give insight into the propensity of the individual in question to commit an offence.¹⁹

Risk assessment tools do not predict the severity or imminence of future offending

9.15 Risk assessment tools are developed using reoffending rates from the sample population within a set timeframe from release from prison. A risk assessment tool can show that the person shares characteristics with people from the sample population known to have reoffended within the timeframe used to select the sample population data.²⁰ Beyond that, the results of a risk assessment will not provide evidence as to how severe or how imminent any possible reoffending may be.²¹

Problems can arise from using unsuitable sample data

9.16 Risk assessment tools are only as useful as the data on which they have been developed.²² Issues can arise if the sample data is unreliable or not representative of the population of Aotearoa New Zealand. This concern is particularly relevant to the preventive regimes. Because serious offending is rarer than lower-level offending, sample population datasets are relatively small and consequently risk scores are less accurate.²³

¹⁹ New South Wales Sentencing Council *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (May 2012) at [2.75]; Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 94; and Kris Gledhill “Preventive Sentences and Orders: The Challenges of Due Process” (2011) 1 *Journal of Commonwealth Criminal Law* 78 at 86.

²⁰ Kris Gledhill “Preventive Sentences and Orders: The Challenges of Due Process” (2011) 1 *Journal of Commonwealth Criminal Law* 78 at 86; and Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 97.

²¹ Lucy Moore *Literature Review — Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture / Law Commission* (2023) at 18; and Armon Tamatea, Nick Lascelles and Suzanne Blackwell “Psychological Reports for the Courts on Persons Convicted of Criminal Offending” in Fred Seymour, Suzanne Blackwell and Armon Tamatea (eds) *Psychology and the Law in Aotearoa New Zealand* (4th ed, Rōpū Mātai Hinengaro o Aotearoa | New Zealand Psychological Society, 2022) 201 at 222.

²² Stephen Gottfredson and Laura Moriarty “Statistical Risk Assessment: Old Problems and New Applications” (2006) 52 *Crime and Delinquency* 178 at 183; and Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 94–95.

²³ Stephen Gottfredson and Laura Moriarty “Statistical Risk Assessment: Old Problems and New Applications” (2006) 52 *Crime and Delinquency* 178 at 184; and James Ogloff and Michael Davis “Assessing Risk for Violence in the Australian

Additionally, the risk factors relating to lower-level offending, which occurs more frequently, may be overrepresented by the tool. This may give individuals with the same risk factors as repeat low-level offenders the appearance of a higher risk profile.²⁴

Risk assessment tools may be biased against Māori

- 9.17 Similarly, there is a danger that a sample population affected by racial bias will perpetuate racially disparate risk profiling.²⁵ In *Ewart v Canada*, the Supreme Court of Canada held that risk assessment tools were not sufficiently accurate when applied to Canada’s indigenous populations.²⁶ This was a concern given the growing gap between how indigenous and non-indigenous offenders were treated in the criminal justice system. Similar arguments have been raised in Australia.²⁷
- 9.18 The issue has been raised in Aotearoa New Zealand in relation to Māori. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (the Tribunal) has heard a complaint that tools in Aotearoa New Zealand unfairly capture Māori.²⁸ While finding that the development of the tools breached some principles of te Tiriti o Waitangi | Treaty of Waitangi, the Tribunal was unable to conclude on the evidence that prejudice had been caused. However, it is now generally accepted that racism and unconscious bias exists within the criminal justice and corrections system as a whole.²⁹ The overrepresentation of Māori, their experience of racism and negative stereotyping and other issues of systemic disadvantage, may promote lifestyle choices that are more likely to correlate with risk factors identified in some tools.³⁰ For example, Māori are more likely to have family and friends who have had involvement with the criminal justice system meaning that, for some risk assessment tools that include a focus on peer associations, they may receive a higher risk score.³¹ There is an increasing recognition that an accurate understanding of a person’s risk needs to assess the person in their individual cultural context.

Context” in D Chappell and P Wilson (eds) *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, Chatswood, 2005) 294 at 306.

²⁴ Lucy Moore *Literature Review — Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 15.

²⁵ See Colin Gavaghan, Alistair Knott, James MacLaurin, John Zerilli, Joy Liddicoat *Government Use of Artificial Intelligence in New Zealand* (New Zealand Law Foundation, 2019) at 56–57; Oliver Fredrickson “Risk Assessment Algorithms in the New Zealand Criminal Justice System” (2020) NZLJ 328 at 330; and Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 95.

²⁶ *Ewart v Canada* [2018] SCC 30, [2018] 2 S.C.R. 165

²⁷ *Attorney-General (Qld) v McLean* [2006] QSC 137 at [26]; *Attorney-General (Qld) v George* [2009] QSC 2 at [33]; and *Director of Public Prosecutions (WA) v Samson* [2014] WASC 199 at [50]–[51].

²⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005).

²⁹ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (2019) at 12, and Oliver Fredrickson “Risk Assessment Algorithms in the New Zealand Criminal Justice System” (2020) NZLJ 328 at 330.

³⁰ See generally Armon Tamatea “Culture is our business: Issues and challenges for forensic and correctional psychologists” (2017) 49(5) *Australian Journal of Forensic Sciences* 564; and Oliver Fredrickson “Risk Assessment Algorithms in the New Zealand Criminal Justice System” (2020) NZLJ 328 at 330.

³¹ Darcy J Coulter, Caleb D Lloyd and Ralph C Serin “Psychometric Properties of a Risk Tool Across Indigenous Māori and European Samples in Aotearoa New Zealand: Measurement Invariance, Discrimination, and Calibration for Predicting Criminal Recidivism” (2023) *Assessment* 1 at 13. Note that the study found that although Māori assessed by the DRAOR tool were more readily scored as having “slight/possible problem” in connection to “peer associations”, New Zealand Europeans were more likely to be assessed as having “definite problems”.

Risk assessment tool results may not be adequately scrutinised

- 9.19 Because of the technical nature of the psychological evidence presented through risk assessment tools, the court may not adequately scrutinise the evidence. There have been instances where the courts have accepted the conclusions generated from the risk assessment tools without inquiring into whether the risk results are sufficiently accurate.³²
- 9.20 Relatedly, confusion can arise because risk assessment tools may not align with the legislative tests of the preventive regimes.³³ Despite receiving the highest risk categorisation under a particular assessment tool, a person may not be of sufficiently high risk to satisfy the statutory thresholds. For example, we understand that most tools used in connection with sexual offending would designate a person as being in the highest risk category if they were considered to have a 30–40 per cent chance of reoffending within five years, and 40–50 per cent within 10 years.³⁴ In the context of PPOs, *te Kōti Matua | High Court* has recently explained that being placed in the highest clinical risk category itself does not establish that the person is at very high risk of imminent sexual offending.³⁵ It cautioned that the different appreciations of risk between risk assessment tools and the legislative thresholds is a limitation on the utility of risk assessment tools.³⁶ The Court said it was instead reliant on wider assessment and clinical judgement provided by expert psychological and psychiatric opinions that address the statutory tests.³⁷

Our preliminary views

- 9.21 The limitations of risk assessment tools described above have justifiably attracted much criticism. Risk assessment tools can be misused and there have been isolated instances where the courts have not properly scrutinised results generated from the tools.
- 9.22 Our preliminary view, however, is that law reform is not needed. Rather, we consider the limitations can be appropriately addressed as matters of practice within the current legal framework.
- 9.23 In the first instance, the relevant bodies, including *Ara Poutama | Department of Corrections*, must continue to take responsibility for ensuring risk assessment tools are used in the appropriate way. They can ensure risk assessment tools are regularly updated and validated for the relevant populations on which they are used. We recognise that *Ara Poutama* takes steps to recalibrate and validate the tools.³⁸ We would expect that, if a

³² See *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [56], which described the lower Court's decision to impose an ESO as giving "sparse" reasons for the ESO, which gave rise to concerns the health assessor's report had been merely "referred to" and "rubber stamped". See too *Barr v Chief Executive of the Department of Corrections* CA60/06, 20 November 2006 at [32] and Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 103–104.

³³ Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 95.

³⁴ Lucy Moore *Literature Review — Risk Assessment of Serious Offending Commissioned by Te Aka Matua o te Ture | Law Commission* (2023) at 8.

³⁵ *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [146].

³⁶ *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [151].

³⁷ *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [152].

³⁸ See for example Peter Johnston "Assessing Risk of Re-Offending: Recalibration of the Department of Corrections' Core Risk Assessment Measure" (2021) 8 *The New Zealand Corrections Journal* 13.

tool has not been adequately updated, this would be reflected in the health assessor's report and be properly considered by the court.³⁹

- 9.24 When the results of risk assessment tools are used to formulate health assessor reports, the courts have communicated how they expect the evidence to be presented to the court.⁴⁰ The limitations of the relevant tools should be communicated to the court. In addition, it is important that the results produced by risk assessment tools are integrated with other relevant information known to relate to the risk the particular individual will reoffend. All information should be used to formulate a clinical assessment of risk so results from the tools are not considered in isolation.⁴¹
- 9.25 Health assessor reports should be tested appropriately by opposing counsel and the judge. The case law shows that judges, opposing counsel or the psychologists presenting the evidence routinely note the limitations with risk assessment tools and, as a result, what weight ought to be given to the results generated from the tools.⁴² Instances where this has not occurred have been corrected on appeal.⁴³
- 9.26 We are concerned at the possibility that tools could be inappropriate for use on Māori and may perpetuate racial bias. As concluded by the Tribunal, however, there is limited evidence to test the extent of the issue. We are mindful of the increasing awareness of racial bias within the criminal justice and corrections system. We note the introduction of the *Algorithm Charter for Aotearoa New Zealand* in which government agencies committed to carefully manage algorithms, including to prevent unintended bias and reflect the principles of the Treaty.⁴⁴ We also note that Ara Poutama is taking steps to validate its tools specifically for Māori. However, in light of the absence of evidence, and because of the increasing awareness of the need to eradicate aspects of risk assessment that disadvantage Māori, we are interested to hear from submitters about this issue and what, if any, reform may be needed.

QUESTION

Q28

Do you agree with the issues we have identified regarding evidential matters and our preliminary conclusion that legislative reform is not generally needed to address these issues?

³⁹ In *Miller v Department of Corrections* [2021] NZHC 983 at [34]–[37] the Court found that the results from the tools, particularly the VRS-SO tool, were likely to have exaggerated Mr Miller's reoffending risk because they were drawn from sample data that did not reflect more recent studies showing that rates of sexual recidivism were declining.

⁴⁰ *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [50]–[54]. See also Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 97–103.

⁴¹ *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [51]. See also Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 97–103.

⁴² See for example *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [22]; *Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32 at [201]; *Chief Executive of the Department of Corrections v Salmon* [2021] NZHC 118 at [39]–[40], and *Miller v Department of Corrections* [2021] NZHC 983 at [35]–[36].

⁴³ *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [56]; and *Barr v Chief Executive of the Department of Corrections* CA60/06, 20 November 2006.

⁴⁴ *Algorithm Charter for Aotearoa New Zealand* (Tauranga Aotearoa | Stats NZ, July 2020) at 1 and 3.

QUESTION**Q29**

Do you think the possibility that risk assessment tools may be inappropriately used on Māori is an issue requiring reform? If so, why, and what reforms should be implemented?

There is insufficient attention to the views of whānau, hapū and iwi

- 9.27 In our preliminary engagement, we heard a clear desire among Māori to take greater responsibility for managing people subject to preventive measures with whom they have a whakapapa or cultural connection. We discuss this issue in Chapter 2 and note that the law could place greater priority on enabling people to be safely managed with Māori-designed and Māori-led initiatives. Through these initiatives, Māori could be managed in ways that better enable Māori to act in accordance with tikanga.
- 9.28 A related point we encountered during initial engagement was that, when a court considers whether to impose preventive detention, an ESO or a PPO, the person's whānau, marae, hapū or iwi ought to have an opportunity to provide information to the court. The submissions these groups may make could provide valuable assistance to the court such as:
- (a) providing relevant information about the person's background and cultural context;
 - (b) providing insight, including in terms of the relevant tikanga, on the risks posed by the person, whether preventive detention, an ESO or a PPO is appropriate and, if so, on what terms; and
 - (c) if the law was to better enable Māori to take responsibility for the management of people subject to preventive measures, providing views on what possible management options are available and appropriate.
- 9.29 We recognise that some Māori may not be connected to their whānau, hapū, marae or iwi. There are, however, other ways the court could receive the information it needs about the person and their cultural context. For instance, some Māori may have a shared sense of whānau identity around a particular kaupapa. People with this shared sense of whānau identity could speak to the court. Alternatively, a person could be appointed to provide information on cultural matters relating to the person, perhaps similar to cultural reports under section 27 of the Sentencing Act.
- 9.30 The current law provides some opportunities for relevant groups and individuals to address the court when it is considering whether to impose preventive detention, an ESO or a PPO. Section 27 of the Sentencing Act provides avenues for the court to hear a person or persons on various matters relating to an offender's whānau and cultural background. This process will apply for preventive detention. Section 107H(2) of the Parole Act provides that, at the hearing of an ESO application, the court may receive and take into account any evidence or information that it thinks fit for the purpose of determining the application, whether or not it would be otherwise admissible. Section 108(1) of the Public Safety Act provides that, in any proceedings regarding PPOs, a court may receive as evidence any statement, document, information or matter that it considers relevant, whether or not it would be otherwise admissible.

- 9.31 Our preliminary view is that these provisions could be strengthened. The legislation could place greater emphasis on enabling relevant groups or individuals to provide information to the court. The legislation could also provide more detail on how the information may be relevant to the decision on whether to impose preventive detention, an ESO or a PPO. Cultural input, especially from the whānau themselves, will be highly relevant. In particular, their views can provide important cultural information about the individual and their risks of reoffending, given the limitations of risk assessment tools discussed above. Further, as noted above and as we discuss further in Chapter 10, the law could give greater priority for Māori to be managed in Māori-designed and Māori-led initiatives. The law could require the court to take into account the views of the person's whānau, or a group with whom the person shares a sense of whānau identity about whether this would be a suitable way of managing the person.
- 9.32 Enabling greater participation of Māori in this way may better facilitate tino rangatiratanga. Considering the disproportionate representation of Māori among those subject to preventive detention and ESOs, greater participation may be in line with the principles of partnership and active protection under the Treaty.
- 9.33 In Chapter 12, we present proposals for reform in further detail for feedback.

QUESTION

Q30

Do you think that the legislation should promote opportunities to address the court or provide information to the court for the person's whānau, hapū or iwi or any person who has a shared sense of whānau identity around a particular kaupapa with the person?

Part Five:

Management of people on preventive detention, extended supervision orders and public protection orders

CHAPTER 10

Conditions and management in the community

IN THIS CHAPTER, WE CONSIDER:

- standard and special conditions of parole (where a person sentenced to preventive detention has been released from imprisonment) and extended supervision orders (ESOs);
- how these conditions are imposed; and
- issues relating to these conditions.

THE LAW

Preventive detention

- 10.1 A person subject to preventive detention will remain in prison unless they are granted release on parole by direction of the New Zealand Parole Board (Parole Board) once they are eligible.
- 10.2 If a person subject to preventive detention is released on parole, that person is:
- (a) subject to the standard release conditions for the rest of their life (unless the Parole Board varies or discharges the conditions);¹
 - (b) subject to any special conditions imposed by the Parole Board, which remain in force for the period that the Parole Board specifies;² and

¹ Parole Act 2002, s 29(4)(b). The Parole Board may vary or discharge a condition under s 58 upon application by the offender or their probation officer.

² Parole Act 2002, s 29AA(2).

- (c) subject to recall to prison for the rest of their life.³

Standard release conditions

- 10.3 Standard release conditions apply to every person who is released on parole from a sentence of imprisonment.⁴ While these conditions apply to a person subject to preventive detention for the rest of their life (unless varied or discharged), they only apply to people who are on parole from a determinate sentence of imprisonment for a maximum of six months after their statutory release date.⁵
- 10.4 The Parole Act 2002 does not prescribe the purpose of parole or of release conditions. According to the Parole Board, parole aids reintegration, provides people with an incentive not to reoffend and “encourages people to address their offending and its causes, to rehabilitate themselves to live in society without being a risk to the community”.⁶
- 10.5 Section 14 of the Parole Act sets out the standard release conditions:⁷
- (a) the offender must report in person to a probation officer in the probation area in which the offender resides as soon as practicable, and not later than 72 hours, after release:
 - (b) the offender must report to a probation officer as and when required to do so by a probation officer, and must notify the probation officer of his or her residential address and the nature and place of his or her employment when asked to do so:
 - (c) the offender must not move to a new residential address in another probation area without the prior written consent of the probation officer:
 - (d) if consent is given under paragraph (c), the offender must report in person to a probation officer in the new probation area in which the offender is to reside as soon as practicable, and not later than 72 hours, after the offender’s arrival in the new area:
 - (e) if an offender intends to change his or her residential address within a probation area, the offender must give the probation officer reasonable notice before moving from his or her residential address (unless notification is impossible in the circumstances) and must advise the probation officer of the new address:
 - (f) the offender must not reside at any address at which a probation officer has directed the offender not to reside:
 - (fa) the offender must not leave or attempt to leave New Zealand without the prior written consent of a probation officer:
 - (fb) the offender must, if a probation officer directs, allow the collection of biometric information:
 - (g) the offender must not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the offender not to engage or continue to engage:

³ Parole Act 2002, s 6(4)(d).

⁴ Parole Act 2002, s 29(1).

⁵ Parole Act 2002, s 29(3).

⁶ New Zealand Parole Board “What we do” (accessed December 2022) <paroleboard.govt.nz>.

⁷ Parole Act 2002, s 14(1).

- (h) the offender must not associate with any specified person, or with persons of any specified class, with whom the probation officer has, in writing, directed the offender not to associate;
 - (i) the offender must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.
- 10.6 Standard release conditions apply automatically — the Parole Board has no discretion whether or not to impose them. However, as we discuss in Chapter 11, standard conditions may be varied or discharged.
- 10.7 As can be seen from the conditions listed above, almost all the standard release conditions give a person's probation officer broad discretion as to how to carry out the conditions in practice.

Special release conditions

- 10.8 The Parole Board has discretion to impose special release conditions upon a person released on parole.⁸ This may be done at a parole hearing or at any later time upon application by the person subject to release conditions or by a probation officer.⁹
- 10.9 The Parole Act sets out a non-exhaustive list of the kinds of special conditions that may be imposed. They include conditions relating to:¹⁰
 - (a) directing where the person lives;
 - (b) curfews;
 - (c) prohibiting the person from consuming alcohol or drugs;
 - (d) preventing the person from associating with any person or class of persons;
 - (e) requiring the person to take prescription medication;¹¹
 - (f) requiring the person to participate in programmes to reduce the risk of further offending;
 - (g) prohibiting a person from entering specified places or areas; and
 - (h) requiring the person to submit to electronic monitoring.
- 10.10 A special release condition must not be imposed unless it is designed to:¹²
 - (a) reduce the risk of the person reoffending;
 - (b) facilitate or promote the person's rehabilitation and reintegration; or
 - (c) provide for the reasonable concerns of victims of the person.
- 10.11 When making decisions about special release conditions, the Parole Board must be guided by:

⁸ Parole Act 2002, s 29AA(1).

⁹ Parole Act 2002, s 56.

¹⁰ Parole Act 2002, s 15(3).

¹¹ A special release condition requiring a person to take prescription medication may only be imposed if the person gives informed consent to taking the medication. Withdrawing consent to take the prescription medication is not a breach of parole conditions, but failure to take the medication may give rise to a ground for recall to prison: Parole Act 2002, s 15(4) and (5).

¹² Parole Act 2002, s 15(2).

- (a) the “paramount consideration”, which is the safety of the community;¹³ and
 - (b) the principle that people “must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community.”¹⁴
- 10.12 Before the hearing, the Parole Board is provided with information about the person they are considering, including the following:
- (a) Copies of all relevant information relating to the person’s convictions, such as sentencing notes and pre-sentence reports.¹⁵
 - (b) A report from Ara Poutama | Department of Corrections (Ara Poutama) about the person.¹⁶ The legislation does not set out what information the report should contain, but it is likely to include information about the person, their risk of reoffending, their progress in prison, a release proposal, proposed special conditions for release and the rationale for each special condition.¹⁷
 - (c) A psychological report about the person, focusing on risk, rehabilitation needs, reintegration needs and commenting on the proposed release conditions.¹⁸
 - (d) Where available, other reports such as forensic psychiatric reports, private psychological reports and psychological treatment reports.¹⁹
- 10.13 The person subject to preventive detention is entitled to appear at the hearing and make oral and written submissions to the Parole Board on whether the Board should impose special conditions.²⁰ The person may be represented by a lawyer.²¹

¹³ Parole Act 2002, s 7(1).

¹⁴ Parole Act 2002, s 7(2)(a).

¹⁵ Parole Act 2002, s 43(1)(a).

¹⁶ Parole Act 2002, s 43(1)(c).

¹⁷ Memorandum of Understanding between the New Zealand Parole Board and the Department of Corrections (December 2012) at 8; Tumuaki o te Mana Arotake | Controller and Auditor-General *Department of Corrections: Managing Offenders on Parole – Performance Audit Report* (Ara Poutama | Department of Corrections, February 2009); Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 1.

¹⁸ Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 1.

¹⁹ Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 1.

²⁰ Section 49(3)(a) of the Parole Act 2002 entitles the person to appear and make oral submissions. The Parole Board also always provides the person with an opportunity to make written submissions: Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 1.

²¹ Section 49(3)(c) of the Parole Act 2002 entitles the person to be represented by counsel with leave of the Parole Board. In practice, the Parole Board always grants leave to persons who are subject to preventive detention: Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 1.

- 10.14 A member of Ara Poutama staff with knowledge of the person — usually their case manager — also attends parole hearings in order to provide information to the Parole Board as required.²²
- 10.15 The Parole Board must take all reasonable steps to notify every victim that a hearing is to be held and to provide them with information about how they may participate in the process.²³ Each victim must be provided with certain information about the person on request and may appear at the hearing and make oral submissions to the Parole Board.²⁴

Extended supervision orders

- 10.16 Under an ESO, a person subject to:
- (a) standard extended supervision conditions; and
 - (b) any special extended supervision conditions imposed by the Parole Board.

Standard extended supervision conditions

- 10.17 When the court imposes an ESO, the standard extended supervision conditions set out in the Parole Act apply.²⁵ These conditions apply for the term of the ESO unless varied or discharged by the Parole Board.²⁶
- 10.18 Standard extended supervision conditions largely mirror the standard release conditions that apply to a person on parole, with the addition of the following conditions:²⁷
- (a) The person must not associate with, or contact, a person under the age of 16 years, except with the prior written approval of a probation officer and in the presence and under the supervision of an adult who has been informed about the relevant offending and who has been approved in writing by a probation officer as suitable to undertake the role of supervision.
 - (b) The person must not associate with, or contact, a victim of their offending without the prior written approval of a probation officer.
 - (c) The person must not associate with, or contact, any person or class of person specified in a written direction given to the person.
- 10.19 As with standard parole release conditions, standard extended supervision conditions apply automatically and there is no discretion as to whether to apply them to an individual. However, standard extended supervision conditions can be varied by the Parole Board upon application by the person subject to the ESO or a probation officer.²⁸ We discuss variation of conditions in Chapter 11.

²² Memorandum of Understanding between the New Zealand Parole Board and the Department of Corrections (December 2012) at 9.

²³ Parole Act 2002, ss 43(2)(b) and 43(3).

²⁴ Parole Act 2002, ss 44 and 49(4)(a).

²⁵ Parole Act 2002, s 107J.

²⁶ Parole Act 2002, s 107J(2) and s 107O.

²⁷ Parole Act 2002, s 107JA(1).

²⁸ Parole Act 2002, s 107O(1).

10.20 Almost all of the standard conditions allow a person's probation officer broad discretion as to how to carry out the condition in practice. We discuss this further below.

Special extended supervision conditions

10.21 While the ESO is made by the court, special extended supervision conditions are generally imposed by the Parole Board. The Parole Board may impose special conditions at any time during an ESO, upon an application by a probation officer or the chief executive of Ara Poutama (chief executive).²⁹ The court may, however, impose special extended supervision conditions on an interim basis at the time it makes an ESO if satisfied that there may not be sufficient time before the ESO comes into force for the Parole Board to determine which (if any) special conditions should be imposed.³⁰

10.22 The Parole Board may impose the same special conditions on a person subject to an ESO as it is entitled to impose on a person on parole – these conditions are discussed above. The imposition of special extended supervision conditions is also subject to the same test – a special extended supervision condition must not be imposed unless it is designed to:³¹

- (a) reduce the risk of reoffending;
- (b) facilitate or promote the person's rehabilitation and reintegration; or
- (c) provide for the reasonable concerns of victims.

10.23 If the Parole Board is considering imposing special extended supervision conditions, it must notify the person subject to the ESO and all victims of that person.³² The person subject to the ESO and any victims are entitled to make written submissions to the Parole Board on whether special conditions should be imposed, what the conditions should be and their duration.³³

10.24 The Parole Act only allows the person subject to the ESO and any victims to appear and make oral submissions if granted leave by the Parole Board.³⁴ There is no statutory entitlement for the person subject to the ESO to be represented by a lawyer at the hearing. In practice, the Parole Board always holds an oral hearing and allows the person subject to the ESO to be represented by a lawyer who may make submissions.³⁵

10.25 The Parole Board is provided with all the information that was provided to the court that granted the ESO, as well as a report from Ara Poutama that identifies the special conditions sought and the rationale for each.³⁶

²⁹ Parole Act 2002, s 107K. The exception is intensive monitoring conditions, which are discussed further below.

³⁰ Parole Act 2002, s 107IAC(1).

³¹ Parole Act 2002, s 15(2).

³² Parole Act 2002, s 107K(6).

³³ Parole Act 2002, s 107K(7).

³⁴ Parole Act 2002, s 107K(7).

³⁵ Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 2.

³⁶ Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 2.

- 10.26 When imposing special extended supervision conditions, the Parole Board must specify the duration of the conditions. With certain exceptions, conditions can apply for the full term of the ESO or for any lesser period.³⁷ Any residential restrictions and any intensive monitoring condition (both discussed below) may only apply within the first 12 months of an ESO.³⁸ Other restrictions on the use of certain special conditions are discussed later in this chapter.

Intensive monitoring conditions

- 10.27 An intensive monitoring (IM) condition is a particular kind of special extended supervision condition that is imposed by a different process to the other conditions.

- 10.28 An IM condition is:³⁹

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.

- 10.29 Unlike other special conditions, the Parole Board cannot impose an IM condition unless directed by the court. At the time of making an ESO application, the chief executive may also apply for an order requiring the Parole Board to impose an IM condition.⁴⁰ The court does not impose the IM condition — rather, it makes an order requiring the Parole Board to impose the IM condition.⁴¹

Interim supervision orders

- 10.30 If an ESO application has been made, the court can make an interim supervision order (ISO) for the period from when the person who is the subject of the order is released from detention (or ceases to be subject to an existing ESO) until the application for the ESO is finally determined.

- 10.31 There are no standard conditions that automatically apply to an ISO. The court may impose any of the standard or special conditions that may be imposed under an ESO, including IM conditions or residential restrictions.⁴² Unlike for an ESO, any special conditions are imposed by the court, rather than by the Parole Board. These conditions remain in place until the ESO application is finally determined.⁴³

Public protection orders

- 10.32 If a public protection order (PPO) is cancelled, the court must impose a protective supervision order (PSO) on the person. A PSO allows the court to impose conditions similar to parole conditions.

³⁷ Parole Act 2002, s 107K(3)(a).

³⁸ Parole Act 2002, ss 107K(3)(b) and 107K(3)(ba).

³⁹ Parole Act 2002, s 107IAC(2).

⁴⁰ Parole Act 2002, s 107IAB.

⁴¹ Parole Act 2002, s 107IAC(1).

⁴² Parole Act 2002, s 107FA(3).

⁴³ Or discontinued: Parole Act 2002, s 107FA(6).

10.33 As far as we are aware, no PSOs have been imposed to date, and consequently, there have been no major issues identified in cases and commentary. PSOs will not be discussed in this chapter, but we welcome feedback on any issues relating to PSO conditions.

ISSUES

10.34 As noted at the start of this chapter, when a person subject to preventive detention is released from prison on parole, they are subject to the same standard conditions that apply to any other person released on parole from a sentence of imprisonment. However, where we discuss issues with release conditions in this chapter, our focus is on release conditions as they apply to a person who has been sentenced to preventive detention. We do not intend to comment on the operation of parole conditions generally.

Insufficient priority on enabling Māori-designed and Māori-led initiatives

10.35 As we discuss in Chapter 2, we consider good law in this area should give effect to obligations under te Tiriti o Waitangi | Treaty of Waitangi and enable Māori to live in accordance with tikanga Māori, should they wish to do so.

10.36 Our preliminary engagement with Māori emphasised the desire for Māori participation in the design and delivery of responses to the risks of reoffending by people convicted of serious crimes. We have heard that Māori-led rehabilitation should be able to occur in a fundamentally Māori context. It cannot be dictated by legislation or delivered in a kāwanatanga context. We have heard that the law should create space to enable Māori-designed, Māori-led responses to risk and to allow Māori to exercise responsibility.

10.37 We have heard that there are currently limited opportunities for Māori groups to exercise responsibility for managing people in the community on parole (from sentences of preventive detention) or ESOs.

10.38 In our preliminary view, the current law relating to parole conditions and extended supervision conditions could better provide for Māori-designed and Māori-led initiatives by:

- (a) requiring the Government to instigate, support and resource the development of Māori-designed and Māori-led initiatives; and
- (b) requiring the Parole Board or court, when imposing conditions, to consider whether and how a person can access Māori-designed and Māori-led initiatives.

10.39 We note that Ara Poutama is making operational and strategic changes in accordance with *Hōkai Rangī*, its strategy to improve outcomes for Māori in the corrections system and reduce the disproportionate effect of the corrections system on Māori.⁴⁴ Some of the aims of the strategy relate to resourcing and supporting the development of kaupapa Māori responses to administering sentences and delivering treatment and support.⁴⁵

10.40 We consider that a statutory obligation to instigate, support and resource these initiatives would give better effect to the Crown's Treaty obligations to facilitate tino rangatiratanga

⁴⁴ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 4.

⁴⁵ Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 25.

through partnership and developing options.⁴⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has also emphasised that the principle of active protection requires priority to be given and sufficient resources and effort to be deployed to support Māori-led initiatives.

- 10.41 A statutory obligation would also better enable the Parole Board, courts and probation officers to consider Māori initiatives when imposing special conditions or managing conditions.
- 10.42 Currently, the legislation allows the Parole Board and probation officers to consider Māori initiatives when imposing special conditions or when managing conditions, where those initiatives are available. For example:
- (a) The Parole Board may impose conditions requiring a person to participate in a rehabilitation and reintegration programme — a “programme” includes cultural programmes and placement in the care of an appropriate person or agency such as an iwi, hapū, whānau, marae or cultural group.⁴⁷
 - (b) When exercising powers and duties, probation officers must take into account the principles of the Corrections Act 2004 so far as is practicable in the circumstances. One of these principles is:⁴⁸
 - in order to reduce the risk of reoffending, the cultural background, ethnic identity, and language of offenders must, where appropriate and to the extent practicable within the resources available, be taken into account—
 - (i) in providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community; and
 - (ii) in sentence planning and management of offenders
- 10.43 However, the Parole Board has no control over funding or what initiatives are available. Probation officers are also restricted by the resources available.
- 10.44 The legislation does not currently require the Parole Board or court to consider Māori-designed and Māori-led initiatives when imposing special conditions. In our preliminary engagement, we have heard from the Parole Board that it is highly supportive of organisations providing kaupapa Māori responses to those on parole.⁴⁹ However, we consider that a legislative requirement could better accord with the Crown’s Treaty obligations.
- 10.45 We discuss proposals for reform further in Chapter 12 where we present proposals to facilitate tino rangatiratanga and enable Māori to live according to tikanga.

⁴⁶ Ara Poutama | Department of Corrections has proposed amendments to the Corrections Act 2004 to strengthen the approach in *Hōkai Rangī*. The Cabinet Social Wellbeing Committee has agreed to introduce some of these amendments to the Corrections Act, including incorporating three new principles derived from the principles of the Treaty that would, so far as reasonably practicable, support the Corrections system to provide for equitable outcomes for Māori, engage and work with Māori and promote the wellbeing of Māori and other people: Cabinet Social Wellbeing Committee *Minute of Decision: Amendments to the Corrections Legislative Framework: Improving Safety, Rehabilitation and Reintegration Outcomes* (Cabinet Office Wellington, SWC-22-MIN-0244, 14 December 2022).

⁴⁷ Parole Act 2002, ss 15(3)(b) and 16. The person or agency must be approved by the chief executive.

⁴⁸ Corrections Act 2004, s 6(1)(c).

⁴⁹ Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 2.

Insufficient priority on providing for the operation of tikanga Māori

- 10.46 In our preliminary engagement with Māori, we have heard that, according to tikanga, when serious offending has occurred, the primary focus is to restore relationships between kin groups, including kin groups of the victim. A person who has offended has had their tapu disrupted. Part of the response is to whakaoho i te tapu — to renew and regrow the tapu (and the potential for mana) so that the person can participate in the community. According to Tā Kim Workman, public safety is achieved in te ao Māori when the functioning of communities and whānau reflects a collective sense of wellbeing.⁵⁰
- 10.47 In our preliminary view, there are several instances where the current law could be strengthened to better recognise and provide for tikanga Māori.
- 10.48 The paramount consideration when setting special conditions is the safety of the community. There is no legislative guidance about the meaning of “the safety of the community”. Courts have interpreted it as referring to safety from the undue risk of reoffending.⁵¹ One of Ara Poutama’s strategic aims is to take a new approach to safety by seeing it “through a lens of manaaki, positive relationships, and uplifting wellbeing”.⁵² In our preliminary engagement, we have heard from the Parole Board that uplifting wellbeing is an essential part of the rehabilitation programmes available in prison.⁵³ This is not currently apparent in the legislation.
- 10.49 The principle discussed above requires probation officers to consider a person’s cultural background when providing rehabilitative programmes and managing them. This allows a probation officer to take into account relevant tikanga. However, this principle is qualified by the purpose of reducing the risk of reoffending. Though an argument could be made that providing for the operation of tikanga may generally relate to reducing the risk of reoffending, it is feasible that there may be situations in which the operation of tikanga Māori would be considered neutral to a person’s risk of reoffending. It is unclear whether tikanga could be taken into account in this situation.
- 10.50 In our preliminary engagement, we heard that a person’s whānau, marae, hapū or iwi should have an opportunity to provide information to the court or Parole Board making decisions about a person. This could include information relevant to setting conditions, such as relevant information about the person’s background and cultural context, providing insight (including in terms of relevant tikanga Māori) on the risks posed by the person and providing views on what possible conditions or management options would be available and appropriate.
- 10.51 Currently, when the Parole Board holds a hearing to determine parole conditions, the person subject to preventive detention is entitled to be accompanied by one or more support persons who may, if granted leave by the Parole Board, speak in support of the

⁵⁰ Kim Workman “Whānau Ora and Imprisonment” (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 12.

⁵¹ See for example *Reid v Parole Board* (2006) 22 CRNZ 743 (CA).

⁵² Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 20.

⁵³ Memorandum from Sir Ron Young (Chairperson of New Zealand Parole Board) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding Preventive Detention, ESO and Special Conditions of Parole (21 April 2023) at 2.

person.⁵⁴ The Parole Board also has broad discretion to determine who may attend and speak at a hearing and to impose limits on what a person may talk about.⁵⁵ If the Parole Board holds a hearing to determine ESO conditions, the person subject to the ESO does not have a legislative entitlement to be accompanied by a support person or to have another person speak.

- 10.52 We suggest that the law could contain relevant principles to guide the exercise of discretion in a way that recognises and provides for tikanga Māori. We discuss this further in Chapter 12, where we present proposals to facilitate tino rangatiratanga and enable Māori to live according to tikanga. We suggest several ways this could be achieved, including that the law expressly require the court or Parole Board, when imposing preventive measures, to consider whether and how a person can access Māori-designed and Māori-led initiatives. We also suggest that the law could contain relevant principles to guide the exercise of discretion in a way that recognises and provides for tikanga Māori.
- 10.53 It is also important to explore how Māori who are disconnected from whānau, hapū and iwi can connect with non-kin groups. Not all tāngata Māori have strong connections to their whānau, hapū or iwi nor their taha Māori (cultural identity). Colonisation imposed foreign concepts, weakened ties to tribal lands and support networks and undermined traditional Māori theories of knowledge and methods of dealing with harm within the community. While this has impacted many Māori groups, it is an experience acutely felt by urban Māori (Māori who live outside of their traditional rohe). Many people subject to preventive detention, ESOs and PPOs may not be connected to kin groups or familiar with tikanga Māori.
- 10.54 For some Māori, their primary sense of whānau identity may be with others around a shared kaupapa.⁵⁶ These groups and individuals may wish to exercise greater responsibility for people who require some form of preventive management.

QUESTION

Q31

Do you think that the law relating to the conditions and management of people subject to release on parole from preventive detention and ESOs appropriately allow for Māori-designed and Māori-led initiatives?

The law could better ensure consistency with the New Zealand Bill of Rights Act 1990

- 10.55 Conditions imposed on people subject to preventive regimes restrict their rights and freedoms, often in significant ways. As we discuss in Chapter 3, limitations on the rights affirmed under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) must be prescribed by law and demonstrably justified in a free and democratic society.

⁵⁴ Parole Act 2002, s 49(3)(d).

⁵⁵ Parole Act 2002, s 49(2).

⁵⁶ As recognised in Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 17.

- 10.56 The requirement that restrictions be prescribed by law means conditions should be identifiable and precise and their nature and consequences should be clear.
- 10.57 Restrictions in the form of conditions must, however, be rationally connected to the risk posed by an individual and impair the individual's rights or freedoms no more than is reasonably necessary, in the circumstances, to achieve the restriction's important purpose. Therefore, the management of conditions should be flexible enough to take into account that those subject to preventive regimes have diverse backgrounds and their needs and risks may be dynamic.
- 10.58 Decisions by the Parole Board imposing conditions on people subject to preventive orders, as well as decisions by probation officers managing conditions, must comply with the NZ Bill of Rights. This requirement is not explicitly stated in legislation governing the preventive regimes – rather, it reflects the general requirements under the NZ Bill of Rights.⁵⁷
- 10.59 Since standard conditions apply automatically to parole and ESOs, the Parole Board cannot consider whether or not a standard condition is demonstrably justified. The only mechanism for ensuring compliance with the NZ Bill of Rights is the discretion of the probation officer managing the conditions.
- 10.60 In relation to how conditions are implemented in practice, both standard and special conditions are, for the most part, framed to confer broad discretion on a probation officer. The advantage of discretion is that it allows probation officers to take into account a person's individual circumstances and respond to changes in their needs or risk. Ara Poutama advises probation officers on administering conditions consistently with the NZ Bill of Rights.
- 10.61 The courts have, however, found in some circumstances that the implementation of a standard condition was an unjustified limitation on a right affirmed under the NZ Bill of Rights. For example, in *Te Whatu v Department of Corrections*, implementation infringed the right to freedom of association.⁵⁸ Mr Te Whatu was subject to an ESO on the basis of sexual offending, including against children. He was subject to conditions including:
- (a) the standard condition not to associate with any person with whom a probation officer has, in writing, directed him not to associate; and
 - (b) a special condition not to contact children.
- 10.62 Mr Te Whatu's probation officer issued him with a written direction not to associate with his partner of seven years, on suspicion that his partner may be grooming a neighbour's 11-year-old daughter for sexual offending by Mr Te Whatu. Te Kōti Matua | High Court (High Court) held that the concerns Ara Poutama had about Mr Te Whatu having contact with children were squarely addressed by the special condition requiring that he not have contact with children. There was no evidence (as opposed to suspicion) that he was not complying with this condition.
- 10.63 The Court found that the blanket direction that Mr Te Whatu not associate with his own partner was an unjustified limitation on his right to associate with his own partner. It

⁵⁷ For example, te Kōti Pira o Aotearoa | Court of Appeal confirmed that decisions of the Parole Board in imposing special conditions must be consistent with the NZ Bill of Rights in *McGreevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [21].

⁵⁸ *Te Whatu v Department of Corrections* [2017] NZHC 3233.

applied whether or not children were around and deprived Mr Te Whatu of his primary source of support. The direction was too broad and therefore a disproportionate response to the problem.⁵⁹

- 10.64 This case illustrates the availability of a court-based process to challenge implementation decisions that breach rights and freedoms. On the one hand, this may seem an appropriate remedy. On the other hand, the remedy relies on a person challenging the probation officer's decision about implementing conditions. In this case, the matter only arose after Mr Te Whatu appealed his conviction for breaching the non-association order.
- 10.65 In a case involving the now-repealed “three strikes” regime, judges of the Kōti Mana Nui | Supreme Court (Supreme Court) commented that, where the law could result in breaches of the NZ Bill of Rights, the rule of law may require safeguards to be addressed within primary legislation.⁶⁰

QUESTION

Q32

Should the legislation build in tests or guidance to ensure that decisions about conditions are made in accordance with the NZ Bill of Rights?

“Residential restrictions” not defined in legislation

- 10.66 The Parole Act includes “residential restrictions” that may be imposed as a special condition of parole or an ESO.⁶¹ The Supreme Court noted in *Woods v Police* that the Act does not define residential restrictions — rather, it empowers the Parole Board to impose residential restrictions and sets out the list of requirements of a person subject to them.⁶² A person subject to residential restrictions is required:⁶³
- (a) to stay at a specified residence:
 - (b) to be under the supervision of a probation officer and to co-operate with, and comply with any lawful direction given by, that probation officer:
 - (c) to be at the residence—
 - (i) at times specified by the Board; or

⁵⁹ *Te Whatu v Department of Corrections* [2017] NZHC 3233 at [2].

⁶⁰ To meet concerns about the possible overreach of the three strikes regime, Cabinet relied on an administrative requirement that the local Crown Solicitor review all stage three charges. When exercising discretion to lay charges, Crown Solicitors are required to consider the public interest, which includes NZ Bill of Rights considerations. The expectation was that prosecutorial discretion would be exercised to avoid unjust or disproportionately severe outcomes. In *Fitzgerald v R*, the Kōti Mana Nui o Aotearoa | Supreme Court considered an appeal against conviction and sentence by the appellant, who had been sentenced to the maximum penalty of seven years' imprisonment for an indecent assault that was at the bottom of the range of seriousness. A majority of the Court considered the sentence breached the right not to be subjected to disproportionately severe treatment or punishment affirmed in s 9 of the NZ Bill of Rights. The administrative safeguard had failed to prevent a breach of the NZ Bill of Rights. All of the judges questioned whether the administrative safeguard was an appropriate method of guarding against inappropriately harsh outcomes in breach of the NZ Bill of Rights. Winkelmann CJ and William Young J considered that the rule of law required the safeguard to be “addressed within the legislation rather than left to ad hoc administrative decisions”: *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [174] per Winkelmann CJ and at [326] per William Young J.

⁶¹ Parole Act 2002, s 15(3)(ab).

⁶² *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [23].

⁶³ Parole Act 2002, s 33(2).

- (ii) at all times:
 - (d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions;
 - (e) to keep in his or her possession the licence issued under section 53(3) and, if requested to do so by a constable or a probation officer, must produce the licence for inspection.
- 10.67 In addition, a person subject to residential restrictions may not leave the residence without approval of a probation officer except to seek urgent medical or dental treatment or to avoid or minimise a serious risk of death or injury to themselves.⁶⁴
- 10.68 There are also procedural and eligibility requirements for imposing residential restrictions, including:
- (a) before imposing residential restrictions, the Parole Board must request and consider a report from the chief executive on certain matters relating to the person and the residence, such as the likelihood that the residential restrictions will prevent further offending and the suitability of the proposed residence, including the safety and welfare of any other occupants;⁶⁵
 - (b) residential restrictions may only be imposed if the occupants of the relevant residence consent;⁶⁶
 - (c) in the case of a person released on parole, but not in the case of ESO conditions, residential restrictions may only be imposed if the person subject to the restrictions agrees to comply with them;⁶⁷ and
 - (d) a requirement to be at the residence at all times may be imposed for no longer than 12 months⁶⁸ – for an ESO, this must be within the first 12 months of the term of the order.⁶⁹
- 10.69 Therefore, it is important to know what “residential restrictions” are in order to know if these further requirements apply. Courts have been required to assess whether a combination of conditions, in substance, amounts to “residential restrictions”.
- 10.70 Defining “residential restrictions” in the legislation may make it easier for the courts to assess whether a person is subject to residential restrictions. In *Woods v Police*, the Supreme Court was required to consider this issue in the context of sentencing and commented that “[d]esirably, there should be greater legislative clarity”.⁷⁰

⁶⁴ Parole Act 2002, s 33(4).

⁶⁵ Parole Act 2002, s 34(2).

⁶⁶ Parole Act 2002, s 35.

⁶⁷ Parole Act 2002, s 35(c).

⁶⁸ Parole Act 2002, s 33(3).

⁶⁹ Parole Act 2002, s 107K(3)(b).

⁷⁰ *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [29]: the Supreme Court made this comment in relation to a number of provisions of the Parole Act 2002 and also their interaction with provisions of the Sentencing Act 2002.

QUESTION**Q33**

Do you think the term “residential restrictions” should be defined in the legislation?

Issues relating to preventive detention***Requirement for person to agree to residential restrictions may result in parole being denied***

- 10.71 As we discuss above, residential restrictions may only be imposed on a person released on parole if the Parole Board is satisfied that the person subject to the restrictions agrees to comply with them.⁷¹ Agreement is not required to impose residential restrictions on a person subject to an ESO.⁷²
- 10.72 In *Woods v Police*, the majority of the Supreme Court commented on the rationale for the procedural requirements relating to residential restrictions:⁷³
- ... the provisions ... reflect a careful balancing of the purposes of such restrictions and the rights and freedoms preserved under the New Zealand Bill of Rights Act ... ensuring that the intrusion upon rights is no more than is justifiable in a free and democratic society ...
- 10.73 In our preliminary engagement, we have heard that, if the Parole Board considers a person’s risk will only be effectively managed by residential restrictions but the person does not agree to comply with the condition, the person may not be granted parole because the Board cannot be satisfied that the person will not present an undue risk to the safety of the community.
- 10.74 Our preliminary view is that the human rights imperative to impose the least restrictive order may mean the law should allow residential restrictions to be imposed as a special release condition on a person subject to preventive detention, whether or not they agree to comply with the condition, where this would allow the person to be managed within the community rather than within prison.

QUESTION**Q34**

Do you think that the Parole Board should be able to impose residential restrictions as a special release condition on a person subject to preventive detention, whether or not they agree to comply with the condition, where this would allow the person to be managed within the community rather than within prison?

⁷¹ Parole Act 2002, s 35(c).

⁷² Parole Act 2002, s 107K(1A).

⁷³ *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [74].

Issues relating to extended supervision order conditions

Extended supervision order special conditions and the principle that conditions must not be more onerous, or last longer, than necessary

- 10.75 Section 7 of the Parole Act sets out “guiding principles”. The paramount consideration for the Parole Board when making decisions about or in any way relating to the release of an offender is the safety of the community.
- 10.76 Section 7(2)(a) provides that another principle is:⁷⁴
- that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community
- 10.77 The High Court has said that the guiding principles of the Parole Act recognise offenders’ fundamental rights and that, when the Parole Board correctly applies them, it will have regard to human rights.⁷⁵
- 10.78 When the Parole Board imposes special conditions on release from prison, the Parole Board’s decision must be guided by the above principle about conditions. However, it is arguable that, as drafted, the principle does not apply when the Parole Board imposes special conditions on an ESO. The principle refers specifically to “release conditions”, which are defined in the Parole Act as “the standard conditions and any special conditions imposed by the Parole Board or the sentencing court and that apply to an offender *released from detention*”.⁷⁶ ESO conditions are not “release conditions”.⁷⁷
- 10.79 Even if this provision does not strictly apply, the NZ Bill of Rights is relevant to the exercise of discretion by the Parole Board when setting special ESO conditions under the Parole Act. In effect, the Parole Board must not impose ESO conditions that limit rights or freedoms affirmed under the NZ Bill of Rights to an extent that is more onerous or lasts longer than is consistent with the safety of the community. However, we would like feedback on whether the principle should be amended to expressly apply to ESO conditions.

QUESTION

Q35

Do you think the guiding principles of the Parole Act should be amended to state that people subject to ESOs must not be subject to conditions that are more onerous, or last longer, than is consistent with the safety of the community?

⁷⁴ Parole Act 2002, s 7(2)(a).

⁷⁵ *Miller v New Zealand Parole Board* HC Wellington CRI-2004-485-37, 11 May 2004.

⁷⁶ Parole Act 2002, s 4(1) “release conditions” (emphasis added).

⁷⁷ For example see s 107O(2) of the Parole Act 2002, which states that certain sections of the Parole Act apply “as if the conditions of the extended supervision order were release conditions”.

Inefficiency of dividing order-making and condition-setting jurisdictions for extended supervision orders

10.80 The court has responsibility for making an ESO and setting its duration while the Parole Board has responsibility for setting conditions.

10.81 In *Chief Executive of the Department of Corrections v McIntosh*, one of the first ESO decisions, a full court of the High Court noted that, while “[a]t first sight it may seem odd” to divide the jurisdictions in this way, it is “obviously an intended feature of the statutory scheme”.⁷⁸ The Court explained the rationale as follows:⁷⁹

It recognises and imposes dual responsibility. That upon the Court is to judge whether there is a likelihood of further relevant offending when the offender ceases to be on parole and to assess the term of the minimum period required for the purposes of community safety. By contrast once an order is made and its term is fixed it is for the Parole Board to define the conditions to which the offender will be subject under the extended supervision order. Hence, risk management, an unenviable but everyday function of the Parole Board, rests with it.

10.82 In our preliminary engagement, two issues were raised:

- (a) Inefficiencies arising as multiple hearings may be required in respect of a similar issue.
- (b) Inefficiencies arising as there are different mechanisms for reviewing decisions of the court and of the Parole Board.

Multiple hearings required

10.83 The different powers of the court and Parole Board may require, in some situations, multiple hearings to be held in respect of similar issues and with respect to the same evidence. This is illustrated by a timeline of cases involving Mr Chisnall and Ara Poutama:⁸⁰

- (a) The High Court imposed a PPO on Mr Chisnall.⁸¹
- (b) Mr Chisnall appealed. On appeal, te Kōti Pira | Court of Appeal (Court of Appeal) said it could not properly consider whether an ESO was an appropriate less restrictive alternative to a PPO because it did not have any information about the terms on which an ESO would be made. The Court allowed the appeal, quashed the PPO and remitted the matter to the High Court for reconsideration.⁸²
- (c) When the High Court reconsidered the matter, the judge heard detailed evidence about the special conditions that Ara Poutama would seek if an ESO was made, whether Mr Chisnall would agree with those conditions being imposed and the details of how the ESO would be administered. The judge considered the ESO conditions would not sufficiently address the risk of serious offending and imposed a PPO.⁸³
- (d) Mr Chisnall appealed again. Taking into account further evidence, the Court of Appeal considered that an ESO with an IM condition would be sufficient to mitigate the risk

⁷⁸ *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [33].

⁷⁹ *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [34].

⁸⁰ We discuss other proceedings involving Mr Chisnall’s challenge of the ESO and PPO regimes in Chapter 3.

⁸¹ *Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 3120.

⁸² *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510.

⁸³ *Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32.

and quashed the PPO. However, the Court did not have the power to impose an ESO or set conditions directly. The ESO application had to be remitted to the High Court. The Court of Appeal imposed an ISO with special conditions until the ESO could be determined.⁸⁴

- (e) A further hearing will be required in the High Court to impose the ESO.
- (f) The chief executive will then need to apply to the Parole Board to impose any special conditions.

10.84 In our preliminary engagement, some people suggested that, as the court also hears evidence about special conditions and imposes special conditions on an interim basis, the whole process should lie with the court.

10.85 As the Court observed in *McIntosh*, the Parole Board has expertise in setting parole conditions. In our preliminary engagement, we heard some support for the Parole Board setting conditions because of this expertise. The Parole Board may also have more hearing time available for setting and varying conditions than the courts do.

10.86 However, the courts also have experience in setting similar conditions in a number of other contexts, including imposing special release conditions on short terms of imprisonment,⁸⁵ imposing special conditions on sentences such as intensive supervision, community detention and home detention⁸⁶ and imposing bail conditions.⁸⁷

10.87 Sometimes, the Parole Board may adopt the ESO conditions that were set by the court on an interim basis until the Parole Board could hear an application. For example, in *C v New Zealand Parole Board*, the Court noted that the Parole Board imposed special conditions that mirrored those that had been imposed by the High Court on an interim basis.⁸⁸

Different mechanisms for challenging decisions

10.88 If a person wishes to challenge a decision by the court in relation to an ESO, the applicable review mechanism is an appeal to the Court of Appeal. This includes appeals against the making of or failure to make an ESO, cancellation of an ESO, imposition of an order requiring the Parole Board to impose an IM condition or a decision to confirm or cancel an ESO upon review.⁸⁹

10.89 These appeals are conducted as if they are appeals against sentence in the criminal jurisdiction.⁹⁰ This means the court must allow the appeal if it is satisfied there was an error in the decision under appeal and a different decision should have been made.⁹¹

⁸⁴ *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402.

⁸⁵ Sentencing Act 2002, s 93. A court that sentences an offender to a term of imprisonment of 24 months or less may impose any special conditions on the offender, including conditions of the kind that the Parole Board may impose under s 15(3) of the Parole Act 2002.

⁸⁶ Sentencing Act 2002, ss 50, 52, 54G, 54I, 80D and 80P.

⁸⁷ Bail Act 2000, s 30.

⁸⁸ *C v New Zealand Parole Board* [2021] NZHC 2567 at [7].

⁸⁹ Parole Act 2002, s 107R.

⁹⁰ Parole Act 2002, s 107R(2).

⁹¹ Criminal Procedure Act 2011, s 250(2).

- 10.90 If a person wishes to challenge a decision by the Parole Board in relation to an ESO, there is a different review mechanism.⁹² The person must first apply in writing for a review of the Parole Board's decision by the chairperson of the Parole Board or a panel convener.⁹³ If the person wishes to challenge the decision further, there is no right of appeal, but they can apply for judicial review by the court.⁹⁴
- 10.91 This is potentially problematic because lawyers who act in relation to ESO matters may not have expertise in conducting judicial review proceedings, which are civil in nature. If they have been acting for a client on legal aid through an ESO application, they may not be approved for civil proceedings and may not be able to represent that client. This may result in inefficiencies and disadvantage the client.
- 10.92 Judicial review is also essentially limited to examining whether the decision-maker lawfully followed the proper decision-making process rather than looking at whether the decision was the correct one.
- 10.93 We have not reached a preliminary view on the issue of the division of the order-making and condition-setting jurisdictions for ESOs. We are interested in feedback.

QUESTION

Q36

Do you think there are any issues arising from the division between the order-making and condition-setting jurisdictions for ESOs that require legislative reform?

Issues relating to intensive monitoring

- 10.94 An IM condition is a condition requiring the offender to submit to being accompanied and monitored for up to 24 hours a day by a person who has been approved to undertake person-to-person monitoring.⁹⁵
- 10.95 The potential issues relating to IM conditions discussed in this section are:
- There is no legislative test for imposing an IM condition.
 - The legislation does not permit an IM condition to be added after an ESO is ordered.
 - An IM condition can only be imposed for a maximum period of 12 months and may not be ordered more than once, even if the person is subject to repeated ESOs.⁹⁶ This means that a person whose risk is effectively managed by ESO with an IM condition may instead be placed on a more restrictive PPO.

⁹² Parole Act 2002, s 107S.

⁹³ Parole Act 2002, ss 67.

⁹⁴ For example in *Coleman v Chief Executive of the Department of Corrections* [2020] NZHC 1033 at [33], te Kōti Matua o Aotearoa | High Court said that the appropriate procedure to challenge the conditions of an ISO would be judicial review.

⁹⁵ Parole Act 2002, s 107IAC(2).

⁹⁶ There is one exception. Prior to 2014, intensive monitoring was a special condition that could be imposed by the Parole Board without a court order. It could also only be imposed for a maximum of 12 months. Under s 107IAC(6), a person who was subject to an ESO before 12 December 2014 can be made subject to an IM condition even if, under that ESO, they were subject to an IM condition imposed by the Parole Board.

No legislative test for imposing IM conditions

- 10.96 There is no test or statutory guidance on the criteria to be considered when an order is sought requiring the Parole Board to impose an IM condition.
- 10.97 The courts have applied a high threshold when imposing this condition. For example, in *Department of Corrections v Paniora*, the Court noted “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”.⁹⁷
- 10.98 The courts now generally apply the test formulated in *Department of Corrections v Miller*:⁹⁸
- Clearly it is highly intrusive in the person’s life and will only be justified where a high risk of sexual offending exists and is likely to be exacerbated if the transition from prison to living in the community is not able to be managed without close and constant supervision.
- 10.99 While it seems desirable to have a legislative test for such a restrictive condition, the approach adopted by the courts appears to be appropriately rights consistent – in effect, requiring the condition to be reasonably necessary to address a high risk. The test adopted by the courts does not import a proportionality analysis, but this does not seem unreasonable as the court is only able to order the Parole Board to impose the condition – it does not have input into the actual term of the order or how it is managed so cannot assess whether the condition is proportionate.

QUESTION

Q37

Do you think the legislation should include a test or guidance on when an IM condition may be imposed?

Inability to add IM condition after ESO ordered

- 10.100 The Parole Act states that:⁹⁹
- When a sentencing court makes an extended supervision order in respect of an offender, the court may at the same time, on application by the chief executive made under section 107IAB(1), make an order requiring the Board to impose an intensive monitoring condition on the offender.
- 10.101 The courts have interpreted this to mean that the court may only make an order requiring the Parole Board to impose an IM condition at the same time as ordering the ESO – there is no jurisdiction to make an order requiring the Parole Board to impose an IM condition on an existing ESO.
- 10.102 This issue arose in *Chief Executive of the Department of Corrections v Kerr*.¹⁰⁰ Ara Poutama had made an application for a PPO and an interim detention order (IDO) in respect of Mr Kerr, who was subject to an existing ESO. The parties had agreed that,

⁹⁷ *Department of Corrections v Paniora* [2018] NZHC 1505 at [46].

⁹⁸ *Department of Corrections v Miller* [2017] NZHC 2527 at [16]. This was followed in for example *Chief Executive of the Department of Corrections v Narayan* [2022] NZHC 1535.

⁹⁹ Parole Act 2002, s 107IAC(1).

¹⁰⁰ *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139.

pending the hearing of the PPO and IDO, the Court should impose an IM condition on Mr Kerr's ESO. However, the Court considered that it did not have jurisdiction to add an IM condition to the existing ESO for the reasons given above. The matter was dealt with by Mr Kerr consenting to being subject to monitoring for 24 hours a day, seven days a week until the PPO and IDO applications could be determined. If there was any breakdown in this arrangement, Ara Poutama could make an urgent application for an IDO.

- 10.103 As a matter of practice, in subsequent cases where Ara Poutama has wished to add an IM condition to an existing ESO, it has made an application for a new ESO and, at the same time, an application for the court to make an order requiring the Parole Board to impose an IM condition. Courts have granted such applications.¹⁰¹
- 10.104 Our preliminary view is that there can be a legitimate need to impose an IM condition after an ESO has been made. It would be more efficient if an application could be made solely to impose an IM condition rather than requiring a new ESO application.

QUESTION

Q38

Do you think the legislation should allow an IM condition to be imposed after an ESO has been ordered?

Maximum period of an IM condition can result in more restrictive order being made

- 10.105 It appears from the parliamentary materials relating to the Parole (Extended Supervision Orders) Amendment Bill that the purpose of an IM condition is to allow Ara Poutama to assess whether a person can be appropriately managed under an ESO or whether a PPO is necessary. In its Initial Briefing on the Parole (Extended Supervision Orders) Amendment Bill to the Law and Order Committee, Ara Poutama stated that:¹⁰²

In cases where the Courts impose an ESO with up to one year's intensive monitoring, Corrections would use this period to determine whether an offender would be more appropriately managed under a PPO in the long-term if they posed a very high risk of imminent serious re-offending. If this is the case, the Department could apply to the Court for a PPO before the period of intensive monitoring comes to an end.

- 10.106 The person-to-person monitoring involved in the IM condition is expensive. In the Regulatory Impact Statement, Ara Poutama noted that limiting the use of person-to-person supervision would significantly reduce the costs of managing those subject to ESOs, whereas unrestricted use of IM conditions "would have significant cost implications for Corrections (approximately \$20 million over ten years)".¹⁰³
- 10.107 The 12-month maximum term of an IM condition can mean that a person whose risk is effectively managed by an IM condition is instead made subject to a more restrictive PPO

¹⁰¹ For example *Chief Executive of the Department of Corrections v Clements* [2021] NZHC 1383.

¹⁰² Letter from Jo Field (Deputy Chief Executive, Service Development, Ara Poutama | Department of Corrections) to Mike Sabin MP (Chairperson, Law and Order Committee) regarding the Parole (Extended Supervision Orders) Amendment Bill – Initial Briefing (24 October 2014) at [17].

¹⁰³ Ara Poutama | Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2013) at 15.

or that the courts endeavour to tailor conditions to provide for maximum monitoring without meeting the definition of an IM condition.

10.108 For example, in *Chief Executive of the Department of Corrections v R*, Mr R had been subject to an ESO with an IM condition.¹⁰⁴ On the expiry of the IM condition, the Parole Board reviewed the other special conditions of the ESO in order to manage Mr R's risks. Ara Poutama applied for a PPO. The Court was satisfied that the test was met for imposing a PPO but wanted to consider whether any alternatives were available.

10.109 The Court was satisfied that the risk presented by Mr R would be sufficiently mitigated by the following conditions that would in effect result in 24/7 monitoring:

- (a) To participate in the activities provided by an agency, with day-time supervision.
- (b) To be subject to partial residential restrictions between 7 pm to 7 am daily
- (c) To reside with the programme provider.

10.110 While the Parole Act prohibits people from residing with a programme provider and limits monitoring to the extent necessary to ensure attendance at the programme,¹⁰⁵ Mr R indicated that he would consent to these conditions. However, the Court noted that, if Mr R withdrew his consent, he could not lawfully be monitored or restrained. Rather, a PPO was the only enforceable mechanism for ensuring 24/7 monitoring. The combination of conditions to which Mr R consented could not be enforced against his will as it would have been a back-door method of intensive supervision beyond the allowable 12-month period.

10.111 This case demonstrates that a person who can be safely managed in the community could be made subject to a PPO due to the 12-month restriction on an IM condition. Our preliminary view is that the human rights imperative to impose the least restrictive order means the law should facilitate longer periods of monitoring where this allows a person to be managed within the community rather than under a more restrictive detention order. However, care would need to be taken to ensure that the condition was not overused.

QUESTION

Q39

Do you think that the court should be able to impose an IM condition for longer than 12 months if it would allow a person to be managed in the community rather than be detained?

Prohibition on requiring a person to reside with a programme provider

10.112 Section 107K(3)(bb)(ii) of the Parole Act provides that a condition requiring a person to participate in a programme must not require the person to reside with, or result in the

¹⁰⁴ *Chief Executive of the Department of Corrections v R* [2018] NZHC 3106; and *Chief Executive of the Department of Corrections v R (No 2)* [2018] NZHC 3455.

¹⁰⁵ Parole Act 2002, s 107K(3)(bb).

person residing with, a person, persons or agency in whose care the person is placed (a programme provider).¹⁰⁶

- 10.113 It appears that the purpose of this provision is to prevent a person from being subject to the supervision and direction of a single agency for 24 hours per day, as would be the case in a custodial environment.¹⁰⁷
- 10.114 The provision though, is difficult to interpret. It sits uncomfortably with the definition of a “programme” in the Parole Act, which includes “placement in the care of any appropriate person, persons, or agency, approved by the chief executive”. Other provisions of the Parole Act also clearly contemplate that people subject to parole may be placed in residential rehabilitation programmes, and it appears that Ara Poutama’s practice is for people to be placed with programme providers.¹⁰⁸
- 10.115 The Parole Board has applied to the High Court for clarity on the interpretation of section 17K(3)(bb)(ii). It seeks a declaration to determine whether the provision means that an accommodation provider cannot ever be the same organisation as the programme provider and, if not, what limits the provision imposes on the Parole Board as to when it might impose conditions enabling an accommodation provider and programme provider to be the same organisation.¹⁰⁹
- 10.116 If the provision does mean an accommodation provider can never be the same organisation as a programme provider, it prevents attendance at residential rehabilitative programmes. Our preliminary view is that this is undesirable because the regimes should provide for effective rehabilitation. We understand that residential programmes have advantages over non-residential programmes in this respect. They are more intensive and structured than non-residential programmes. They reduce recidivism and help with mental health, relationship development and interpersonal competence.¹¹⁰
- 10.117 This provision may also limit the ability for Māori to take responsibility for managing people subject to ESOs, as marae-based or tikanga-based programmes may involve a residential component.

QUESTION

Q40

Do you think the prohibition on requiring a person to reside with a programme provider should be removed?

¹⁰⁶ Parole Act 2002, s 107K(3)(bb)(ii).

¹⁰⁷ *C v New Zealand Parole Board* [2021] NZHC 2567 at [19].

¹⁰⁸ For example s 61(e) provides for grounds of recall “in the case of an offender who is subject to a special condition that requires his or her attendance at a residential programme”.

¹⁰⁹ *New Zealand Parole Board v Attorney-General* [Statement of Claim (Application for Declaratory Judgment) dated 16 May 2022, CIV-2022-485].

¹¹⁰ Statement of Evidence of Professor Devon Polaschek on Behalf of Ara Poutama Aotearoa | Department of Corrections (Criminal Psychology) to the Independent Hearings Commissioners before the Christchurch City Council, in the matter of an application by Ara Poutama Aotearoa/Department of Corrections for resource consent to establish a rehabilitative and reintegrative residential accommodation programme with an existing property at 14 Bristol Street, Christchurch (RMA/2020/173) (16 August 2021), citing Richard Shuker “Treating Offenders in a Therapeutic Community” in L Craig, L Dixon and T Gannon (eds) *What Works in Offender Rehabilitation* (Wiley-Blackwell, Chichester, 2013) at 340.

Standard ESO condition not to associate with persons under 16 may not be justified in every case

10.118 It is a standard condition of an ESO that:¹¹¹

the offender must not associate with, or contact, a person under the age of 16 years, except—

- (i) with the prior written approval of a probation officer; and
- (ii) in the presence and under the supervision of an adult who—
 - (A) has been informed about the relevant offending; and
 - (B) has been approved in writing by a probation officer as suitable to undertake the role of supervision:

10.119 When an earlier version of this condition was first enacted, ESOs were only available for people who had committed certain sexual offences against victims under the age of 16¹¹² and who presented a risk of such offending. In that context, the rationale for restricting a person's right to freedom of association in this way was clear.

10.120 When the ESO regime was extended to sexual offending against adults and to violent offending, Parliament retained the condition and explicitly stated in the legislation that the condition applies to ESOs made both before and after the amendment.¹¹³

10.121 This condition is capable of seriously impairing a person's rights — for example, if it results in a person not being able to associate with their own children or whānau. Some people who are subject to ESOs will not pose a risk of relevant offending against people under 16. In those circumstances, the condition is not rationally connected to the purpose of managing the risk of their offending. We have heard in our preliminary engagement that this condition may also prevent a person from associating with people in their lives who are prosocial or who support their rehabilitation or reintegration but may also have children. This seems counterproductive to the objective of protecting public safety.

10.122 On the other hand, we also heard in our preliminary engagement that there are good reasons to retain this condition as a standard condition. Children are vulnerable and people who are subject to ESOs have demonstrated a lack of self-regulation — a potential risk when that person is around children without supervision. If a person does not pose a risk, a probation officer can permit contact with certain children. However, they may only allow supervised contact, and the approval must be in writing.

QUESTION

Q41

Do you think that the requirement not to associate with persons under 16 should be removed from the standard ESO conditions?

¹¹¹ Parole Act 2002, s 107JA(1)(i).

¹¹² Including certain offences under the Films, Videos, and Publications Classification Act 1993.

¹¹³ Parole Act 2002, s 107JA(3).

Other issues

10.123 Finally, we are interested in your views on whether there are any other issues relating to the conditions imposed on people who are released on parole from a sentence of preventive detention or who are subject to ESOs.

QUESTION

Q42

Are there any other issues relating to the conditions imposed on people who are released on parole from a sentence of preventive detention or who are subject to ESOs?

CHAPTER 11

Variation and termination of preventive detention, extended supervision orders and public protection orders

IN THIS CHAPTER, WE CONSIDER:

- how a person subject to preventive detention may be released on parole;
- how extended supervision orders (ESOs) and public protection orders (PPOs) come to an end;
- how parole conditions and extended supervision conditions can be varied;
- the consequences for breaching the conditions of parole, an ESO or a PPO; and
- issues with the current law.

PREVENTIVE DETENTION**Release from imprisonment**

11.1 A person subject to preventive detention will remain in prison unless they are granted release on parole by direction of the New Zealand Parole Board (Parole Board).¹ The

¹ Parole Act 2002, s 86(3).

person becomes eligible for parole once they have served the applicable minimum period of imprisonment (MPI) set at sentencing.²

11.2 The Parole Board may direct that a person be released on parole only if:³

... it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—

- (a) the support and supervision available to the offender following release; and
- (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

11.3 When assessing whether the person poses an “undue risk”, the Parole Board must consider both:⁴

- (a) the likelihood of further offending; and
- (b) the nature and seriousness of any likely subsequent offending.

11.4 The Parole Act 2002 states that there is no entitlement to be released on parole.⁵ However, *te Kōti Matua | High Court* (High Court) has said this provision must be interpreted consistently with the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). If a person subject to preventive detention no longer constitutes an undue risk, there is no basis to restrain the person’s liberty any longer and there is an obligation to release them from prison.⁶

11.5 There is no end date for a sentence of preventive detention.⁷ If a person is released on parole, they are subject to recall to prison for the rest of their life.⁸

Varying or discharging parole conditions

11.6 As we discuss in Chapter 10, if the Parole Board directs release on parole, a person subject to preventive detention will be subject to the standard release conditions for the rest of their life unless they are varied or discharged by the Parole Board.⁹

11.7 The person subject to parole or a probation officer can apply to the Parole Board to vary or discharge any conditions at any time.¹⁰ A probation officer may also apply to add further conditions.¹¹

11.8 The legislation does not include criteria for varying or discharging conditions.¹²

² Parole Act 2002, s 20(1).

³ Parole Act 2002, s 28(2).

⁴ Parole Act 2002, s 7(3).

⁵ Parole Act 2002, s 28(1AA).

⁶ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [87].

⁷ Parole Act 2002, s 82(3).

⁸ Parole Act 2002, s 6(4)(d).

⁹ Parole Act 2002, s 29(4)(b).

¹⁰ Parole Act 2002, s 56(1) and (2).

¹¹ Parole Act 2002, s 4: “variation”.

¹² As noted in *Grinder v New Zealand Parole Board* [2022] NZHC 3188 at [41].

- 11.9 Recently, the High Court has held that Parole Board decisions about varying or discharging release conditions for a person sentenced to preventive detention are subject to the guiding principles of the Parole Act.¹³ When considering whether to discharge or vary conditions, the Parole Board must apply the principle that parolees must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community. This requires the Board to assess whether the person presents an undue risk to the safety of the community if the relevant conditions are varied or discharged. The assessment of risk must be sufficient to ensure that any special conditions imposed or retained have a rational nexus to the purposes in section 15(2) and are reasonably necessary and proportionate.¹⁴

Breaching parole conditions

- 11.10 Breaching any standard or special conditions without reasonable excuse is an offence with a maximum penalty of one year of imprisonment or a fine not exceeding \$2,000.¹⁵ Additionally, breaching standard or special conditions can result in a person being recalled to prison.¹⁶

EXTENDED SUPERVISION ORDERS

- 11.11 An ESO may be imposed for a term of up to 10 years.¹⁷ Before an ESO expires, the chief executive of Ara Poutama | Department of Corrections (chief executive) may apply for a new, consecutive ESO.¹⁸
- 11.12 An ESO expires on:¹⁹
- (a) the date on which the ESO is cancelled;
 - (b) the date on which the term of the ESO expires; or
 - (c) if the person becomes subject to a new ESO before the expiry of an earlier one, the commencement of the new ESO.

Cancelling an extended supervision order

- 11.13 At any time after an ESO comes into force, the person subject to the ESO or the chief executive may apply to the court to cancel the ESO.²⁰ The grounds on which they may apply are 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.²¹

¹³ *Grinder v New Zealand Parole Board* [2022] NZHC 3188.

¹⁴ *Grinder v New Zealand Parole Board* [2022] NZHC 3188 at [51].

¹⁵ Parole Act 2002, s 71(2).

¹⁶ Parole Act 2002, s 61.

¹⁷ Parole Act 2002, s 107I(4).

¹⁸ Parole Act 2002, s 107C(1)(a)(iii).

¹⁹ Parole Act 2002, s 107L(3).

²⁰ Parole Act 2002, s 107M(1).

²¹ Parole Act 2002, s 107M(1).

- 11.14 Additionally, if a person has not ceased to be subject to an ESO for 15 years since the date on which the first ESO commenced, the court must review the ESO and either confirm the order or cancel it.²²
- 11.15 Time ceases to run on an ESO and its conditions are suspended if the person is under legal custody in accordance with the Corrections Act 2004.²³ The time and conditions reactivate on the offender's statutory release date.²⁴ If a person on an ESO is detained in a hospital or secure facility under a compulsory care order or under a compulsory treatment order, the conditions of the ESO are suspended but time continues to run on the ESO.²⁵

Varying or discharging extended supervision conditions

- 11.16 The person subject to the ESO or their probation officer may apply to the Parole Board at any time to vary or discharge any ESO condition.²⁶ The same process applies as for varying or discharging parole release conditions.²⁷ As stated above, the legislation does not include criteria for varying or discharging conditions.
- 11.17 The Parole Board must review "high-impact conditions" every two years after the condition was imposed, confirmed or varied.²⁸ A "high-impact condition" means:²⁹
- (a) a residential condition that requires the person to stay at a specified residence for more than a total of 70 hours during any week; or
 - (b) a condition requiring the person to submit to a form of electronic monitoring that allows their whereabouts to be monitored when they are not at their residence.
- 11.18 Before the Parole Board reviews a high-impact condition, the chief executive must make a recommendation to it on whether the condition is still appropriate or whether it should be varied. The person who is subject to the condition may make written or oral submissions to the Parole Board.³⁰

Breaching extended supervision conditions

- 11.19 Breaching conditions of an ESO or interim supervision order (ISO) without reasonable excuse is an offence with a maximum penalty of two years' imprisonment.³¹

²² Parole Act 2002, s 107RA(2).

²³ Parole Act 2002, s 107P(1)(a).

²⁴ Parole Act 2002, s 107P(2).

²⁵ Parole Act 2002, s 107P(3).

²⁶ Parole Act 2002, s 107O(1). It is unclear whether the Parole Board may vary or discharge an intensive monitoring condition — we discuss this in the issues section of this chapter.

²⁷ Parole Act 2002, s 107O(2).

²⁸ Parole Act 2002, s 107RB(2).

²⁹ Parole Act 2002, s 107RB(1).

³⁰ Parole Act 2002, ss 107RB(3) and 107RB(4).

³¹ Parole Act 2002, ss 107T and 107TA(2).

PUBLIC PROTECTION ORDERS

- 11.20 A PPO does not have a specified end date.
- 11.21 PPOs are subject to annual reviews by a review panel established by the legislation.³² If the review panel considers that there may no longer be a very high risk of imminent serious sexual or violent offending by the person subject to the PPO, it may direct the chief executive to apply to the court for a review of the order.³³
- 11.22 A person subject to a PPO may, with the leave of the court, apply to the court for a review of the PPO.³⁴ The chief executive must, in any event, apply to the court to review the continuing justification of a PPO at five-year intervals.³⁵
- 11.23 If the court is satisfied, on the balance of probabilities, that there is no longer a very high risk of imminent serious sexual or violent offending by the person subject to the PPO, the court must cancel the PPO and impose a protective supervision order (PSO).³⁶

Protective supervision orders

- 11.24 When the court imposes a PSO, it may include any requirements that the court considers necessary to:³⁷
- (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 of the person under protective supervision.
- 11.25 The chief executive or person subject to a PSO may apply to the court at any time for a variation or discharge of a requirement of a PSO.³⁸ The review panel also has powers to modify a requirement of a PSO but only if the review panel is satisfied the modification will render the requirement less restrictive.³⁹
- 11.26 The chief executive must apply to the court at five-year intervals for a review of the PSO.⁴⁰
- 11.27 The court may cancel a PSO if, during a period of five years in which the person has been subject to the order, the person has neither:⁴¹
- (a) committed any serious sexual or violent offences; nor

³² Public Safety (Public Protection Orders) Act 2014, s 15(1).

³³ Public Safety (Public Protection Orders) Act 2014, s 15(2).

³⁴ Public Safety (Public Protection Orders) Act 2014, s 17(1).

³⁵ Public Safety (Public Protection Orders) Act 2014, s 16(1).

³⁶ Public Safety (Public Protection Orders) Act 2014, ss 18(4) and 93(1). We discuss PSOs in Chapter 1.

³⁷ Public Safety (Public Protection Orders) Act 2014, s 94.

³⁸ Public Safety (Public Protection Orders) Act 2014, s 96(1).

³⁹ Public Safety (Public Protection Orders) Act 2014, s 97.

⁴⁰ Public Safety (Public Protection Orders) Act 2014, s 99.

⁴¹ Public Safety (Public Protection Orders) Act 2014, s 102(1).

- (b) breached any requirements included in the order.

Breaching public supervision order requirements

- 11.28 A person who breaches any requirements included in a PSO without reasonable excuse is liable on conviction to imprisonment for a term not exceeding two years.⁴²

Prison detention orders

- 11.29 As we discuss in Chapter 1, the court may make a prison detention order (PDO) requiring a person subject to a PPO to be detained in a prison instead of a residence.⁴³ The court may make the order only if it is satisfied that:⁴⁴

- (a) the person would, if detained or further detained in a residence, pose such an unacceptably high risk to themselves or to others, or to both, that the person cannot be safely managed in the residence; and
- (b) all less restrictive options for controlling the behaviour of the person have been considered and any appropriate options have been tried.

- 11.30 The review panel must review the continuing justification of a PDO at six-month intervals.⁴⁵ The chief executive must apply annually for the court to review the order.⁴⁶ The person subject to the PDO may apply, with the leave of the court, to cancel the order.⁴⁷

ISSUES

- 11.31 There is little case law or commentary relating to the variation or termination of conditions or orders. We invite feedback on whether there are other issues we have not raised.

Issues concerning preventive detention

Concerns that people on preventive detention do not have the right to apply to court for review

- 11.32 Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that anyone detained should be entitled to take proceedings “before a court” to determine the lawfulness of the detention and order release if the detention is unlawful.
- 11.33 In *Miller v New Zealand* (also discussed in Chapter 3), the United Nations Human Rights Committee (UNHRC) found that the preventive detention of two individuals breached the ICCPR because, among other reasons, the Parole Board did not constitute a court for the purposes of article 9(4).⁴⁸ The UNHRC reasoned that the Parole Board has no jurisdiction to review the legality of the detention but rather has an “administrative task” of assessing

⁴² Public Safety (Public Protection Orders) Act 2014, ss 103 and 103A.

⁴³ Public Safety (Public Protection Orders) Act 2014, s 85(1).

⁴⁴ Public Safety (Public Protection Orders) Act 2014, s 85(2).

⁴⁵ Public Safety (Public Protection Orders) Act 2014, s 87(1).

⁴⁶ Public Safety (Public Protection Orders) Act 2014, s 88(1).

⁴⁷ Public Safety (Public Protection Orders) Act 2014, s 89.

⁴⁸ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

risk. In the opinion of the UNHRC, the right to appeal to a court also falls short of the requirements of article 9(4) because judicial review of a Parole Board decision does not address considerations as to whether the detention is arbitrary in nature. The UNHRC concluded that Aotearoa New Zealand had failed to show “judicial review over the lawfulness of detention” was available to challenge continued detention pursuant to article 9(4) of the ICCPR.⁴⁹

- 11.34 The UNHRC appeared to conclude that there is no other right under New Zealand law to challenge the legality of detention in court other than the Parole Board’s risk assessment and judicial review of those decision. The correct position is that, aside from appeal rights against a sentence, a person subject to preventive detention can apply to court by way of habeas corpus.⁵⁰
- 11.35 The broader underlying issue, however, is that, when considering a habeas corpus application, New Zealand courts will not apply the ICCPR’s standards of what constitutes a “lawful” detention.⁵¹ Rather, the courts will determine whether the detention has been imposed and reviewed in accordance with the Sentencing Act 2002 and Parole Act. We discuss the mismatch between the legal standards of preventive detention under the ICCPR and New Zealand’s domestic law in Chapter 3.
- 11.36 Aside from the underlying issue that the law applying to preventive detention in Aotearoa New Zealand is different to the standards under the ICCPR, we are interested in feedback on the UNHRC’s views that the Parole Board does not satisfy the requirements of article 9(4) of the ICCPR.

QUESTION

Q43

Should the courts have greater responsibilities for reviewing preventive detention instead of leaving the task of determining release on parole to the Parole Board?

The provisions governing release on parole do not sit comfortably with human rights law

- 11.37 The courts and human rights bodies have considered when the indeterminate detention of a person for community protection purposes amounts to arbitrary detention under human rights law. We discuss this matter more fully in Chapter 3. In summary, once a punitive period of imprisonment has been served, compelling reasons relating to community safety are required to justify the person’s ongoing detention and avoid a finding that the detention is arbitrary.⁵²
- 11.38 In *Vincent v New Zealand Parole Board*, the High Court explained further that the test for release on parole (whether a person subject to preventive detention is an “undue risk”) can be interpreted consistently with the NZ Bill of Rights.⁵³ The Court said the test is

⁴⁹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.15].

⁵⁰ This right is affirmed by the Habeas Corpus Act 2001, s 6.

⁵¹ *Miller v New Zealand Parole Board* [2010] NZCA 600 at [51].

⁵² See *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC) at [7.3]; *Miller v New Zealand Parole Board* [2010] NZCA 600 at [70]; and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

⁵³ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [86].

subject to an “implicit proportionality assessment” that requires the Parole Board to weigh the risk to community (measured in the likelihood, nature and seriousness of possible further offending) against the person's interest in retaining liberty.⁵⁴ The Court also held that the provision in section 28(1AA) of the Parole Act that a prisoner has no entitlement to release on parole must also be interpreted consistently with the NZ Bill of Rights. The Court explained, that if a person imprisoned on preventive detention no longer constitutes an undue risk, there is no basis to maintain the detention. The state, having no basis to restrain the person's liberty any longer, has an obligation to release that person within as short a period of time as is reasonably possible.⁵⁵

- 11.39 In our preliminary view, it is desirable that the wording of the legislative test reflects the approach the courts apply in practice. This is despite the High Court's view in *Vincent* that section 28 of the Parole Act can be interpreted consistently with the NZ Bill of Rights. It may be preferable that the tests:
- (a) are expressly worded to recognise that a person detained beyond the punitive period of the preventive detention sentence should only be denied parole when there are compelling reasons relating to community safety; and
 - (b) omit the wording that a person on preventive detention has “no entitlement to be released on parole”.

QUESTION

Q44

Do you think the test for release from detention for people sentenced to preventive detention should expressly recognise their right to liberty except when justified by compelling reasons relating to community safety?

Difficulties with the suggestion that the test for release on parole changes over time

- 11.40 Where a person is in prison subject to a sentence of preventive detention and is eligible for parole, the Parole Board may grant release on parole if satisfied on reasonable grounds that the person will not pose an undue risk to the safety of the community.
- 11.41 Based on the wording, the test appears to be static — the same standard applies whether the person is being considered for parole for the first time or a subsequent time.⁵⁶
- 11.42 However, when examining the right to liberty and protection against arbitrary detention in the context of preventive detention, the courts and human rights bodies have suggested the test for justifying the detention changes over time. In *Miller*, the UNHRC said that, as the period of preventive detention increases, the state has an “increasingly heavy burden” to justify the continued detention.⁵⁷ The UNHRC added that “a level of risk which might reasonably justify a short period of preventive detention, may not necessarily

⁵⁴ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [86].

⁵⁵ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [87].

⁵⁶ In *Vincent v New Zealand Parole Board* [2020] NZHC 3316, te Kōti Maua o Aotearoa | High Court noted at [88] that the Parole Board had refused parole for Mr Vincent, who was detained under a sentence of preventive detention, at least 48 times.

⁵⁷ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.5].

justify a longer period of preventive detention”. Similarly, the High Court in *Vincent v New Zealand Parole Board* held that a NZ Bill of Rights-consistent interpretation of the test for parole required a proportionality assessment. The Court referred to the possibility that an “increasing justification” may be needed for ongoing and lengthy periods of detention.⁵⁸

11.43 It is difficult to make sense of the UNHRC’s views that a certain level of risk might justify a “short-term preventive detention” but not a longer period. If an increasing justification is required the longer the detention lasts, this suggests that:

- (a) at the point the court imposes preventive detention, the justification for imposing an indeterminate sentence is lower; and
- (b) if the risk a person poses remains static, the increased justification may not be met, and they would be released notwithstanding the likelihood that they will commit serious offences.

11.44 This could result in a situation where a person posing lesser risk is subject to detention but a person posing higher risk is released from detention. However, in the context of detention under the intellectual disability legislation, *te Kōti Pīra* | Court of Appeal has said:⁵⁹

We do not see this as material other than in finely balanced cases. Where a care recipient constituted a significant danger to the public and compulsory care was necessary for community protection, the liberty interest of the care recipient, even if he or she had been in care for a long period, would not outweigh the community protection interest.

11.45 Our preliminary view is that, rather than requiring increasing justification for detention over time, the initial justification for imposing preventive detention should be high. Detention for purely preventive reasons is always a very serious matter. Subsequent reviews should assess whether ongoing detention is justified and proportionate to the risks a person poses.

QUESTION

Q45

Do you think the test for release from detention for people sentenced to preventive detention should require “increasing justification” over time?

Issues concerning extended supervision orders

The test for cancelling an extended supervision order differs from the test for imposing an extended supervision order

11.46 Section 107(2)(b) of the Parole Act provides that, to impose an ESO, the court must be satisfied that “*either or both* of the following apply”:

- (a) There is a high risk that the offender will in future commit a relevant sexual offence.

⁵⁸ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [88] citing *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 at [90]–[91].

⁵⁹ *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 at [90].

- (b) There is a very high risk that the offender will in future commit a relevant violent offence.
- 11.47 In contrast, section 107M provides that the court may cancel the ESO “if the applicant satisfies the court, on the basis of the matters set out in section 107IAA, 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”.
- 11.48 The italicised words show the key differences between the two tests. The wording of section 107M seems to require the applicant to satisfy the court that neither ground from section 107I(2)(b) applies, even if the ESO has only been imposed in respect of one of the grounds. This seems to place a potentially unnecessary and difficult onus to discharge.

QUESTION

Q46

Do you think that the test for cancelling an ESO should mirror the test for imposing an ESO?

No provision for what happens when a person subject to an extended supervision order becomes subject to an interim detention order or a public protection order

- 11.49 The Parole Act is silent on what happens to an ESO when the person subject to the ESO becomes subject to an interim detention order (IDO) or a PPO. This seems to be a legislative oversight.
- 11.50 In our preliminary view, during the course of an IDO, an ESO should be suspended. That is because the order is intended to be a temporary holding position pending the determination of the PPO application.⁶⁰ It should then resume if the court refuses to grant a PPO.
- 11.51 In our preliminary view, an ESO should come to an end and not resume once a final PPO is granted. That is because a PPO provides for a form of indeterminate detention and, following release, the person is then subject to a PSO. Under the PSO, a person will be subject to ESO-like conditions. It would therefore be unnecessary for the ESO to resume.

QUESTIONS

Q47

Do you agree that an ESO should be suspended if an interim detention order is made?

Q48

Do you agree that an ESO should come to an end if a PPO is ordered?

⁶⁰ Public Safety (Public Protection Orders) Act 2014, s 107.

Issues relating to the timing of ESO reviews

- 11.52 Section 107RA(2) of the Parole Act provides that the court must review an ESO 15 years after the date on which a person first became subject to an ESO if they have “not ceased” to be subject to an ESO since first becoming subject to an ESO. It is not clear from the Act when an ESO starts or ceases in several scenarios. First, if a person is placed on an ESO after being subject to an ISO, it is not clear when the ESO starts for the purposes of the review obligations. Similarly, if a person is made subject to an ISO in between consecutive ESOs, it is not clear from the Act if the person has “ceased” to be subject to an ESO. Secondly, if a person on an ESO is made subject to an IDO or a PPO, it is not clear from the Act if the ESO ceases.
- 11.53 In our preliminary view, these issues could be easily resolved:
- (a) It would make sense to include any time spent on an ISO when determining when the court should review an ESO.
 - (b) If a person is made subject to an IDO but a PPO is not subsequently granted, the time spent on the IDO could be included when determining when the court should review an ESO.
 - (c) Consistent with our suggestion that an ESO should terminate when a final PPO is imposed, ESO review obligations should also terminate when the court makes a PPO.

It is unclear whether the Parole Board can vary an intensive monitoring condition

- 11.54 Section 107IAC of the Parole Act states that, when making an ESO, the court may at the same time make an order requiring the Parole Board to impose an intensive monitoring (IM) condition. The order must specify the maximum duration of the IM condition, which must be no longer than 12 months.⁶¹
- 11.55 If the court makes the order, the Parole Board must impose the IM condition.⁶² However, the Parole Board may set the duration of the condition (up to the maximum specified by the court) and its details (for example, how many hours per day the person must be monitored).⁶³
- 11.56 Section 107O of the Parole Act allows the Parole Board to vary or discharge ESO conditions. The provision contains an exception:⁶⁴
- (1A) However, the Board may not vary any condition of an extended supervision order in a way that would be contrary to any order made under section 107IAC requiring the imposition of an intensive monitoring condition.
- 11.57 We assume that the purpose of the provision is to avoid the Parole Board circumventing a court order to impose an IM condition by imposing it and then discharging it.
- 11.58 It is unclear whether or to what extent the Parole Board may vary an IM condition. For example, the court could order the Parole Board to impose an IM condition and specify a

⁶¹ Parole Act 2002, s 107IAC(3).

⁶² Parole Act 2002, s 107IAC(4).

⁶³ In *C v New Zealand Parole Board* [2021] NZHC 2567, the Court at [121] considered that conditions requiring line-of-sight monitoring for periods of five to six hours at a time amounted to intensive monitoring.

⁶⁴ Parole Act 2002, s 107O(1A).

maximum term of 12 months. The Parole Board would have discretion to impose the IM condition for six months. It is not clear whether the Parole Board could subsequently vary the IM condition by reducing the term to four months or if this would amount to varying the condition “in a way that would be contrary” to the order of the court.

- 11.59 As far as we are aware, there is no case law on the interpretation of section 107O(1A). It is uncertain whether the drafting of the provision is an issue requiring legislative amendment.

QUESTION

Q49

Do you think that the law relating to whether the Parole Board can vary an IM condition needs clarification?

Concern that breaching an ESO condition is an offence

- 11.60 Breaching an ESO condition is an offence punishable by up to two years’ imprisonment.⁶⁵
- 11.61 There are concerns about whether conviction and sentence is an appropriate measure for ensuring compliance with ESO conditions.
- 11.62 On the one hand, it may be argued that it is desirable that breaching an ESO condition be an offence. ESO conditions are imposed for the purposes of reducing the risk of reoffending, facilitating or promoting rehabilitation and reintegration or providing for the reasonable concerns of victims.⁶⁶ Breaching a condition imposed for these purposes could indicate unmanaged risk. In some cases, the breach may consist of offence-paralleling behaviour.⁶⁷ It is necessary to have robust measures to respond to breaches yet for the court to have flexibility to respond to the breach in the way it considers most appropriate. The courts may impose a sentence from the full range of sentences, from conviction and discharge to home detention to imprisonment. Convicting and sentencing a person for breaching a condition may deter that person or others from breaching conditions in future.
- 11.63 On the other hand, it may be argued that breaching an ESO condition should not be an offence:
- (a) An ESO is a second punishment (as we discuss in Chapter 3). Convicting and sentencing a person for breaching an ESO condition amounts to punishing a person for breaching the restrictions of a second punishment.

⁶⁵ Parole Act 2002, ss 107T and 107TA.

⁶⁶ Parole Act 2002, s 15(2).

⁶⁷ Offence-paralleling behaviour is a behavioural pattern that resembles, in some significant respect, the sequence of behaviours that has previously led to an offence: Lawrence Jones “Offence Paralleling Behaviour (OPB) as a Framework for Assessment and Interventions with Offenders” in Adrian Needs and Graham Towl (eds) *Applying Psychology to Forensic Practice* (Blackwell Publishing, Oxford, 2004) 34 at 38.

- (b) Research shows that, for high-risk people, the process of desistance (stopping offending) is slow and can take years to become consolidated.⁶⁸ During this process, a person may make considerable progress but nevertheless make “minor slip-ups” (compared to their previous offending), which could include breaches of conditions. Convicting and sentencing a person for breaches of this nature may not only fail to recognise their progress but have a detrimental effect on it.⁶⁹
- (c) Convictions for breaching conditions may result in an unfairly inflated assessment of risk for people subject to ESOs. Most risk assessment tools take into account the number of previous convictions a person has. If a person subject to an ESO breaches a condition by committing an offence, they may be charged with both breaching the condition and the substantive offence. This could give the appearance they pose a greater risk of reoffending than a person who has engaged in identical behaviour while subject to a court order (for example, a bail condition) but who is not subject to an ESO.
- 11.64 There are alternative measures to ensure compliance with conditions and respond to risk that do not involve conviction and sentence. An example may be found in the bail system. If a person is charged with an offence, the court may release them on bail with conditions imposed to ensure that the person does not commit any offence while on bail.⁷⁰ Breaching a bail condition is not an offence. However, if a person breaches a bail condition, they may be arrested and brought before the court to reconsider their bail.⁷¹ Depending on how serious the breach is and whether it indicates an increased risk of offending, the options available to the court include releasing the person on the same bail conditions, varying the bail conditions or remanding the person in custody. We note that, unlike a person on bail, a person subject to an ESO cannot be remanded in custody for breach of conditions if it is not an offence. However, conditions could be varied to manage any risk. Where a breach of conditions indicated that a person could not be managed safely in the community, the chief executive could apply for a PPO and may apply for an IDO until the application is determined.⁷²
- 11.65 If a person has breached a bail condition without reasonable excuse, the court has discretion to certify the breach and to have the nature of the condition and the breach entered in the court record.⁷³ The court may decide not to direct the breach to be entered

⁶⁸ Statement of Evidence of Professor Devon Polaschek on Behalf of Ara Poutama Aotearoa/Department of Corrections (Criminal Psychology) to the Independent Hearings Commissioners before the Christchurch City Council, in the matter of an application by Ara Poutama Aotearoa/Department of Corrections for resource consent to establish a rehabilitative and reintegrative residential accommodation programme with an existing property at 14 Bristol Street, Christchurch (RMA/2020/173) (16 August 2021) at 22.

⁶⁹ Statement of Evidence of Professor Devon Polaschek on Behalf of Ara Poutama Aotearoa/Department of Corrections (Criminal Psychology) to the Independent Hearings Commissioners before the Christchurch City Council, in the matter of an application by Ara Poutama Aotearoa/Department of Corrections for resource consent to establish a rehabilitative and reintegrative residential accommodation programme with an existing property at 14 Bristol Street, Christchurch (RMA/2020/173) (16 August 2021) at 22–23.

⁷⁰ Bail Act 2000, s 30(4)(c). Bail conditions may also be imposed for the purposes of ensuring the person appears in court and that they do not interfere with any witness or evidence against them: Bail Act 2000, ss 30(4)(a) and 30(4)(b).

⁷¹ Bail Act 2000, ss 35 and 37.

⁷² Public Safety (Public Protection Orders) Act 2014, s 107.

⁷³ Bail Act 2000, ss 39(1) and 39(3).

in the court record if the breach is of such minor nature that it does not warrant being taken into account when considering any further bail applications.⁷⁴

- 11.66 If a person breaches their bail conditions by committing another offence (for example, committing an assault in breach of a condition not to use violence on any person), they may be charged with the offence and have the breach recorded. As well as breaches, a person's bail record shows the offences of which they have been charged or convicted that were committed while they were subject to bail conditions. When the court is considering whether to grant bail or remand a person in custody, the court may take into account whether the person has a history of offending while on bail or breaching bail conditions.⁷⁵
- 11.67 The data we have received from Ara Poutama | Department of Corrections shows that, between 1 July 2005 and 21 September 2022, of the 537 individuals subject to ESOs, 355 were convicted of at least one breach of their ESO.⁷⁶ However, we cannot draw any conclusions from this data about whether it is appropriate for breaching an ESO condition to be an offence. We do not have information about the conditions or the circumstances of the breaches that resulted in convictions or any data about breaches that did not result in convictions.

QUESTION

Q50

Do you think that breaching an ESO condition should be an offence or that another mechanism should be used for ensuring compliance with ESO conditions?

Issues concerning public protection orders

- 11.68 We have discerned few issues with the way PPOs cease. The lack of critical commentary is likely because so few people have been subject to a PPO and to date, as far as we are aware, no person has yet been placed on a PSO.
- 11.69 We would value feedback on whether there are any other issues relating to how PPOs cease.

QUESTION

Q51

Are there any issues relating to the variation or termination of PPOs?

⁷⁴ Bail Act 2000, s 39(4).

⁷⁵ Bail Act 2000, s 8(2)(e).

⁷⁶ Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to John-Luke Day (Principal Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (14 March 2023).

Part Six:

Proposals for reform

CHAPTER 12

Proposals for reform

IN THIS CHAPTER, WE CONSIDER:

- proposals to reform the law applying to preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs).

INTRODUCTION

- 12.1 This chapter presents high-level proposals for reforming the law relating to the preventive regimes. These proposals seek to address the main issues raised across this Issues Paper.
- 12.2 Our aim in presenting these proposals is to receive initial feedback on the advantages and disadvantages of each proposal. We will use the feedback we receive on these proposals as we develop comprehensive options for reform. We will present these options in a Preferred Approach Paper, which we will publish in mid-2024 for further consultation.
- 12.3 We discuss the proposals in this chapter separately on an issue-by-issue basis. Most proposals could be implemented alongside any combination of other proposals. Sometimes we note where, in our view, a particular combination of proposals would or would not work well.
- 12.4 It is helpful to explain briefly some of the terms we use in this chapter:
- (a) Some proposals envisage the continuation of preventive detention, ESOs and PPOs with amendment. For these proposals, we use the language of preventive detention, ESOs and PPOs.
 - (b) Some proposals instead contemplate the introduction of new preventive measures to replace the current preventive regimes, although those measures may resemble preventive detention, ESOs and PPOs. Where a new form of preventive measure is envisaged, we describe them as “new preventive measures”.
 - (c) Some proposals could apply to preventive detention, ESOs and PPOs in their current (or amended) form or to new preventive measures. We therefore use the term “preventive measures” to mean preventive detention, ESOs and PPOs or new preventive measures.

PROPOSAL TO FACILITATE TINO RANGATIRATANGA AND ENABLE MĀORI TO LIVE ACCORDING TO TIKANGA

PROPOSAL

P1

In protecting the community from serious reoffending, the law could better enable Māori to live according to tikanga and could facilitate tino rangatiratanga. To achieve this:

- a. the Government could instigate, support and resource the development of Māori-designed and Māori-led initiatives through which people who are at risk of serious reoffending after the completion of a determinate prison sentence can be safely managed to prevent harm to the community; and
- b. when the court considers imposing preventive measures, or when the Parole Board considers what conditions to impose on a person on an ESO, the law could:
 - i. promote opportunities to address the court/Parole Board for the person's whānau, hapū or iwi, or any person who has a shared sense of whānau identity around a particular kaupapa with the person; and
 - ii. require the court/Parole Board to consider whether and how the person can access Māori-designed and Māori-led initiatives.

12.5 This proposal responds to our preliminary view discussed in Chapters 2 and 10 that the law is inconsistent with tikanga Māori in several respects and fails to facilitate tino rangatiratanga as best it could.

Promote the development of Māori-designed and Māori-led initiatives

12.6 In our preliminary view, the best way the law can enable Māori to live according to tikanga and facilitate tino rangatiratanga is through the promotion of Māori-designed and Māori-led initiatives. These initiatives would be designed to safely manage those at risk of serious reoffending after they complete a determinate prison sentence.¹

12.7 From our preliminary engagement, we are aware of a small number of Māori groups providing kaupapa Māori rehabilitation programmes both within prisons and for those who have been released from prison, including some who are on ESOs. This proposal envisages an upscaling of those types of initiatives and the development of entirely new ones, to the point where Māori providers, such as iwi, hapū and non-governmental organisations are able to provide the preventive measures needed to keep the community safe. We see this proposal as firmly within the scope of the *Hōkai Rangi* strategy released by Ara Poutama | Department of Corrections. The strategy requires new approaches in which the delivery of functions and responsibilities are shared with

¹ If preventive detention is continued and reformed in accordance with Proposal 6, Māori-designed and Māori-led initiatives should be made available once a person completes their minimum term of imprisonment.

Māori partners.² It requires the exploration of new opportunities, such as the possibility of iwi-led administration of sentences and the development of new models of working with Māori service providers.

- 12.8 Under this proposal, the Government would support Māori to design initiatives that can effectively implement the preventive measures needed, thereby facilitating tino rangatiratanga. These initiatives may be tikanga-based and founded within te ao Māori. They may also draw on other approaches such as best clinical practice. We envisage that the initiatives would facilitate a person’s rehabilitation and prioritise important aspects of tikanga, such as supporting relationships with whānau, working to build the person’s mana and tapu, and achieving restoration into the community. These initiatives could be run independently by Māori, or they could be run in partnership or within facilities operated by Ara Poutama. Once developed, it could be for the Māori providers to decide which people would be eligible for the initiative, for example, whether it is for Māori of a particular iwi, all Māori or all people both Māori and non-Māori. We note, however, that Māori-led programmes that are based on tikanga should occur in a fundamentally Māori context, and there are limits on the extent to which programme requirements could be prescribed by legislation and delivered in a kāwanatanga context.
- 12.9 The first step to implementing this proposal would be for the Government to make the development of Māori-designed and Māori-led initiatives a key priority. Their development would need to be properly resourced. As explained, we consider this approach aligns with the Government’s commitments made in *Hōkai Rangī*.

Require consideration of Māori-designed and Māori-led initiatives

- 12.10 Under this proposal, the law could promote opportunities for certain people to address the court or New Zealand Parole Board (Parole Board). In preliminary engagement, several people emphasised that a person’s whānau, hapū or iwi or any person who has a shared sense of whānau identity around a particular kaupapa (such as urban Māori initiatives) should provide input to the court when it considers imposing preventive measures. The court could receive additional information in the form of cultural reports. We discuss this further in Chapters 8 and 10. The law currently enables the court to receive a wide range of evidence and information when considering whether to impose preventive detention, an ESO or a PPO.³ This proposal envisages something stronger, such as imposing positive requirements on the party applying for the order to have sought the views of the relevant individuals or to have given them notice of the ability to address the court.⁴
- 12.11 The law could expressly require that a court, when it considers imposing preventive measures, must consider whether and how a person can access Māori-designed and Māori-led initiatives. Similarly, when the Parole Board considers what conditions to impose

² Ara Poutama | Department of Corrections *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019) at 18.

³ Sentencing Act 2002, s 27; Parole Act 2002, s 107H(2); Public Safety (Public Protection Orders) Act 2014, s 108(1).

⁴ See for comparison s 107H(4) of the Parole Act 2002 that requires the chief executive of Ara Poutama | Department of Corrections, when applying for an ESO in respect of a person, to notify every victim of the person about the hearing. Victims may make written submissions to the court and, with the leave of the court, may appear and make oral submissions at the hearing: s 107H(5).

on a person managed in the community on an ESO, it would consider access to Māori-designed and Māori-led initiatives. There is already limited provision for this under the current law. For example, it is possible for a person on parole or subject to an ESO to be placed within the care of a an iwi, hapū, whānau or marae or an ethnic or cultural group as part of a requirement to attend a programme.⁵ This proposal envisages a strengthening of the current law by requiring the court or Parole Board to consider Māori-designed and Māori-led initiatives, rather than the option simply being available.

- 12.12 The law could provide direction to the court by requiring it to take into account the views of the person's kin or kaupapa relations, or any other cultural information, when considering:
- (a) the extent to which the person poses risks of serious reoffending;
 - (b) if a preventive measure should be imposed, whether and how the person can access Māori-designed and Māori-led initiatives; and
 - (c) any other matter the court considers relevant.
- 12.13 Similarly, the law could provide direction to the Parole Board to take into account the views of the person's kin or kaupapa relations, or any other cultural information, when considering:
- (a) what conditions to impose on parole or an ESO;
 - (b) whether and how the person can access Māori-designed and Māori-led initiatives; and
 - (c) any other matter the Parole Board considers relevant.
- 12.14 It may also be desirable for the law to set out the relevant principles of tikanga to guide the court and Parole Board as they determine these matters. We intend to undertake further work and consultation in the next stage of this review to assess feasibility and identify what those specific principles are and how they should be framed. We recognise there are several important matters to work through, such as the extent to which tikanga can and should be incorporated into the legislation, whether the courts and Parole Board are well placed to apply tikanga and the implications for consistency across the law and its application. We welcome any preliminary comment on the desirability of setting out the relevant principles of tikanga in the legislation and how that might be framed.

⁵ Parole Act 2002, s 16(c).

PROPOSAL TO MANAGE PEOPLE DETAINED BEYOND A DETERMINATE PRISON SENTENCE FOR PREVENTIVE REASONS IN DIFFERENT CONDITIONS TO PRISON

PROPOSAL

P2

Legislation that enables people to be detained after the completion of a determinate sentence to prevent them committing further serious offences could provide that:

- a. people detained must have as much autonomy and quality of life as reasonably possible;
- b. people detained must be managed in conditions that are separate and distinct from the conditions in which people serve determinate prison sentences;
- c. rehabilitation and reintegration are central objectives of the law; and
- d. people detained are guaranteed therapeutic and rehabilitative interventions.

12.15 This proposal addresses the law that could govern the nature and conditions of detention for preventive reasons after a person completes a determinate sentence. It assumes that the law will continue to provide detention as a preventive measure, whether that be preventive detention and/or PPOs or new preventive measures. If preventive detention is retained, in line with Proposal 6 below, the requirements of this proposal could apply after the person completes the minimum period of imprisonment (MPI) of their preventive detention.

12.16 We note, however, that elsewhere in this Issues Paper, we have sought feedback on the extent to which detention as a preventive measure is a non-arbitrary and justified limitation on individual rights and freedoms. The feedback we receive on this question may cause us to conclude that detention is not justified or not justified in its current form. Nevertheless, for the purposes of this proposal, we assume that detention of some form will be continued as a preventive measure in any reformed law.

12.17 The aim of this proposal is to respond to the human rights concerns raised in *Miller v New Zealand* and *Chisnall v Attorney-General* (we discuss these concerns further in Chapter 3).⁶ In *Miller*, the United Nations Human Rights Committee (UNHRC) explained that people subject to preventive detention following a punitive prison term must be managed in conditions that are distinct from the conditions for convicted prisoners serving punitive sentences.⁷ The detention must be aimed at the detainee's rehabilitation and reintegration into society.⁸ Because people subject to preventive detention remain in prison conditions with those serving determinate sentences, the UNHRC found that the

⁶ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC); *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.

⁷ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee *General Comment No. 35, Article 9 (Liberty and Security of the Person)* CCPR/C/GC/35 (16 December 2014) at [21].

⁸ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee *General Comment No. 35, Article 9 (Liberty and Security of the Person)* CCPR/C/GC/35 (16 December 2014) at [21].

- cases of preventive detention in *Miller* were in breach of the protection against arbitrary detention under the International Covenant on Civil and Political Rights (ICCPR).
- 12.18 In *Chisnall*, te Kōti Pira | Court of Appeal (Court of Appeal) held that the legislation governing PPOs “must guarantee therapeutic and rehabilitative interventions by the state in order to avoid the conclusion that it is penal”. Because the Public Safety (Public Protection Orders) Act 2014 (Public Safety Act) qualifies a person’s right to receive rehabilitation with the requirement that “the treatment has a reasonable prospect of reducing risk to public safety posed by the resident”,⁹ the Court of Appeal concluded that PPOs were penalties thereby infringing the protection in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) against second punishment.¹⁰
- 12.19 In light of these decisions, this proposal envisages that a person detained for preventive reasons could be detained in a separate and distinct facility that is oriented to facilitate as much autonomy and quality of life as can be reasonably provided while ensuring community safety. The predominant aim of detention at those facilities, alongside community safety, would be the therapeutic treatment, rehabilitation and reintegration of the person detained.
- 12.20 Precedent exists for this approach to detention. The German Criminal Code, to which the Court of Appeal in *Chisnall* contrasted the PPO regime, provides that people preventively detained in Germany must reside in facilities that are separate to prisons.¹¹ The facilities must offer comprehensive, individualised and intensive treatment tailored to the detainee’s needs. We discuss the German law further in Chapter 3.
- 12.21 We also note that the Matawhāiti residence, in which people subject to PPOs are detained, provides better conditions than those provided to people on preventive detention in prison. For example, residents at Matawhāiti have a well-maintained communal area with a lounge and shared kitchen. They are accommodated in individual residential units each with a lounge, kitchenette, bathroom and shower. Residents wear their own clothes. They cook for themselves. They go on supervised outings. While the qualified rights to rehabilitative treatment are an issue for people on PPOs, the Matawhāiti residence provides a more rights-compliant environment than detention in prison conditions.
- 12.22 We recognise the significance of the proposal to manage people detained in different conditions to prison. There are considerable resource and infrastructure implications. If implemented, careful consideration of transitional provisions would be required.
- 12.23 The guarantees of therapeutic and rehabilitative treatment under this proposal would require a substantial reworking of the duties as they currently exist under the Corrections Act 2004 and the Public Safety Act. The provision of treatment under the Corrections Act must be “reasonable and practicable in the circumstances within the resources available”¹² and is provided to those prisoners who, in the opinion of the chief executive of Ara Poutama | Department of Corrections, “will benefit from those programmes”.¹³ As

⁹ Public Safety (Public Protection Orders) Act 2014, s 36.

¹⁰ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [164].

¹¹ Strafgesetzbuch – StGB [German Criminal Code] 1998 (Germany), s 66C.

¹² Corrections Act 2004, s 6(1)(h).

¹³ Corrections Act 2004, s 52.

noted, a person on a PPO is entitled to receive treatment if it reduces the risks that person poses to public safety. This proposal contemplates a reorientation from an approach that sees treatment as an extension of the goal of community safety to something guaranteed as of right to persons detained for preventive reasons. It requires sufficient commitment of resource to ensure a person is provided with appropriate treatment options. It may be that individual treatment options must be developed if standard approaches prove inadequate.¹⁴

ALTERNATIVE PROPOSALS FOR WHEN A COURT COULD IMPOSE PREVENTIVE MEASURES

PROPOSALS

P3A Preventive detention remains a sentence. A court could impose an ESO at sentencing or as a post-sentence order at the expiry of a person's determinate sentence. PPOs remain post-sentence orders.

P3B ESOs and PPOs cease to be post-sentence orders. Instead, at sentencing, a court would impose an ESO or a PPO. To take effect at the expiry of the person's determinate sentence, the court must confirm any ESO or PPO it imposed at sentencing. Preventive detention is repealed.

P3C Preventive detention is repealed. Instead, if a person must be detained to ensure community safety, the detention must be imposed as a post-sentence order. ESOs would remain a post-sentence order.

- 12.24 These proposals consider the appropriate point for a court to impose a preventive measure. In Chapter 3, we discuss the Court of Appeal's findings in *Chisnall* that ESOs and PPOs are second penalties (and therefore in breach of the NZ Bill of Rights) because they are post-sentence orders instead of being imposed at time of sentencing by the sentencing court. In Chapter 8, however, we note that preventive detention requires an assessment of the risk the person will seriously reoffend at the time they will finish a determinate sentence. That may be several years in the future. Predictions of a person's future risk at sentencing are likely to be less accurate than assessments made at the end of the sentence. In particular, assessments of future risk at sentencing cannot factor in how a person responds to rehabilitation treatment during their prison sentence.
- 12.25 These alternative proposals present different points when a court could impose a preventive measure.
- 12.26 Proposal 3A largely retains the status quo. Preventive detention remains a sentence. PPOs remain a post-sentence order. The key change is that ESOs could be imposed at sentencing as well as a post-sentence order. The main advantage of enabling a court to

¹⁴ *B v R* 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011 at [100] and [113].

impose an ESO at sentencing is it may avoid the concerns that an ESO that is imposed as a post-sentence order is a form of second punishment. Proposal 3A does not, however, address the concern about the risk of inaccurately predicting a person's risk at sentencing compared to the end of the sentence.

- 12.27 Proposal 3B is a hybrid approach. It enables the court to impose ESOs and PPOs at the time of sentencing. To take effect, however, the court must confirm the measure at the end of the person's sentence. Because the court at sentencing could impose a PPO, there would be an unnecessary double-up with preventive detention. Preventive detention could therefore be repealed.
- 12.28 This proposed approach may address the concern that post-sentence orders constitute second punishment. The sentencing court would impose an ESO or a PPO when finally disposing of the criminal proceedings in respect of the qualifying offending (albeit the ESO or PPO would need to be confirmed at the end of the sentence).
- 12.29 By requiring the court to confirm the order at the end of sentencing, changes in the person's risk profile can be taken into account. If a person no longer poses the required level of risk, the court would not confirm the order.
- 12.30 The main disadvantage with Proposal 3B is there would be no ability to impose post-sentence preventive measures on people who have not been made subject to a preventive measure at sentencing. The risks a person poses may not be known until late in their sentence, for example, depending on how they have responded to treatment during their sentence. Further, because there is only one opportunity to obtain a preventive measure, it is possible ESOs and PPOs may be sought too readily at sentencing.
- 12.31 Proposal 3C would repeal preventive detention as a sentence and move entirely to post-sentence orders. The main advantage of this option is that the risk assessment would be more accurate as the court would not be required to make orders to detain people based on what their risks may be some time in the future.
- 12.32 This proposal would, however, be vulnerable to a finding that post-sentence orders remain a second punishment and inconsistent with the NZ Bill of Rights. In our view, there are several points that may mitigate this concern:
- (a) If Proposal 2 is implemented, post-sentence detention would have a central rehabilitative and therapeutic focus. This may change the character of the detention so it is no longer considered a penalty.
 - (b) Some people may consider it better to subject a person to a form of second punishment based on more accurate risk assessment than unnecessarily imposing measures at sentencing based on a less accurate assessment.
 - (c) A person eligible for a post-sentence order because of their qualifying offending could be notified at sentencing of the possibility that a post-sentence order may be imposed at the sentence expiry. While that may not fully address the problem of double punishment, it could alleviate the issue by making people aware at the time they are sentenced of the possibility of post-sentence preventive measures.
- 12.33 Ultimately, to adopt any proposal, we would need to be satisfied that any limit on rights under the NZ Bill of Rights, like the protection against second punishment, is demonstrably justified.

ALTERNATIVE PROPOSALS TO ADDRESS THE FRAGMENTATION OF THE REGIMES

PROPOSALS

P4A

- Retain preventive detention, ESOs and PPOs within their existing statutory regimes but make amendments to address the fragmentation of the law by:
- a. requiring the court to impose the least restrictive preventive measure necessary to protect the community from the risk the person will commit further serious violent or sexual offences;
 - b. removing barriers that currently prevent a court from imposing the least restrictive measures, specifically by:
 - i. enabling a person subject to preventive detention to be eligible for an ESO;
 - ii. enabling the court to hear an application for an ESO and a PPO at the same time; and
 - c. treating PPOs as a criminal and/or parole matter for the purposes of court procedure and legal aid entitlements.

P4B

Repeal sections 87–90 of the Sentencing Act 2002, Part 1A of the Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014. In their place enact a single statutory regime to govern all preventive measures.

The new statute could provide for a gradation of preventive measures with a requirement that the court impose the least restrictive measure necessary to protect the community from the risk the person will commit further serious violent or sexual offences.

- 12.34 These proposals respond to the issues raised in Chapter 4 regarding the fragmentation of the law across three statutory regimes.
- 12.35 Proposal 4A retains the existing regimes but proposes amendments to deal with the main issues caused by the fragmentation of the law.
- 12.36 Proposal 4B goes further and proposes a new single statutory regime in place of the existing legislation. This approach could better facilitate the courts' ability to consider and order the most appropriate and least restrictive preventive measure in each case. It would, however, be a significant change to the law. Most notably, it would take preventive detention out of the Sentencing Act 2002, meaning it should not continue as a sentence. That may, however, be appropriate because preventive measures could have different purposes and principles to sentencing generally, with a narrower focus on community protection and therapeutic and rehabilitative treatment (see Proposals 2 and 5).
- 12.37 A possible hybrid approach that we have not listed as a proposal but could be considered is to retain preventive detention within the Sentencing Act but bring the ESO and PPO regime together into a single post-sentence order legislative regime.

- 12.38 It should also be noted that the time at which a preventive measure is imposed is directly linked to the advantages of a single statutory regime. For example, if preventive measures were to be imposed only as post-sentence orders (Proposal 3C), a single statutory regime might be more suitable.

PROPOSAL TO REFORM PREVENTIVE DETENTION IF IT CONTINUES AS A SENTENCE

PROPOSAL

P5

If the law continues to provide for preventive detention as a sentence, the law could be reformed to provide that:

- a. the minimum period of imprisonment (MPI) for preventive detention must reflect the full term of the determinate sentence that would have been imposed for the qualifying offending had the preventive detention sentence not been imposed;
- b. on the expiry of the MPI, the justification for the ongoing detention must be regularly and periodically reviewed and the person subject to detention must be managed in the conditions described in Proposal 2;
- c. the provisions governing reviews must require that compelling reasons are needed to justify the ongoing detention; and
- d. the person subject to preventive detention would be eligible for an ESO.

- 12.39 This proposal considers changes that could be made to preventive detention to demarcate more clearly the first and second periods of the sentence in accordance with the human rights jurisprudence discussed in Chapter 3. As we note, this distinction is not currently found in the Sentencing Act or Parole Act 2002. The UNHRC has, however, repeatedly stated that the distinction between the first and second period is required for consistency with article 9 of the ICCPR.
- 12.40 Proposal 5 identifies the first period by requiring an MPI for preventive detention that reflects the full determinate sentence that would have been imposed in respect of the qualifying offending but for the preventive detention sentence. This is to reflect the “just deserts” or punitive part of the sentence the person is required to serve for the qualifying offending. The proposal also assumes the person would serve the full determinate sentence and would not satisfy the test for release on parole before the sentence expiry owing to the risks they would reoffend.
- 12.41 After the MPI has expired, the person detained must be managed in conditions described in Proposal 2. At this point, the ongoing detention in those conditions must be periodically and regularly reviewed.
- 12.42 Lastly, in line with the point stressed throughout this Issues Paper that a court should impose the least restrictive preventive measure available, people on preventive detention would be eligible for an ESO. It is possible that, if a person on preventive detention could be safely managed in the community on an ESO with the necessary conditions, they may need to spend less time detained. This would seem to be a less restrictive approach. If a

person on preventive detention becomes subject to an ESO, the ESO would take effect in place of the parole conditions and eligibility for recall that otherwise applies to people on preventive detention released on parole.

PROPOSALS FOR REFORM RELATED TO ELIGIBILITY FOR PREVENTIVE MEASURES

Proposal to reform the age of eligibility for preventive detention

PROPOSAL

P6

If the law continues to provide for preventive detention as a sentence, the law could provide that a person must be aged 25 years or older at the time of conviction for the qualifying offence in order to be eligible for preventive detention.

- 12.43 This proposal addresses the issues we discuss in Chapter 5 relating to risk assessment of young adults and the impact of indeterminate sentences on young adults.
- 12.44 Regions of the brain involved with controlling emotions, resisting temptation and considering consequences continue to develop until 25 years or older. While this development can result in risk-taking, it can also make young adults more amenable to rehabilitation. Developmental changes can make estimating long-term risk, as is required for preventive detention, difficult for young adults. Indeterminate sentences may have disproportionate impacts on young adults and cause psychological harm. As we discuss in Chapter 5, courts are already aware of these issues, and young adults are rarely sentenced to preventive detention.¹⁵
- 12.45 This proposal prevents the imposition of preventive detention on anyone aged under 25 at the time of conviction for the qualifying offending. Where a young adult is sentenced to imprisonment for serious offending and continues to pose a significant risk of reoffending at the end of the sentence, post-sentence orders could meet this risk. The advantages of post-sentence orders over preventive detention in this situation are:
- (a) the person has had an opportunity to mature neurologically and to engage in rehabilitation before they are assessed for ongoing risk;
 - (b) the particular adverse impacts of indeterminate imprisonment on young adults are avoided; and
 - (c) the risk assessment is more accurate as it addresses current risk.
- 12.46 This proposal would not be needed if Proposal 3B or 3C were implemented. Proposal 3B would allow ESOs and PPOs to be imposed at the time of sentence, but they would need to be confirmed at the end of a person's sentence. This would mitigate many of the concerns. Proposal 3C would involve only post-sentence orders, so the concerns would not arise.

¹⁵ As stated in Chapter 6, five young adults were sentenced to preventive detention in the 10-year period from 1 July 2012 to 30 June 2022.

Proposals for reform relating to qualifying offences

PROPOSALS

P7

The same offences could be qualifying offences for preventive detention, ESOs and PPOs.

P8

The qualifying offences could be expanded by including other offences that are of a similar nature and seriousness to the current qualifying offences. The proposed offences to include are:

- a. contracting a person under 18 for commercial sexual services, causing or encouraging a person under 18 to provide sexual services or receiving payment derived from commercial services provided by a person under 18;
- b. strangulation or suffocation;
- c. dealing in people under 18 for sexual exploitation, removal of body parts or engagement in forced labour;
- d. wilfully infecting with disease;
- e. preventing or impeding a person who is attempting to save his or her own life or the life of another without lawful justification or excuse;
- f. female genital mutilation;
- g. inciting, counselling or procuring suicide, where the victim then commits or attempts to commit suicide;
- h. killing an unborn child in such a manner that the offender would have been guilty of murder if the child had legally become a human being;
- i. ill-treatment or neglect of a child or vulnerable adult in a manner likely to cause suffering, injury or adverse effects;
- j. failure to protect a child or vulnerable adult from a risk of death, grievous bodily harm or sexual assault;
- k. an offence committed overseas that would come within the description of an offence against the Films, Videos and Publications Classification Act 1993 punishable by imprisonment where the material is objectionable because it (a) promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes; and/or (b) describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both; and/or (c) exploits the nudity of children, or young persons, or both;
- l. offences against the Films, Videos and Publications Classification Act 1993 punishable by imprisonment where the material is objectionable because it promotes or supports, or tends to promote or support (a) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct, (b) bestiality, or (c) acts of torture or the infliction of extreme violence or extreme cruelty; and

- m. offences against the Prostitution Reform Act 2003 of contracting a person under 18 for commercial sexual services, causing or encouraging a person under 18 to provide commercial sexual services or receiving payment derived from commercial sexual services provided by a person under 18.

P9

Repeal incest and bestiality as qualifying offences.

- 12.47 Proposals 7 and 8 address the issues we discuss in Chapter 6 relating to apparent inconsistencies in the qualifying offences.
- 12.48 For the most part, the same offences are qualifying offences for preventive detention, ESOs and PPOs. Proposal 7 addresses the remaining inconsistencies in the qualifying offences for each regime that exist without any apparent rationale. This could also make it easier for the court to impose the least restrictive order if the changes in Proposal 4A or Proposal 4B were adopted.
- 12.49 Proposal 8 would add some qualifying offences that are similar to the current qualifying offences in nature, seriousness and harm to the community but are currently excluded. The maximum penalties and legislative references for these offences are in Chapter 6.
- 12.50 As we discuss in Chapter 6, we consider that caution should be exercised in expanding the scope of the preventive regimes. We are unaware of any issues that might justify the inclusion of the offences listed in Proposal 8, other than the fact that they are omitted as qualifying offences despite seeming to be of same seriousness as offences included in the legislation.
- 12.51 Proposal 9 would repeal incest and bestiality as qualifying offences. As we discuss in Chapter 6, the offence of incest is generally used for consensual sexual connection between adult family members. Where sexual offending between family members is non-consensual or is against a victim who is a child or young person, there are other charges available that are qualifying offences.
- 12.52 Bestiality involves a person engaging in penetrative sexual activity with an animal. Unlike the other qualifying offences, it does not involve harm to a human or threat to community safety. Bestiality does not involve forcing or compelling another person to engage in sexual or indecent activity with an animal — this is covered by a separate qualifying offence, which we do not propose repealing.

PROPOSALS TO REFORM THE LEGISLATIVE TESTS FOR IMPOSING PREVENTIVE MEASURES

PROPOSALS

P10

To impose a preventive measure, the legislation could omit any requirement that the court be satisfied that a person displays any specific traits or behavioural characteristics other than the risk they pose to community safety by reoffending.

P11

To impose a preventive measure, the legislation could require the court to assess the risk that a person will commit a qualifying offence within a certain timeframe. The requirement in the Public Safety Act that the offending be “imminent” could be repealed.

- 12.53 These proposals address the issues we discuss in Chapter 8 relating to the legislative tests for imposing preventive detention, ESOs and PPOs.
- 12.54 Proposal 10 suggests the removal of any requirement that the person must display certain traits or behavioural characteristics such as those that feature in the current tests for ESOs and PPOs. This would place primary focus on the degree of risk posed by the person, which would need to be established by relevant evidence — a test that would resemble the current test for preventive detention.
- 12.55 That does not mean traits and behavioural characteristics would cease to be relevant. Rather, to the extent traits and behavioural characteristics are relevant to a person’s risk, these matters would be dealt with as evidence in support of the overall risk assessment.
- 12.56 Proposal 11 addresses the temporal elements of the current tests. As we discuss in Chapter 8, the Sentencing Act requires that the court be satisfied the person is likely to reoffend if released into the community at the sentence expiry date. The Public Safety Act requires the court to be satisfied there is a very high risk of “imminent” serious violent or sexual offending. The Parole Act, however, expresses no temporal requirements for ESOs. Proposal 11 contemplates that the legislation adopt a uniform approach under which the court will assess the risk of reoffending within a certain timeframe following the person’s release from a determinate prison sentence. We will use feedback on this question to determine whether an express and uniform temporal element is desirable and, if so, what the relevant timeframe should be. Lastly, the proposal suggests the repeal of the “imminent” test under the Public Safety Act. As we explain in Chapter 8, we do not consider this test reflects reoffending risk.

PROPOSALS**P12A**

To impose a preventive measure, the legislation could require the court to be satisfied that:

- a. the measure is the least restrictive necessary to address the risks the person will commit a further qualifying offence; and
- b. the nature and extent of the risk the person poses to community safety justifies the limits the preventive measure would impose on their rights affirmed under the New Zealand Bill of Rights Act 1990.

P12B

To impose a preventive measure, the legislation could state that the court must not impose a preventive measure unless it is satisfied that the limits the measure would impose on rights affirmed under the New Zealand Bill of Rights Act 1990 are justified.

- 12.57 Proposals 12A and 12B address the issue raised in Chapter 8 that, when considering whether to impose a preventive measure, the courts weigh considerations arising from human rights law that are not explicitly expressed in the legislative tests. As discussed in Chapter 8, it may be that this is not an issue that requires reform. The law is clear that the NZ Bill of Rights already applies when the court considers whether to impose a preventive measure. On the other hand, it may be desirable for the primary legislative tests to make clearer in some way that the NZ Bill of Rights applies. Proposals 12A and 12B suggest ways this might be achieved.
- 12.58 Proposal 12A is an attempt to state within the primary legislation the standards the court must apply to ensure a preventive measure is a justified limit on human rights. The two matters the court could be required to consider (as already generally occurs in practice) are that the measure is the least restrictive in the circumstances and that the measure is justified when balanced against the risks to community safety.
- 12.59 Proposal 12B could be introduced as an alternative or in addition to Proposal 12A. Unlike Proposal 12A, which attempts to prescribe the matters the court could consider, the primary purpose of Proposal 12B is to alert the courts and decision-makers that the NZ Bill of Rights applies. It would require the court to be satisfied that the preventive measure would be a justified limit on human rights.
- 12.60 As we flag in Chapter 8, these proposals on their own would not be sufficient to ensure the preventive regimes complied with human rights law. For example, other elements of the legislative tests, and whether the overall focus of the law is predominantly therapeutic and rehabilitative, must conform to human rights standards. Proposals 12A and 12B should be considered in addition to the other proposals set out in this chapter.

PROPOSALS FOR REFORM RELATING TO CONDITIONS AND MANAGEMENT IN THE COMMUNITY

12.61 This section sets out proposals for reform to address the issues we discuss in Chapter 10 relating to the management of people on preventive detention or ESOs in the community. Where proposals in this section relate to release conditions, they are intended to apply only to release conditions imposed on people released on parole from a sentence of preventive detention (not in relation to determinate sentences). We have not considered whether the same issues would apply to release conditions or parole more generally. These proposals proceed on the basis that the law could provide for a different approach to release conditions for a person subject to preventive detention than for people sentenced to determinate sentences of imprisonment.

PROPOSAL

P13

The requirement for the Parole Board and probation officers to impose and manage parole conditions and ESO conditions consistently with the New Zealand Bill of Rights Act 1990 could be expressed in the legislation governing the preventive regimes. When imposing a condition, the legislation could require the Parole Board to be satisfied that the condition is a justified limitation on the person's rights affirmed under the New Zealand Bill of Rights Act 1990.

The legislation could require a probation officer to administer a condition only in a way that is a justified limitation on the person's rights affirmed under the New Zealand Bill of Rights Act 1990.

12.62 Proposal 13 is intended to better ensure that conditions would be imposed and managed in a rights-consistent way.

12.63 This would be consistent with other legislation that significantly restricts rights and freedoms. For example, the Terrorism Suppression (Control Orders) Act 2019 also allows the court to impose restrictions on a person for the purposes of community safety and rehabilitation and reintegration. When making an order, the court must be satisfied that any conditions the order imposes on the person are necessary and appropriate, and only those necessary and appropriate, to achieve the purpose.¹⁶ The court is also required to consider how any conditions imposed will or may affect the person's personal circumstances (for example, their financial position, health and privacy) and whether the conditions are justified limits on rights and freedoms in the NZ Bill of Rights.¹⁷

PROPOSAL

P14

The court could be responsible for setting special conditions of ESOs at the time it makes an ESO.

¹⁶ Terrorism Suppression (Control Orders) Act 2019, s 12(2).

¹⁷ Terrorism Suppression (Control Orders) Act 2019, s 12(3).

- 12.64 This proposal would address the possible inefficiency of dividing order-making and condition-setting jurisdictions between the court and the Parole Board, as we discuss in Chapter 10.
- 12.65 This proposal envisages that, when the court orders an ESO, it would also impose special conditions. Currently, courts will often hear evidence about the special conditions that Ara Poutama will seek and impose special conditions on an interim basis. However, the Parole Board has final responsibility for setting conditions. Proposal 14 would avoid the necessity for multiple hearings about the same issue and allow the court to ensure that an ESO is a reasonable and demonstrably justified limit on rights affirmed in the NZ Bill of Rights.
- 12.66 Applications to add, remove or vary special conditions would also need to be made to the court. Precedent exists for such a process — applications to add, remove or vary release conditions imposed by the court on release from short terms of imprisonment are made to the court.¹⁸
- 12.67 If a person wished to challenge decisions about ESO conditions, they could appeal to the Court of Appeal. This is the process currently in place if a person wishes to appeal the imposition of an ESO and is familiar to lawyers who act in ESO matters. If a person appeals against an ESO, the court could consider not only whether the ESO was justified, but whether any conditions should be amended.
- 12.68 If Proposal 14 were implemented, Proposal 13 would require the courts, rather than the Parole Board, to impose ESO conditions consistently with the NZ Bill of Rights.

PROPOSAL

P15

The law could allow an intensive monitoring condition to be imposed at a time after an ESO has been ordered and could extend beyond 12 months.

- 12.69 As we discuss in Chapter 10, an intensive monitoring (IM) condition is highly intrusive.
- 12.70 Currently, the courts may only make an order requiring the Parole Board to impose an IM condition at the same time as ordering the ESO. If a person subject to an ESO subsequently requires an IM condition, a new ESO application must be made. This proposal would allow an IM condition to be imposed on an existing ESO, where needed to manage a person's risk.
- 12.71 The current 12-month maximum term of an IM condition can mean that a person whose risk is appropriately managed by an IM condition is instead made subject to a more restrictive PPO. This proposal would allow an IM condition to be imposed for longer than 12 months if this would allow a person to be managed in the community rather than be detained. We do not, at this stage, suggest the appropriate mechanism to govern the length of an IM condition. It could, for example, be that the term of an IM condition could be renewed. Alternatively, the term of the condition could be set for any length that is considered reasonable and proportionate in the circumstances, with a right for the person

¹⁸ Sentencing Act 2002, s 94.

subject to the IM condition to apply for the discharge of the IM condition. We are interested in feedback on this point.

PROPOSAL

P16

The standard ESO condition not to associate with persons under 16 years could be removed but be available as a special condition.

- 12.72 As we discuss in Chapter 10, some people subject to ESOs — for example, for violent offending or sexual offending against adults — may not pose any risk of offending against people under 16 years old. A standard ESO condition prevents anyone subject to an order from associating with persons under 16 years old. This condition can prevent people from associating with their own children, whānau or support people who have children.
- 12.73 While a probation officer can allow a person to associate with a person under age 16, the approval must be in writing, and the association must be under the supervision of a person approved by the probation officer.
- 12.74 This proposal would remove this standard ESO condition. The Parole Board (or court, if Proposal 14 were implemented), would be able to impose the same condition as a special condition.

QUESTION

Q52

What do you think about the proposals for reform in this chapter?



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