

**He Puka Kaupapa | Issues Paper 54**

# Here ora?

**Preventive measures for  
community safety, rehabilitation  
and reintegration**

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**Preferred Approach Paper**



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 Law 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***

**The Commissioners are:**

Amokura Kawharu — Tumu Whakarae | President

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Geof Shirtcliffe — Kaikōmihana | Commissioner

**THE TITLE OF THIS PREFERRED APPROACH PAPER**

The title of this Preferred Approach Paper was developed in consultation with our Māori Liaison Committee. In te reo Māori, “here” means restriction and “ora”, in this context, means a state of wellbeing. Combined, the two terms may be translated to mean “restrictions for wellbeing”. This phrase fits well with the purposes of our proposals, which are to ensure people subject to preventive measures are treated in accordance with human rights law and that their risk to community safety is addressed by meeting their therapeutic and rehabilitative needs. Posing this as a question is intended to invite reflection by those who consider our proposals whether they best promote the wellbeing of people who are subject to preventive measures and their communities.

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# Have your say

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We want to know what you think about our preferred approach for reform set out in this Preferred Approach Paper.

You are invited to provide feedback on all or any aspects of this Preferred Approach Paper. We also welcome feedback on matters that are not addressed by our proposals.

The feedback we receive will help inform the recommendations to the Government that we make in our Final Report.

## WAYS TO MAKE A SUBMISSION

Submissions on our Preferred Approach Paper must be received by **5pm on 20 September 2024**.

You can use the submission template document available for download on our [project website](#).

You can email your submission to [pdr@lawcom.govt.nz](mailto:pdr@lawcom.govt.nz).

You can also post your submission to

**Review of Preventive Detention and Post-Sentence Orders**

**Law Commission**

**PO Box 2590**

**Wellington 6140**

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If you have questions about the way we manage your submission, you are welcome to contact us at [pdr@lawcom.govt.nz](mailto:pdr@lawcom.govt.nz).

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# Acknowledgements

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We emphasise nevertheless that the views expressed in this Preferred Approach Paper are those of Te Aka Matua o te Ture | Law 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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**PART ONE:**

**INTRODUCTORY MATTERS**

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## CHAPTER 1

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# Executive summary

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- 1.1 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 — namely, preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs).
- 1.2 We published an Issues Paper for consultation in May 2023, which identified potential issues with the current law.<sup>1</sup> This is our Preferred Approach Paper, which analyses the views of submitters put to us during our consultation exercise and sets out our proposals for reform. We have concluded that significant reform is required.
- 1.3 This executive summary provides an overview of our proposals for reform and signposts the relevant chapters of this Preferred Approach Paper that contain our full discussion of the issues with the current law, consultation responses and analysis of our proposals. We encourage you to read the more detailed discussion on any topics that interest you.
- 1.4 We want to hear your views. Rather than ask targeted consultation questions on our proposals, we invite feedback on any matter. We will use the feedback we receive to develop the proposals into our recommendations to the Minister of Justice in our Final Report.
- 1.5 Submissions must be received by **5pm on 20 September 2024**. For information on how we will use your submission, please see the “Have your say” section of this Preferred Approach Paper.

## PART 1: INTRODUCTORY MATTERS

- 1.6 Part 1 of this Preferred Approach Paper sets out a number of introductory matters related to our review and the aims of this Preferred Approach Paper. This chapter (Chapter 1) provides an executive summary of this Preferred Approach Paper and our proposals for reform.
- 1.7 Chapter 2 provides an introduction to the review, setting out our process so far, the purpose and aims of this Preferred Approach Paper and an overview of current laws governing preventive measures.

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *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 post-sentence orders* (NZLC IP51, 2023).

## PART 2: FOUNDATIONAL MATTERS

1.8 Part 2 of this Preferred Approach Paper sets out the foundational and overarching matters relating to our proposals for reform.

### The need for preventive measures (Chapter 3)

1.9 In Chapter 3, we consider whether and why the law should provide for preventive measures and what those measures should be. We conclude that the law should continue to provide for some form of preventive measures to address the risk of serious sexual or violent reoffending by those who would otherwise be released to the community. We introduce the preventive measures we propose should be provided for under reformed law.

#### PROPOSAL

P1

The law should continue to provide for preventive measures to protect the community from serious sexual or violent reoffending by those who would otherwise be released into the community after completing a determinate sentence of imprisonment.

1.10 Based on the available evidence, there are some people who will continue to pose a risk of serious sexual or violent offending after serving a prison sentence for previous offending. The prevention of harm caused by reoffending of this nature is a well-established public interest and policy objective both in Aotearoa New Zealand and internationally.

1.11 We consider that the available evidence suggests that preventive measures do address reoffending risks and contribute to community safety. We base this conclusion on previous case law, the reasons given in support of ESOs and PPOs at the time their governing statutes were enacted and overseas experience. In addition, preventive measures are well established in New Zealand law. They are also widespread in comparable jurisdictions. This indicates a community expectation that preventive measures continue.

1.12 The imposition of a preventive measure involves subjecting a person to ongoing detention or other restrictions and supervision. Because these measures are indeterminate or apply after a person has completed a prison sentence, they engage a number of human rights issues. The New Zealand courts and international bodies have been critical of the impact of preventive measures on the right to freedom from arbitrary detention and the protection against second punishment. Our proposals throughout this Preferred Approach Paper are aimed at achieving compliance with the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). In particular, we consider how preventive measures can impair rights to the least extent possible while also providing an overall response to addressing risks to community safety.

## PROPOSAL

P2

The preventive measures the law should provide for are:

- a. community preventive supervision;
- b. residential preventive supervision; and
- c. secure preventive detention.

1.13 We propose that there should be three types of preventive measures to form a gradation of measures at different levels of restriction. In order of severity of restrictions, these would comprise the following:

- (a) **Community preventive supervision.** This would allow a person to live in the community subject to various conditions requiring their supervision and monitoring. Similar to the current operation of ESOs, we consider this should comprise a core set of standard conditions with the option of imposing special conditions.
- (b) **Residential preventive supervision.** This would require a person to stay at a residential facility with minimal security features with the aim of providing a structured and supported living arrangement as close to life in the community as possible.
- (c) **Secure preventive detention.** This would allow for the detention of a person in a secure facility (separate to, and distinct from, prison) designed to stop them from leaving. As the most restrictive measure, this should be an option only when no less restrictive measure would be able to provide adequate community protection.

1.14 We propose how these measures should operate in greater detail in later chapters.

### A single, post-sentence regime (Chapter 4)

1.15 In Chapter 4, we consider some of the issues with the way in which the current law governing preventive detention, ESOs and PPOs is spread across three different statutes and the timing of imposition either at sentencing or post-sentence.

1.16 The fragmentation of the law across the three separate regimes is a critical issue. It can hinder the imposition of the preventive measure that most appropriately addresses risks to community safety while complying with human rights standards. It also gives rise to several procedural inefficiencies. We conclude reforms are needed.

## PROPOSALS

P3

A new statute should be enacted to govern all preventive measures (the new Act).

P4

Sections 87–90 of the Sentencing Act 2002 providing for preventive detention should be repealed. Part 1A of the Parole Act 2002, providing for ESOs, should be repealed. The Public Safety (Public Protection Orders) Act 2014, providing for PPOs, should be repealed.

- 1.17 We propose the creation of a new Act that would consolidate all preventive measures into a single statutory regime. We consider this is preferable to amending existing legislation given the extent of amendments that would be required. It also provides an opportunity to assert the Act's own purpose and principles, focused on rehabilitation and reintegration alongside community safety.
- 1.18 The new Act would link and provide for the gradation of all these preventive measures and so facilitate the imposition of the least restrictive measure necessary in the circumstances. It would enable the imposition of a preventive measure to be determined in a single hearing, addressing some of the procedural problems caused by the current fragmentation across three separate statutes.

## PROPOSALS

P5

All preventive measures should be imposed as post-sentence orders. The new Act should require applications for a preventive measure against an eligible person under a sentence for a qualifying offence to be made prior to the person's sentence expiry date or the date when the individual ceases to be subject to any release conditions, whichever is later.

P6

If it appears to a court sentencing an eligible person following conviction for a qualifying offence that it is possible an application for a preventive measure will be made against that person, the court should, at sentencing, have power to:

- a. notify the eligible person of the possibility a preventive measure may be sought against them; and
- b. record that the person has been notified.

For the avoidance of doubt, when a sentencing court has not given notice, a person's eligibility to have a preventive measure imposed on them should not be affected.

- 1.19 In our view, preventive measures should be post-sentence orders. This approach is a notable difference to the current law. While ESOs and PPOs are post-sentence orders, preventive detention is imposed as a criminal sentence following conviction for a qualifying offence.
- 1.20 The imposition of preventive measures unavoidably involves significant trade-offs at whichever point in time it occurs. A major concern with post-sentence orders raised in recent cases is that highly restrictive preventive measures are a form of punishment that engages the human right to be protected against second punishment. On balance, we are satisfied that the problems of imposing measures at sentencing outweigh the potential second punishment concerns of post-sentence measures. In particular:
- (a) Assessing a person's risk of reoffending post-sentence is more accurate than assessing that at sentencing. This will help avoid a situation where assessments of risk made at sentencing do not accurately identify high-risk offenders or, conversely, overestimate someone's risk and lead to the unnecessary and unjustified imposition of preventive measures.

- (b) The most severe form of preventive measures, indeterminate detention, should not be considered unless all less restrictive measures for managing that person's risk have been shown to be inadequate. Considering all measures together post-sentence, with the ability to impose the most appropriate, is the best way for the court to undertake this exercise.
- (c) A preventive measure imposed post-sentence can focus on the rehabilitative needs of the person alongside the measures necessary to manage their risk. At present, the punitive focus at the time of sentencing may obscure or inhibit that approach.

1.21 We consider that, to the extent post-sentence preventive measures do limit the protection against second punishment, this can be justified. In particular, our proposals for the Act, both general and specific, to reorient the law to a more humane and rehabilitative focus are aimed at mitigating the punitive nature of preventive measures.

### Reorienting preventive measures (Chapter 5)

1.22 In Chapter 5, we consider the issue that the current law does not facilitate the humane treatment of people subject to preventive measures and has an inadequate focus on their rehabilitative and therapeutic needs. We also discuss the prevalence of people with disabilities, mental health issues and complex behavioural conditions who are subject to preventive detention, ESOs and PPOs. We conclude the law should be reoriented to facilitate a more humane and rehabilitative approach towards people subject to preventive measures. We make proposals for a more fundamental reorientation of the law.

#### PROPOSAL

P7

The purposes of the new Act should be to:

- a. protect the community by preventing serious sexual and violent reoffending;
- b. support a person considered at high risk of serious sexual and/or violent reoffending to be restored to safe and unrestricted life in the community; and
- c. ensure that limits on a person's freedoms to address the high risk they will sexually and/or violently reoffend are proportionate to the risks and are the least restrictive necessary.

1.23 We propose the new Act should include a purpose clause that clearly expresses the policy objective of the legislation. The first purpose that we propose is the existing purpose of preventive measures — the objective of protecting the community by preventing serious sexual and violent reoffending. Given our conclusion in Chapter 3 on the need for preventive measures, we consider it important that the new Act continues to express this purpose.

1.24 This purpose would have equal prominence with the second purpose — to support a person to be restored to safe and unrestricted life in the community. This would have the effect of:

- (a) enhancing public safety — public safety is enhanced if preventive measures can support people to address the factors that can trigger risks of reoffending;

- (b) aligning with human rights — the courts and human rights bodies are clear that a rehabilitative and reintegrative focus to preventive measures is essential for compliance with human rights standards; and
  - (c) supporting the needs of offenders — the prevalence of disability, mental health issues and complex behavioural conditions among those subject to preventive measures reinforces the importance of supporting the needs of these individuals.
- 1.25 The third purpose would be to ensure that restrictions on a person are limited to only those justified for community safety. This is in addition to our proposals that this objective be embedded in the legislative tests for imposing a preventive measure (discussed in later chapters). Its express provision as a purpose will also clearly signal that the rights and freedoms of people considered at risk of serious reoffending should be affirmed and protected except where limitations are expressly permitted by the Act.

## PROPOSALS

**P8**

In proceedings under the new Act, if it appears to the court that a person against whom a preventive measure is sought or a person already subject to a preventive measure may be “mentally disordered” or “intellectually disabled”, the court should have power to direct the chief executive of Ara Poutama Aotearoa | Department of Corrections to:

- a. consider an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; and
- b. if the chief executive decides not to make an application, to inform the court of their decision and provide reasons why the preventive measure is appropriate.

**P9**

If at any time it appears to the chief executive of Ara Poutama Aotearoa | Department of Corrections that a person subject to a preventive measure is mentally disordered or intellectually disabled, the chief executive should have power to make an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

**P10**

For the purposes of any application under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 made in relation to a person against whom a preventive measure is sought or who is already subject to a preventive measure, the person should be taken to be detained in a prison under an order of committal.



**PROPOSAL****P11**

If a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is imposed on a person subject to a preventive measure, the preventive measure should be suspended. While suspended, a probation officer should be able to reactivate any conditions of the preventive measure to ensure that the person does not pose a high risk to the community or any class of people.

- 1.26 We consider the new Act should continue to provide for pathways for a person subject to a preventive measure to move to regimes that provide for compulsory care and treatment for mental health issues (under the Mental Health (Compulsory Assessment and Treatment) Act 1992) or intellectual disabilities (under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003). This recognises that, even with our proposals aiming to provide a more supportive environment for those subject to a preventive measure, there will be some people for whom a preventive measure will not be appropriate. In making this proposal, we recognise that there are longstanding concerns about the Mental Health (Compulsory Assessment and Treatment) Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act regimes and calls for wider-scale reforms.
- 1.27 Our proposal would mean that, where a person meets the eligibility criteria under the Mental Health (Compulsory Assessment and Treatment) Act or the Intellectual Disability (Compulsory Care and Rehabilitation) Act, it is generally appropriate for a compulsory treatment order or compulsory care order to operate in place of a preventive measure. It reflects the current position in respect of ESOs and PPOs whereby a preventive measure should be suspended during the time a compulsory treatment order or compulsory care order is imposed. Parole officers should retain the power to reactivate any conditions of a preventive measure while the person is subject to a compulsory treatment order or compulsory care order in order to enhance any community safety aspects.

**Te ao Māori and the preventive regimes (Chapter 6)**

- 1.28 In Chapter 6, we explore whether the current law relating to preventive measures enables Māori to live in accordance with tikanga and gives effect to the Crown's obligations to Māori under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty). We conclude that the law could be improved by requiring the court to consider whether to place a person into the care of a Māori group. That group would have primary responsibility for the person subject to the measure.

**PROPOSAL****P12**

When imposing a preventive measure, the new Act should require the court to consider whether the preventive measure should be administered by placing the person within the care of a Māori group or a member of a Māori group such as:

- a. an iwi, hapū or whānau;
- b. a marae; or
- c. a group with rangatiratanga responsibilities in relation to the person.

1.29 We consider that our proposed focus on rehabilitation and reintegration under the new Act will necessarily more closely align the law with tikanga Māori. This is because tikanga is concerned with, among other things, working alongside an offender to reawaken their tapu and restore their relationship with their community.

1.30 However, we do not think that a greater focus on rehabilitation and reintegration alone will resolve existing issues with the law. In order to better facilitate the exercise of tino rangatiratanga and the implementation of the principles of equality and active protection, we also propose that the new Act should include specific provision that ensures Māori involvement in the administration of the new regime. Our proposal would require the court to consider whether to place a person in the care of a Māori group. In doing so, the court would need to be satisfied of the availability and suitability of such a placement in the circumstances.

1.31 Our proposal is deliberately flexible in order to accommodate different ways preventive measures might be delivered. We envisage that Māori groups could manage facilities for residential preventive supervision or secure preventive detention or provide housing and programmes for people subject to community preventive supervision. They might administer programmes and approaches drawing on tikanga and mātauranga Māori as well as current clinical practice on rehabilitation and risk management. Our proposal therefore envisages that different kinds of government resourcing and support and a commitment to joint working will be necessary to ensure successful delivery and development of capability.

**PART 3: ELIGIBILITY**

1.32 Part 3 of this Preferred Approach Paper sets out proposals for who should be eligible to have a preventive measure imposed on them under the new Act. The proposals cover the age of offenders, the offences a person must have been convicted of and be at risk of committing again in future and how offences committed overseas should make someone eligible for a preventive measure on return to Aotearoa New Zealand.

**Age of eligibility (Chapter 7)**

1.33 In Chapter 7, we discuss issues relating to the age at which a person is eligible for a preventive measure under the current law. We propose that a person should be aged 18 or over to be eligible for a preventive measure.

**PROPOSAL****P13**

The new Act should require that a person is aged 18 years or older to be eligible for a preventive measure.

- 1.34 Our proposal is based on a recognition that a small group of young people may present a high risk of reoffending and that preventive measures may therefore be necessary and justified to protect community safety. At the same time, we accept that the severity of restrictions available under the new Act are unsuitable for imposition on young people. Therefore, our proposal is that preventive measures should only apply once a person is aged 18 or over.
- 1.35 The age of eligibility we propose applies at the time of imposition, not at the time an offence is committed. It therefore does not eliminate eligibility for a person who commits a qualifying offence before they reach the age of 18.

**Qualifying offences (Chapter 8)**

- 1.36 In Chapter 8, we consider what prior offending should make a person eligible for a preventive measure (qualifying offences) and what future offending a person should be at risk of committing for a preventive measure to be imposed on them (further qualifying offences). We conclude that eligibility for preventive measures should continue to be based on conviction for qualifying offences and that the new Act should have one set of qualifying offences that make a person eligible for all preventive measures. We propose that these qualifying offences should, with some amendments, be the same offences as under the current regimes.

**PROPOSAL****P14**

The new Act should continue to require that a person has been convicted of a qualifying offence in order to be eligible for a preventive measure.

- 1.37 We consider that the use of qualifying offences as a trigger for eligibility for a preventive measure should continue. This is because previous offending is one of the most stable and significant predictors of future offending. It rationally connects this approach to the aim of the preventive regime – to protect the community from the harm caused by serious reoffending. Additionally, we consider it is the only principled and practical way of administering eligibility. If a previous conviction was not required for eligibility, the public at large would be eligible for preventive measures. It would be unworkable and unethical to monitor the riskiness of all members of the public. We are not aware of any alternative approaches in comparable jurisdictions nor of any widespread criticism or concern about this approach in the case law or literature.
- 1.38 In our view, the law governing preventive measures should continue to focus on the prevention of sexual and violent offending. This is because of the seriousness of this type of offending. We consider the current regimes target a small number of appropriately serious sexual and violent offences. With the exception of the addition and removal of a small number of offences, we do not propose departing from this approach.

## PROPOSAL

P15

Qualifying offences should be the same for all preventive measures under the new Act.

- 1.39 We consider that qualifying offences should be the same for all preventive measures under the new Act. This aligns with our proposal for a single, post-sentence regime to govern all preventive measures. Using the same list of qualifying offences for all measures will facilitate that single approach, with the legislative tests for imposition (discussed below) bearing primary responsibility for ensuring that measures are imposed only when appropriate and in response to appropriately serious offending and levels of risk.

## PROPOSAL

P16

To be eligible for a preventive measure under the new Act, a person must have been convicted of an offence set out in Table 1 in Appendix 1 with the following amendments:

- a. The offence of strangulation and suffocation (section 189A of the Crimes Act 1961) should be added as a qualifying offence.
- b. The following offences should be removed as qualifying offences:
  - i. Incest (section 130 of the Crimes Act 1961).
  - ii. Bestiality (section 143 of the Crimes Act 1961).
  - iii. Accessory after the fact to murder (section 176 of the Crimes Act 1961).

- 1.40 We propose, subject to the addition and removal of a small number of offences, that qualifying offences for the current regimes should continue as qualifying offences in the new Act. We also acknowledge that there are some qualifying offences (such as indecent assault) that can cover a range of behaviour that varies in seriousness. In these cases, we consider the application of the legislative tests for imposition will ensure that preventive measures will not be imposed when offending that involves less serious behaviour does not indicate sufficient risk to the community.

- 1.41 We propose that imprisonable offences under the Films, Videos, and Publications Classification Act 1993 (FVPC Act) involving objectionable material of children and young people, which are currently qualifying offences for an ESO only, should be qualifying offences for all preventive measures under the new Act. Our conclusion on this point is finely balanced. There is not a direct or inevitable link between non-contact offending involving the viewing of child sexual abuse material and future contact offending. However, available evidence suggests that, with assessment of an individual's characteristics and traits, it may be possible to identify offenders who may commit both non-contact and contact offending. Our view is that FVPC Act offending may therefore be relevant to the assessment of the risk of someone committing future contact offending. Missing offenders who can be identified as posing particular risks of committing contact child sexual offences outweighs the detriment of identifying a large cohort of offenders, many of whom will not pose a risk of committing future contact offending.

- 1.42 Although we consulted in the Issues Paper on a number of offences for possible inclusion as qualifying offences, our proposal is that only the offence of strangulation and suffocation should be added as a new qualifying offence. This offence poses significant risks of harm to the community caused not just by the physical and psychological effects of strangulation itself but, in the context of family violence, the risk of escalation to a future fatal attack. We consider these are harms from which the community should be protected. As strangulation is a frequently charged and convicted offence, this may have a widening effect on the regime. We consider this can be justified given the seriousness of the offending. It should not be unworkable or lead to unjust outcomes because the legislative tests will operate to ensure that preventive measures are only imposed when appropriate and justified.
- 1.43 We propose the removal of three existing qualifying offences: incest, bestiality and accessory after the fact to murder. Our view is that these offences are less serious than other existing qualifying offences, in that that they do not involve the same level of direct, interpersonal harm to people (noting that any cases of incest involving non-consensual behaviour or offending against children or young people would be covered by existing qualifying offences). Additionally, we do not consider the inclusion of these offences to be necessary or effective in protecting the community from the harm caused by serious reoffending. In the case of bestiality, there is not harm or threat of harm to another person. In the case of incest and accessory after the fact to murder, these offences tend to be highly situational and unlikely to be replicated again in the future to create a risk of reoffending.

## PROPOSAL

P17

All qualifying offences listed above should also be “further qualifying offences” for the purpose of the application of the legislative tests under the new Act with the exception of:

- a. imprisonable Films, Videos, and Publications Classification Act 1993 offences;
- b. attempts and conspiracies to commit qualifying offences; and
- c. Prostitution Reform Act 2003 offences.

- 1.44 We consider that the qualifying offences we have identified for inclusion under the new Act are sufficiently serious to justify making someone eligible for a preventive measure. For the same reasons, we consider they can also be serious enough to justify the imposition of preventive measures if the person poses a high risk of committing them in the future. There are three exceptions to this view – imprisonable FVPC Act offending, attempts and conspiracies to commit a qualifying offence and offences under the Prostitution Reform Act 2003. We consider these offences are relevant only as an indicator of the risk of going on to commit further, more serious offending and so are not sufficiently serious to justify the imposition of a preventive measure in and of themselves.

## Overseas offending (Chapter 9)

- 1.45 In Chapter 9, we consider some of the inconsistencies in the current regimes relating to eligibility for a preventive measure for offending committed overseas. We propose that,

under the new Act, a person convicted of an offence overseas should be eligible for a preventive measure if it would be a qualifying offence if committed in Aotearoa New Zealand.

## PROPOSAL

P18

The new Act should provide that a person convicted of an offence overseas is eligible for a preventive measure if the offence would come within the meaning of a qualifying offence as defined under the new Act had it been committed in Aotearoa New Zealand and the person:

- a. has arrived in Aotearoa New Zealand within six months of ceasing to be subject to any sentence, supervision conditions or order imposed on the person for that offence by an overseas court; and
  - i. since that arrival, has been in Aotearoa New Zealand for less than six months; and
  - ii. resides or intends to reside in Aotearoa New Zealand; or
- b. has been determined to be a returning prisoner and is subject to release conditions under the Returning Offenders (Management and Information) Act 2015; or
- c. is a returning offender to whom subpart 3 of Part 2 of the Returning Offenders (Management and Information) Act 2015 applies and who is subject to release conditions under that Act.

1.46 Offenders returning from overseas can pose a high risk to community safety in Aotearoa New Zealand. In this case, the imposition of a preventive measure may be justified. We propose, therefore, that returning offenders should be eligible for a preventive measure under the new Act as is the case under the current law.

1.47 Our proposal would require that a person's overseas offending fall within the definition of a qualifying offence under the new Act. This resolves any potential inconsistencies in the current law whereby a person may be eligible for an ESO for offending committed overseas that would not be qualifying if it was committed in Aotearoa New Zealand. It adopts the current approach taken in relation to PPOs. It would also require some minor consequential amendments to the Returning Offenders (Management and Information) Act 2015.

## PART 4: IMPOSING PREVENTIVE MEASURES

1.48 Part 4 of this Preferred Approach Paper sets out our conclusions on how a court should determine whether to impose a preventive measure. We make proposals on the tests the court should apply, the relevant evidence of reoffending risk it should consider and how these proceedings should be handled.

### Legislative tests for imposing preventive measures (Chapter 10)

1.49 In Chapter 10, we consider the legislative tests that the court should apply to determine whether and what preventive measure should be imposed. We discuss how they should

be properly formulated to strike the correct balance between protecting community safety and not unduly restricting the rights and freedoms of a person subject to a preventive measure. We propose a single set of revised tests that should govern the imposition of all preventive measures.

## PROPOSALS

P19

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the court for an order imposing a preventive measure on an eligible person.

P20

Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for secure preventive detention and residential preventive supervision under the new Act. Te Kōti-ā-Rohe | District Court should have first instance jurisdiction to determine applications for community preventive supervision. Where the chief executive of Ara Poutama Aotearoa | Department of Corrections applies for preventive measures in the alternative, they should apply to the court having first instance jurisdiction to determine the most restrictive preventive measure sought.

- 1.50 We propose that the procedure for imposing a preventive measure should commence with an application made by the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive). This continues the approach in respect of current ESO and PPO applications.
- 1.51 Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for secure preventive detention and residential preventive supervision. Te Kōti-ā-Rohe | District Court should have first instance jurisdiction for applications for community preventive supervision. We consider this approach ensures appropriate allocation of workload between the courts. It also reflects the current jurisdictional arrangements and approach in practice and ensures the High Court continues to exercise jurisdiction where measures constitute detention.

## PROPOSAL

P21

The new Act should provide that the court may impose a preventive measure on an eligible person if it is satisfied that:

- a. the person is at high risk of committing a further qualifying offence in the next three years if the preventive measure is not imposed on them;
- b. having regard to the nature and extent of that risk, the preventive measure is the least restrictive measure adequate to address that risk; and
- c. the nature and extent of any limits the preventive measure would place on the person's rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 are justified by the nature and extent of the risk the person poses to the community.

- 1.52 Our proposal for reform sets out a single set of tests that should apply to the imposition of all preventive measures under the new Act. In line with our proposal for the new Act to provide for a gradation of all three preventive measures, the legislative tests will facilitate the imposition of the least restrictive and proportionate measure needed to protect community safety. The tests do this by directing the court to consider what conditions would best achieve the objective of community safety while imposing only justified limits on a person's rights and freedoms. They broadly reflect the approach that courts are currently taking in relation to ESO and PPO applications. Our proposal would make this approach explicit on the face of the statute itself.

## PROPOSAL

### P22

- When the court hears and determines an application for residential preventive supervision or community preventive supervision:
- a. any reference to a preventive measure in the tests in P21 should include any special conditions to form part of that preventive measure sought against the eligible person; and
  - b. the court should impose the preventive measure together with any special conditions that satisfy the tests.

- 1.53 The tests contemplate that, when the chief executive applies to the court, they will seek an order for a specific preventive measure, including any special conditions to form part of residential preventive supervision or community preventive supervision. The court should then consider any special conditions sought as part of its overall assessment of whether a preventive measure should be imposed and what it should be. This means that – different from the current approach where the imposition of special conditions as part of an ESO is separate from the imposition of the ESO itself – the court will consider and apply the same legislative test to the imposition of the measure and the conditions of the measure at the same time.
- 1.54 We consider that the power to impose special conditions should rest with the court rather than with the New Zealand Parole Board (Parole Board) as at present. Enabling the court to consider the imposition of a preventive measure and special conditions together would reduce the inefficiencies caused by multiple hearings concerning similar issues and the same evidence. We also consider that, given the potential restrictiveness of some conditions, it is appropriate for special conditions to be imposed through a court decision and subject to full appeal rights. This is also the approach taken in all of the comparable jurisdictions we have examined. Finally, and crucially, a core component of our proposed legislative tests is for the court to impose the least restrictive measure adequate to address the risk a person poses and is proportionate to that risk. We consider that the court cannot do that if the special conditions of the measure were left to be set subsequently by a separate body.



## PROPOSAL

### P23

In deciding whether the tests in P21 are met, the new Act should provide that the court:

- a. must take into account:
  - i. the health assessor reports provided in support of the application;
  - ii. offences disclosed in the person's criminal record;
  - iii. any efforts made by the person to address the cause or causes of all or any of those offences;
  - iv. whether and, if so, how a preventive measure imposed can be administered by Ara Poutama Aotearoa | Department of Corrections (or on its behalf); and
  - v. any other possible preventive measure that the court could impose that would comply with those tests; and
- b. may take into account any other information relevant to whether the tests in P21 are met.

1.55 We propose that the legislation include a list of matters relevant to whether the tests are met and that the court be required to take these matters into account. Our proposal identifies the matters that we anticipate will be relevant in nearly all cases but emphasises that these are non-exhaustive. The court may take into account any other relevant information.

1.56 In contrast to the current approach to ESOs and PPOs, our proposed test does not reference specific traits or behavioural characteristics. This is in response to the concerns about the appropriateness and accuracy of considering these in an assessment of risk. This omission does not, however, preclude any traits or behavioural characteristics being considered by the court where they have specific relevance to the assessment of a person's risk of reoffending

## PROPOSAL

### P24

If the court is not satisfied the tests in P21 are met, the new Act should confer on the court the power in the same proceeding to impose a less restrictive measure if satisfied the tests are met in respect of that less restrictive measure.

1.57 If the court is not satisfied the tests are met in respect of the preventive measure sought, we propose that the court should have power to impose a less restrictive preventive measure on its own initiative. The purpose of giving the court this power is to avoid duplicative proceedings by removing the need for a fresh application if the court declines an application for a specific preventive measure.

## PROPOSALS

**P25**

Before an application for a preventive measure is finally determined under the new Act, the court should have power to impose any preventive measure on an interim basis if one or more of the following events occur:

- a. An eligible person is released from detention.
- b. An eligible person who is a returning offender arrives in Aotearoa New Zealand.
- c. The court directs the chief executive of Ara Poutama Aotearoa | Department of Corrections to consider an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
- d. The chief executive of Ara Poutama makes an application to escalate the person to a more restrictive preventive measure.

**P26**

To impose an interim preventive measure under the new Act, the court should be satisfied the primary legislative tests are made out on the available evidence in support of the application for the interim measure.

**P27**

If the court imposes residential preventive supervision or community preventive supervision as an interim preventive measure, the standard conditions of that measure should apply. The court should also have power to impose any special conditions that may be imposed under that measure.

- 1.58 We propose that the law should continue to provide for the imposition of a preventive measure on an interim basis pending the final determination of an application. This reflects the approach under the current law.
- 1.59 Our proposal sets out a test for the imposition of an interim preventive measure. The court should be satisfied on its provisional assessment based on the available evidence in support of the application for an interim measure that the primary tests we present for the imposition of substantive measures are made out. This reflects the test the courts have developed for the imposition of an interim supervision order (for ESOs) or interim detention order (for PPOs). We consider it is preferable for this test to be expressed in statute.

### Evidence of reoffending risk (Chapter 11)

- 1.60 In Chapter 11, we consider the evidence a court relies on when determining whether to impose a preventive measure. We propose that health assessor reports on a person's risk of reoffending should remain the principal evidence on which a court will make its determination.

**PROPOSALS****P28**

The new Act should require the chief executive of Ara Poutama Aotearoa | Department of Corrections to file with the court:

- a. one health assessor report to accompany an application to impose community preventive supervision on an eligible person; or
- b. two health assessor reports to accompany an application to impose residential preventive supervision or secure preventive detention on an eligible person.

**P29**

The new Act should specify that a health assessor report must provide the assessor's opinion on whether:

- a. the person is at high risk of committing a further qualifying offence in the next three years if the preventive measure is not imposed on them; and
- b. having regard to the nature and extent of the high risk the person will commit a further qualifying offence, the preventive measure is the least restrictive measure adequate to address the high risk that the person will commit a further qualifying offence.

- 1.61 Requiring a health assessor report is established practice in both Aotearoa New Zealand and in overseas jurisdictions. Our proposal acknowledges the resourcing difficulties with the number of experts who can provide health assessor reports by requiring two reports where secure preventive detention and residential preventive supervision is sought and one report where community preventive supervision is sought. This approach reflects current practice where two health assessor reports are required for preventive detention and PPOs and one is required for ESOs. We consider it is appropriate for this approach to continue. The court's assessment of whether to impose secure preventive detention or residential preventive supervision is likely to require a high degree of expert input. These are likely to be complex and contestable inquiries in a way that community preventive supervision is not.
- 1.62 We are not prescriptive about what the health assessor reports should cover. Our preferred approach is to enable health assessors to focus on any matters they consider relevant to the legislative tests. We anticipate that assessors will continue to draw on best-practice guidance developed by Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) and the wider profession.

## PROPOSAL

- P30** The new Act should define a health assessor as a health practitioner who:
- a. is, or is deemed to be, registered with Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand specified by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine and who is a practising psychiatrist; or
  - b. is, or is deemed to be, registered with Te Poari Kaimātai Hinengaro o Aotearoa | New Zealand Psychologists Board specified by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of psychology.

- 1.63 We propose that the new Act defines the term “health assessor” in the same way as it is currently defined in ESO and PPO legislation. We are not aware of any concerns with this approach.

## PROPOSALS

- P31** The new Act should provide that the court may, on its own initiative, direct that an additional health assessor report be provided.
- P32** The new Act should provide that the person against whom an application for a preventive measure is made may submit an additional health assessor report prepared by a health assessor they have engaged.

- 1.64 Our proposal permits both the court and the person subject to an application to obtain a separate report from a health assessor. Reports directed or requested under this provision should address the legislative test in the same manner as other reports and could also respond to reports of health assessors that accompanied the application. As with the PPO legislation, the new Act should continue to provide that the expense of these reports be met with public money either through legal aid or otherwise.

## PROPOSAL

- P33** The new Act should provide that the court may receive and consider any evidence or information it thinks fit for the purpose of determining an application or appeal whether or not it would otherwise be admissible. The rules applying to privilege and confidentiality under subpart 8 of Part 2 of the Evidence Act 2006 and rules applying to legal professional privilege should continue to apply.

- 1.65 We propose that the new Act maintain the status quo regarding the court’s ability to receive and consider evidence as provided for in the ESO and PPO legislation. This will allow the court to consider a range of evidence, including additional information from Ara

Poutama, from the individual themselves and from organisations that have supported them or propose to do so during the period of the measure. In particular, this would facilitate the court receiving views from whānau, hapū and iwi who wish to be heard.

### Proceedings under the new Act (Chapter 12)

1.66 In Chapter 12, we consider several matters that arise when the courts hear and determine applications relating to preventive measures. We make proposals relating to the jurisdiction for proceedings under the new Act, rights of appeal, opportunities for family, whānau, hapū, iwi and victims to share their views and participate in proceedings and the suppression of names, evidence and details of measures.

#### PROPOSAL

P34

Te Kōti Matua | High Court and te Kōti-a-Rohe | District Court should hear and determine applications for preventive measures under the new Act under their criminal jurisdiction.

1.67 We propose that applications should be handled under the courts' criminal jurisdiction. We consider that the criminal jurisdiction more appropriately reflects the role of the state in the imposition and administration of preventive measures compared to a civil approach. It also recognises that the trigger for consideration of a preventive measure (but not the justification) is previous criminal offending. Crucially, a criminal approach would address the practical issues caused by the split in the current law between criminal and civil and allow for continuity of counsel and ensure procedural efficiency.

#### PROPOSAL

P35

The new Act should provide for a right of appeal to te Kōti Pira | Court of Appeal against decisions by te Kōti Matua | High Court or te Kōti-a-Rohe | District Court determining an application to:

- a. impose a preventive measure;
- b. impose a preventive measure on an interim basis;
- c. review a preventive measure;
- d. terminate a preventive measure; and
- e. escalate a person to a more restrictive measure (including to a prison detention order).

1.68 From our conclusion that the law on preventive measures should be consolidated into a single statute to be administered by the courts in their criminal jurisdiction, it follows that there should be a right of appeal against decisions made by the determining court. Our proposal is that te Kōti Pira | Court of Appeal should hear all appeals relating to preventive measures. This reflects the current approach to appeals relating to ESOs whereby every appeal must be made to the Court of Appeal regardless of whether the ESO was imposed by the High Court or the District Court. We also consider this creates a singular approach

for challenging decisions relating to the imposition of a preventive measure, which addresses any concerns about fragmentation of the law.

- 1.69 We consider that a right of appeal is more appropriate than a judicial review process for challenging decisions. Judicial review is limited to reviewing the decision-making process and procedure rather than the correctness of the decision itself. Because the imposition of a preventive measure involves a significant restriction on a person's rights and freedoms, the decision itself — rather than just the decision-making process — should be open to re-examination.
- 1.70 Our proposal would provide a right of appeal against decisions by the courts relating to the imposition, review, termination and escalation of preventive measures. This includes any special conditions that form part of the relevant preventive measure. This is appropriate given that imposition or variation of a preventive measure or its constituent conditions can have serious consequences for the person subject to them and for community safety.

### PROPOSAL

P36

When a court hears and determines applications for the imposition or review of a preventive measure in respect of a person, the new Act should require the court to consider any views expressed by the person's family, whānau, hapū, marae or iwi or anyone holding a shared sense of whānau identity with the person.

- 1.71 Enabling kin groups to share their views when the courts make determinations regarding preventive measures would, in our view, better facilitate tino rangatiratanga guaranteed by the Treaty. These groups have an interest in the proceedings owing to their whānau or other kin relationship with the person considered at risk of reoffending. They will have information about a person's background and cultural context and may have views on the risks the person poses and the appropriate way of responding to those. Their input may help ensure the imposition and administration of preventive measures in a way that accords with tikanga and helps preserve the fundamental tikanga values of whakapapa and whanaungatanga. Allowing these groups the opportunity to share their views on these matters will go some way to improving participation of Māori in decisions affecting them and their communities.

### PROPOSAL

P37

The Government should continue to develop and support ways to facilitate the court to hear views from whānau, hapū, marae, iwi and other people holding a shared sense of whānau identity.

- 1.72 The ability of kin groups to share their views depends on the support and mechanisms available to facilitate their access and participation in the court system. We are aware of a range of current initiatives that seek to facilitate this. We also note other practices such as cultural reports for sentencing, the delivery of whānau-centred support programmes and the creation of specific roles to assist the court or to provide guidance on court processes. Our proposal envisages that these arrangements should continue alongside

the development of further initiatives to facilitate participation in proceedings relating to preventive measures under the new Act.

## PROPOSALS

### P38

The new Act should provide that the chief executive of Ara Poutama Aotearoa | Department of Corrections must notify, as soon as practicable, each victim of a person who is considered for or subject to a preventive measure:

- a. that an application for a preventive measure has been made;
- b. of the outcome of an application when the application is determined or suspended;
- c. of any special conditions that are imposed on a person subject to community preventive supervision or residential preventive supervision and when these are varied or terminated;
- d. that an application to the court for review of a preventive measure has been made;
- e. of the outcome of any review conducted by the court;
- f. that the person subject to a preventive measure has died;
- g. that the person subject to a preventive measure has escaped from a secure facility;
- h. that the person subject to residential preventive supervision or community preventive supervision has been convicted of a breach of their conditions.

### P39

The new Act should provide that notification to victims regarding special conditions may be withheld if disclosure would unduly interfere with the privacy of any other person.

### P40

The new Act should:

- a. entitle victims to make written submissions and, with the leave of the court, oral submissions, when the court is determining an application to impose or review a preventive measure; and
- b. provide that victims may be represented by counsel and/or a support person or people if making an oral submission to the court.

## PROPOSAL

P41

For the purposes of the new Act, a victim should be defined as a person who:

- a. is a victim of a qualifying offence committed by a person:
  - i. against whom an application for a preventive measure has been made; or
  - ii. who is subject to a preventive measure imposed under the Act; and
- b. who has asked for notice or advice of matters or decisions or directions and copies of orders and conditions and has given their current address under section 32B of the Victims' Rights Act 2002.

- 1.73 We propose that the new Act should continue many of the rights victims have under the current law regarding preventive measures. This includes the right to be notified about preventive measures, including applications and outcomes, any special conditions imposed, applications for and outcomes of reviews and any breaches of conditions. Our proposed approach aligns with the rights of victims afforded under Part 3 of the Victims' Rights Act 2002. The provision of information about preventive measures in this context is entirely focused on the rights of victims rather than seeking to link the imposition of a preventive measure under the new Act with the person's previous offending and sentence.
- 1.74 We also propose that victims have rights to make submissions to the court although the ability to appear and make oral submissions should require the leave of the court. This is consistent with the approach to ESOs but would give victims greater rights of participation than the current approach to PPOs. We have heard little concern about current provisions allowing victims to make submissions in parole and ESO hearings. Additionally, we have heard through engagement that, although victims rarely wish to have their say, as the persons offended against, they should have the option to do so.
- 1.75 We acknowledge some arguments against victims' sharing their views when a preventive measure is determined. Potentially, victims' submissions could be irrelevant to, or a distraction from, an analysis of a person's risk of reoffending. We do not think this concern warrants excluding victims from sharing their views with the court. The courts will be able to give the appropriate weight to victims' submissions.



## PROPOSAL

P42

The new Act should protect information related to victims by:

- a. requiring that a person subject to a preventive measure or against whom an application for a preventive measure has been made:
  - i. does not receive any information that discloses the address or contact details of any victim; and
  - ii. does not retain any written submissions made by a victim;
- b. providing that the court may, on its own initiative or in response to an application, withhold any part of a victim's submission if, in its opinion, it is necessary to protect the physical safety or security of the victim concerned or others; and
- c. making it an offence for any person to publish information that identifies, or enables the identification of, a victim of a person subject to an application or a preventive measure.

- 1.76 The current law includes certain protections for victims to ensure that information given to an offender does not disclose their address or contact details. Offenders are also prevented from retaining victims' submissions, and the Parole Board can exercise discretion to withhold certain information if it considers disclosure to the offender would prejudice the victim's mental or physical health or endanger the victim's safety.
- 1.77 We consider that these protections are appropriate in the context of preventive measures. Providing means to ensure the safety and security of the victim (and their information) ensures their rights can be upheld by reducing the chances of revictimisation or reprisal. Our preferred approach is to substantively repeat provisions designed to protect victims' safety and security that appear in the Parole Act 2002.

## PROPOSAL

P43

Proceedings under the new Act concerning preventive measures should generally be open to the public.

- 1.78 We consider that proceedings under the new Act concerning preventive measures should generally be open to the public. By proceedings, we mean any proceedings relating to an application to impose, review, terminate or escalate a preventive measure. This represents a continuation of the status quo of the imposition of preventive detention, ESOs and PPOs. It also follows from our proposal above that applications for preventive measures should be heard and determined by the District Court and the High Court under their criminal jurisdictions.
- 1.79 This approach upholds the well-established principle of open justice in criminal proceedings. In our view, this is the correct starting point due to the strong public interest in the outcome of proceedings governing preventive measures and seeing how the state responds to those who pose a risk of serious sexual or violent reoffending. We also

consider the transparency and scrutiny that come with open proceedings are particularly important given the human rights implications of imposing preventive measures.

- 1.80 A more significant change with this proposal would be that discussion of special conditions to be imposed as part of residential preventive supervision and community preventive supervision would be public, both in court and in hearings of the review panel. At present, special conditions for ESOs are set by the Parole Board, with Parole Board hearings conducted in private and not reported (although reports of decisions may be requested under the Official Information Act 1982). We seek feedback on the practical implications of this change for the open and honest giving of evidence relevant to the assessment of risk.
- 1.81 Our proposal extends to proceedings conducted by the independent review panel to review and vary special conditions (discussed in later chapters). By this we intend that decisions rather than the panel meetings themselves should be publicly available. Decisions taken by the review panel to vary special conditions can significantly change the character of the preventive measure imposed on a person. We consider this to be of similar public interest as decisions taken by the court in relation to preventive measures.

## PROPOSAL

### P44

The new Act should allow for the court to make an order forbidding publication of:

- a. the name or any other identifying details of a person who is the subject of an application for, or subject to, a preventive measure; and/or
- b. the whole or any part of the evidence given or submissions made in the proceedings; and/or
- c. any details of the measure imposed.

- 1.82 As with current criminal procedure, we acknowledge that the principle of open justice can be limited by other competing interests. As such, we propose that the new Act should continue to allow for the court to make an order forbidding publication of particular information. Our proposal continues the approach of the Criminal Procedure Act 2011 (CPA) in allowing the court to forbid publication of the name or identifying details of anyone subject to an application for, or subject to, a preventive measure and any evidence given or submissions made during the proceedings. It would also apply to details of the measure imposed on the basis that information of a measure or its component conditions could lead to the identification of the person on whom it is imposed.

**PROPOSAL****P45**

The court may make an order forbidding publication only if satisfied that publication would be likely to:

- a. cause undue hardship to the person who is the subject of an application for, or subject to, a preventive measure;
- b. unduly impede the person’s ability to engage in rehabilitation and reintegration;
- c. cause undue hardship to any victim of the person’s previous offending;
- d. endanger the safety of any person;
- e. lead to the identification of another person whose name is suppressed by order of law; or
- f. prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

1.83 Our proposal envisages a continuation of the strong presumption in favour of the principle of open justice. This principle is well established in the law of Aotearoa New Zealand. On that basis, there would be no restriction on the publication of identifying details or information in proceedings regarding preventive measures unless there are compelling reasons otherwise. Our proposal largely replicates the existing tests in the CPA that set out the grounds on which a court may make an order suppressing publication, with some amendments. We propose removing some of the grounds that appear in the CPA (in particular, the risk of prejudice to proceedings or security of Aotearoa New Zealand) on the basis that these are less relevant to preventive measures.

1.84 Our proposal retains the first ground under the existing tests in the CPA relating to “hardship”. We propose a standard of “undue” hardship, which differs from the existing test of “extreme hardship” under the CPA. “Extreme hardship” is a stringent standard that is appropriate in the context of ordinary criminal proceedings where there is a strong public interest in the openness of proceedings to determine guilt and see justice administered. This interest is less so in the context of preventive measures where guilt has already been determined and the focus is not on punishment but on the assessment and management of risk.

1.85 We propose the addition of a new threshold ground that would require the court to consider whether publication would affect a person’s ability to engage in rehabilitation and reintegration. This is implicit in the existing “hardship” ground and has been considered by the courts in granting name suppression for ESOs and PPOs. Given the focus of our proposals for reform generally on rehabilitation and reintegration, we consider there is benefit to this consideration being made explicit in statute.

**PART 5: ADMINISTRATION OF PREVENTIVE MEASURES**

1.86 Part 5 of this Preferred Approach Paper outlines our proposals for how the new preventive measures should be administered. It also sets out our preferred approach for how non-compliance with, and escalation between, preventive measures should be handled and how measures should be reviewed, varied or terminated.

## Overarching operational matters (Chapter 13)

1.87 In Chapter 13, we consider a number of overarching operational matters relating to the administration of the new preventive measures. We make various proposals in this regard as well as propose a set of guiding principles for the administration of the new preventive measures and entitlements to rehabilitative treatment and reintegrative support.

### PROPOSAL

**P46**

Ara Poutama Aotearoa | Department of Corrections should be responsible for the operation of preventive measures under the new Act.

1.88 We consider Ara Poutama should be the government department responsible for the operation of the new preventive measures. Ara Poutama currently holds primary responsibility for the operation of preventive detention, ESOs and PPOs. We consider its considerable experience in facilitating preventive measures means it is best suited for this role.

### PROPOSALS

**P47**

The new Act should provide for the appointment of facility managers by the chief executive of Ara Poutama Aotearoa | Department of Corrections or, in case of facilities operated pursuant to a facility management contract, by the contractor.

**P48**

The new Act should require all facility managers to comply with guidelines and/or instructions from the chief executive of Ara Poutama Aotearoa | Department of Corrections.

1.89 As is currently the case with prison managers under the Corrections Act 2004 and residence managers under the Public Safety (Public Protection Orders) Act 2014 (PPO Act), we propose that the chief executive should appoint facility managers. Where facilities are run by an external entity through a management contract (discussed below), the contractor should be responsible for appointing a facility manager.

1.90 Facility managers should have primary responsibility for the management of facilities for residential preventive supervision and secure preventive detention. In turn, they should be accountable to the chief executive. As is the case currently in relation to prison managers and managers of PPO residences, the chief executive should be able to issue guidelines and instructions on the management of a residence under the new Act.

### PROPOSAL

**P49**

The new Act should provide that the chief executive of Ara Poutama Aotearoa | Department of Corrections may enter into a contract with an appropriate external entity for the management of a residential facility (under residential preventive supervision) or a secure facility (for secure preventive detention).

**PROPOSALS****P50**

The new Act should require that every facility management contract must:

- a. provide for objectives and performance standards no lower than those of Ara Poutama Aotearoa | Department of Corrections;
- b. provide for the appointment of a suitable person as facility manager, whose appointment must be subject to approval by the chief executive of Ara Poutama, as well as suitable staff members; and
- c. impose on the contracted entity a duty to comply with the new Act (including instructions and guidelines issued by the chief executive of Ara Poutama), the New Zealand Bill of Rights Act 1990, the Public Records Act 2005, sections 73 and 74(2) of the Public Service Act 2020 and all relevant international obligations and standards as if the facility were run by Ara Poutama.

**P51**

The new Act should provide for the ability of the chief executive of Ara Poutama Aotearoa | Department of Corrections to take control of externally administered facilities in emergencies.

- 1.91 We consider that facility management contracts should continue to be available under the new Act. The ability to task other organisations with the operation of facilities for people subject to preventive measures already exists, and we have not heard any criticism of this approach in practice. External organisations (including iwi organisations or charitable trusts) may bring different skills and expertise than Ara Poutama and be better placed to cater to the particular needs that people subject to secure preventive detention or residential preventive supervision may have.
- 1.92 All operators would be required to adhere to the law, meet performance standards and requirements and be subject to the same review and monitoring mechanisms as any facility run by Ara Poutama. The wording of our proposal replicates the current provisions for residence management contracts under the PPO Act. Additionally, the new Act should also provide for the ability for the chief executive to take control of facilities in emergencies.

## PROPOSAL

P52

The new Act should provide that probation officers, as well as facility managers and their staff, must have regard to the following guiding principles when exercising their powers under the new Act:

- a. People subject to community preventive supervision should not be subjected to any more restrictions of their rights and freedoms than are necessary to ensure the safety of the community.
- b. People subject to residential preventive supervision or secure preventive detention should have as much autonomy and quality of life as is consistent with the safety of the community and the orderly functioning and safety of the facility.
- c. People subject to any preventive measure should, to the extent compatible with the safety of the community, be given appropriate opportunities to demonstrate rehabilitative progress and be prepared for moving to a less restrictive preventive measure or unrestricted life in the community.

- 1.93 We propose that the new Act should contain a provision containing overarching guiding principles for the administration of preventive measures. The provision would guide people who are exercising powers in relation to people subject to preventive measures. This would help to give effect to the reorientation of preventive measures towards rehabilitation and reintegration and ensure decision-makers on the ground exercise their powers in a human rights-compliant way.
- 1.94 We have based the wording of the principles on one of the PPO Act's principles and to a similar provision under German law. The first two principles give effect to the purpose that limits on a person's freedoms should be the least restrictive and proportionate to address the risks of reoffending. These principles respond to an issue we have identified that the law could better ensure that probation officers' implementation of conditions is consistent with human rights law.
- 1.95 The third principle is linked to the purpose of supporting someone to live a safe and unrestricted life in the community. This principle responds to stakeholders' concerns that people subject to preventive measures often lack opportunities to demonstrate that they have made rehabilitative progress (for example, by easing any standard or special conditions or being permitted to undertake supervised outings into the community).

**PROPOSAL****P53**

The new Act should provide that:

- a. people subject to a preventive measure are entitled to receive rehabilitative treatment and reintegration support; and
- b. Ara Poutama Aotearoa | Department of Corrections must ensure sufficient rehabilitative treatment and reintegration support is available to people subject to a preventive measure in order to keep the duration of the preventive measure as short as possible while protecting the community from serious reoffending.

1.96 We consider that, under the new Act, people subject to preventive measures should have a stronger entitlement to rehabilitative treatment and reintegration support than available under the current law. This would give effect to our broader aim to reorient the law on preventive measures towards rehabilitation and reintegration. Rather than providing treatment and support to the extent resources allow, the new Act should require that resources be devoted to the extent there is a need to support the person to safe and unrestricted life in the community at the earliest reasonable opportunity. This corresponds to the Act's proposed purpose that limits on a person's freedoms are the least restrictive available and proportionate to the reoffending risk.

1.97 Our proposal to provide entitlements to rehabilitation treatment and reintegration support also responds to some of the criticisms of preventive measures in domestic and international human rights jurisprudence. The provision of rehabilitation and reintegration is key to preventing a finding that preventive measures impose arbitrary detention or are punitive in nature and so constitute an unjustified interference with the right to protection against second punishment.

**PROPOSALS****P54**

The new Act should provide that people subject to residential preventive supervision or secure preventive detention are entitled to participate in therapeutic, recreational, cultural and religious activities to the extent compatible with the safety of the community and the orderly functioning and safety of the facility.

**P55**

The new Act should provide that people subject to residential preventive supervision or secure preventive detention are entitled to medical treatment and other healthcare appropriate to their conditions. The standard of healthcare available to them should be reasonably equivalent to the standard of healthcare available to the public.

- 1.98 Some activities in support of the wellbeing of people subject to preventive measures may not directly target someone's risk of reoffending but instead aim to improve the person's overall wellbeing, which in turn has been shown to help reduce their reoffending risk. Our proposal echoes the expectations of the Ombudsman that people in the custody of Ara Poutama should have the opportunity to participate in various recreational, sporting, religious and cultural activities. It is also directed specifically at people subject to residential preventive supervision and secure preventive detention who will be detained and unable to access activities and healthcare of their own volition.
- 1.99 Likewise, the provision of healthcare is likely to have an impact on a person's wellbeing and reoffending risk. Treatment for mental health and addiction issues, for example, is likely to be particularly significant. We make a specific proposal regarding the standard of healthcare that should be available to people subject to residential preventive supervision and secure preventive detention. Although we acknowledge there are practical limitations to the standard of healthcare available — even to the public — detainees cannot access healthcare without facilitation by facility staff. That is why the new Act should impose a duty on the staff and state that the standard of healthcare available to those detained should be reasonably equivalent to that available to the public.

## PROPOSAL

### P56

The new Act should require that each person subject to a preventive measure must have their needs assessed as soon as practicable after the measure is imposed. The assessment should identify any:

- a. medical requirements;
- b. mental health needs;
- c. needs related to any disability;
- d. educational needs;
- e. needs related to therapeutic, recreational, cultural and religious activities;
- f. needs related to building relationships with the person's family, whānau, hapū or iwi or other people with whom the person has a shared sense of whānau identity;
- g. steps to be taken to facilitate the person's rehabilitation and reintegration into the community; and
- h. other matters relating to the person's wellbeing and humane treatment.



## PROPOSALS

P57

The new Act should provide that each person subject to a preventive measure should have a treatment and supervision plan developed with them. The treatment and supervision plan should set out:

- a. the reasonable needs of the person based on the completed needs assessment;
- b. the steps to be taken to work towards the person's restoration to safe and unrestricted life in the community;
- c. if applicable, the steps to be taken to work towards the person's transfer to a less restrictive measure;
- d. the rehabilitative treatment and reintegration support a person is to receive;
- e. for people subject to residential preventive supervision or secure preventive detention, opportunities to engage with life in the community;
- f. any matters relating to the nature and extent of the person's supervision required to ensure the safety of the person, other residents of a facility, staff of the facility and the community; and
- g. any other relevant matters.

P58

Under the new Act, the person responsible for assessing the person's needs and developing and administering the treatment and supervision plan should be:

- a. in the case of community preventive supervision, the probation officer responsible for supervising the person; or
- b. in the case of residential preventive supervision and secure preventive detention, the facility manager into whose care the person is placed.

1.100 We propose that everyone subject to a preventive measure should have a needs assessment as soon as is practicable following the imposition of a preventive measure. This should inform the development of a treatment and supervision plan that will set out the steps to be taken to work towards the person's restoration to safe and unrestricted life in the community. In the case of residential preventive supervision or secure preventive detention, the plan should also set out the steps to be taken to move a person to a less restrictive preventive measure. This should be the responsibility of the responsible probation officer for those subject to community preventive supervision and the manager of the facility for those subject to residential preventive supervision or secure preventive detention.

1.101 When undertaking a needs assessment or developing a treatment and supervision plan, the responsible person should be under a duty to consult with the person subject to the preventive measure. The responsible person should take their views into account. They should also obtain cultural advice appropriate to the person subject to the preventive measure — in particular, if the person identifies as Māori. It is also likely that the person undertaking a needs assessment and developing a treatment and supervision plan will

need input and support from other relevant agencies. We suggest that Ara Poutama should work with relevant agencies to obtain the information and cooperation it requires.

### Community preventive supervision (Chapter 14)

1.102 In Chapter 14, we set out our proposals for community preventive supervision, the least restrictive of our proposed new measures. Subject to supervisory restrictions, community preventive supervision would enable a person to live within the community. It would be similar to the current law governing parole for people sentenced to preventive detention and released from imprisonment and ESOs.

#### PROPOSAL

P59

Community preventive supervision should comprise of standard conditions, and any additional special conditions imposed by the court. The new Act should provide that, when te Kōti-a-Rohe | District Court imposes community preventive supervision, the following standard conditions should automatically apply. The person subject to community preventive supervision must:

- a. report in person to a probation officer in the probation area in which the person resides as soon as practicable, and not later than 72 hours, after commencement of the extended supervision order;
- b. report to a probation officer as and when required to do so by a probation officer, and notify the probation officer of their residential address and the nature and place of their employment when asked to do so;
- c. obtain the prior written consent of a probation officer before moving to a new residential address;
- d. report in person to a probation officer in the new probation area in which the person is to reside as soon as practicable, and not later than 72 hours, after the person's arrival in the new area if consent is given under paragraph (c) and the person is moving to a new probation area;
- e. not reside at any address at which a probation officer has directed the person not to reside;
- f. not leave or attempt to leave Aotearoa New Zealand without the prior written consent of a probation officer;
- g. if a probation officer directs, allow the collection of biometric information;
- h. obtain the prior written consent of a probation officer before changing their employment;
- i. not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the person not to engage or continue to engage;
- j. take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer;
- k. not associate with, or contact, a victim of their offending without the prior written approval of a probation officer; and

- I. not associate with, or contact, any specified person, or with people of any specified class, with whom the probation officer has, in writing, directed the person not to associate, unless the probation officer has defined conditions under which association or contact is permissible.

- 1.103 We propose that, like the parole and ESO regimes, the new Act should prescribe a set of standard conditions for community preventive supervision. This signals that there are some conditions that are automatically justified if the legislative tests to impose community preventive supervision are met. Our proposal is to continue the standard conditions for parole release conditions and ESOs. This includes maintaining current reporting, notification and prior approval requirements. We also propose maintaining the condition not to associate with a victim and the requirement to take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.
- 1.104 We propose a slight amendment to the standard condition regarding non-association. Rather than allowing a probation officer to direct a person to not associate with a specified person or persons, our proposal would allow a probation officer to define conditions for contacting or associating with specified people. This provides greater freedom and flexibility. For example, it may not be safely possible to allow a person to have contact with a person under the age of 16 but it may be safe to allow the person to have supervised contact with their own child under the age of 16.
- 1.105 There are three conditions that we do not propose retaining as standard conditions under community preventive supervision. We do not propose retaining a condition not to associate with someone under the age of 16 as this will not always be rationally connected to the risk of a particular person. Where someone's reoffending risk does involve children or young people, the court will have an option to impose this as special condition. We also do not propose including conditions that commonly feature in comparative regimes overseas, such as conditions to comply with lawful directions or not to commit an offence. In the case of the former, we consider it preferable to define the specific instances where a binding direction can be issued or where consent can be refused. In the case of the latter, we do not think it necessary to include this as a standard condition. There are adequate existing mechanisms (such as charging the offence) to respond to the offending and mitigate any risk of reoffending.

## PROPOSAL

P60

The new Act should provide for a non-exhaustive list of example special conditions. This list should include conditions:

- a. to reside at a particular place;
- b. to be at the place of residence for up to 12 hours per day;
- c. to take part in a rehabilitative and reintegrative programme if and when directed to do so by a probation officer;
- d. not to use a controlled drug or a psychoactive substance and/or consume alcohol;
- e. not to associate with any person, persons or class of persons;
- f. to take prescription medication, provided they have given their informed consent;
- g. not to enter, or remain in, specified places or areas at specified times or at all times;
- h. not to 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 has been approved in writing by a probation officer as suitable to undertake the role of supervision;
- i. to submit to the electronic monitoring of compliance with any conditions that relate to the whereabouts of the person; and
- j. not to use any electronic device capable of accessing the internet without supervision.

1.106 In addition to the standard conditions, we propose it should be possible for the court to add special conditions. This allows community preventive supervision to be tailored to the particular reoffending risks of each person and so allow consideration of whether each special condition is rationally connected to the specific risk a person poses. We propose that the new Act should include a list of example special conditions to provide guidance for the court on what types of special conditions are common.

1.107 Our proposal maintains most of the examples listed in section 107K of the Parole Act for ESOs with the addition of a condition that prohibits contact with people under the age of 16 (in place of its inclusion as a standard condition) and a condition that a person may not use any electronic device capable of accessing the internet without supervision (in line with the Parole Board's common practice to impose such conditions on sex offenders).

## PROPOSAL

**P61**

The new Act should provide that the following conditions cannot be imposed as part of community preventive supervision:

- a. Any kind of detention, except conditions to be at a residence for up to 12 hours per day.
- b. An intensive monitoring condition (in-person, line-of-sight monitoring).

1.108 Our proposal would prevent any kind of detention or intensive monitoring being imposed as a special condition. This is because it is important to clearly distinguish between residential preventive supervision, which would typically amount to detention, and community preventive supervision, which would not. We do not propose allowing intensive monitoring for people on community preventive supervision, in line with our proposal (in Chapter 15) to restrict person-to-person monitoring to outings for people subject to residential preventive supervision.

1.109 The only exception we consider to be appropriate is the imposition of a curfew not exceeding 12 hours per day at the approved residential address, even though this will typically amount to detention. We think, however, that it fits with the overall aim of community preventive supervision to allow life within the community while imposing certain routines and structure that help minimise reoffending risk.

## PROPOSAL

**P62**

The new Act should provide that special conditions should, by default, be imposed for the same period as the preventive measure itself. Te Kōti-a-Rohe | District Court, may, however, specify a shorter period for individual special conditions where the full period would not be the least restrictive measure.

1.110 We do not think that special conditions should be limited to a specific period that differs from the period of the measure itself. This could lead to unintended consequences such as having to impose a more restrictive measure because certain community preventive supervision conditions can no longer apply. At the same time, we do not wish to limit the District Court's ability to make more tailored preventive measures by imposing some conditions for a shorter time than others.

## PROPOSAL

**P63**

The new Act should provide that probation officers should be responsible for monitoring people's compliance with community preventive supervision conditions.

1.111 We consider that probation officers should continue to be the people responsible for supervising those on community preventive supervision and to monitor their compliance with the conditions. This is because probation officers are already responsible for all types of community supervision, meaning they have significant experience in managing people

with reoffending risks in the community. This is also the approach taken in all comparable jurisdictions. It is not clear what other existing profession or group of officials would be better placed to take on this role.

### Residential preventive supervision (Chapter 15)

1.112 In Chapter 15, we set out our proposals for the administration of a new preventive measure — residential preventive supervision. Residential preventive supervision would be a middle-tier measure sitting between the least restrictive community preventive supervision and most restrictive secure preventive detention. It is intended for those people at serious reoffending risk who do not need to be made subject to secure preventive detention but who cannot be safely placed into the community without residing in the more controlled and supported environment of a residential facility. Residential preventive supervision would require a person to remain at a residential facility, but unlike secure preventive detention, which we discuss in Chapter 16, the facility would not have features to physically prevent the person from leaving.

#### PROPOSAL

##### P64

Residential preventive supervision should comprise of standard conditions and any additional special conditions imposed by the court. The new Act should provide for the following standard conditions of residential preventive supervision. The person subject to residential preventive supervision must:

- a. reside at the residential facility specified by the court;
- b. stay at that facility at all times unless leave is permitted by the facility manager;
- c. be subject to electronic monitoring for ensuring compliance with other standard or special conditions unless the facility manager directs otherwise;
- d. be subject to in-person, line-of-sight monitoring during outings unless the facility manager directs otherwise;
- e. not have in their possession any prohibited items;
- f. submit to rub-down searches and to searches of their room if the facility manager has reasonable grounds to believe that the resident has in their possession a prohibited item;
- g. hand over any prohibited items discovered in their possession;
- h. not associate with, or contact, a victim of the resident's offending without the prior written approval of the facility manager; and
- i. not associate with, or contact, any specified person or people of any specified class with whom the facility manager has, in writing, directed the resident not to associate unless the facility manager has defined conditions under which association or contact is permissible.

- 1.113 We propose that, as with community preventive supervision, residential preventive supervision should be implemented through a set of standard conditions supplemented by more tailored special conditions. Within this, some discretion should be given to the manager of residential preventive supervision facilities to set rules for day-to-day operations. This is different from the approach we propose for secure preventive detention where we propose a set of coercive powers that exist independently of powers derived from standard and special conditions. We consider this both maintains the status quo in relation to managers of facilities that house people subject to ESOs with residential restrictions and clearly demarcates the conditions of residential preventive supervision from secure preventive detention.
- 1.114 Under residential preventive supervision, a person would be required to reside at a facility where they must stay unless given permission to leave. These are the defining features of residential preventive supervision and should therefore be standard conditions. Given that a residential facility would not physically prevent people from leaving, we consider it should be possible for staff to track residents' whereabouts through electronic monitoring if they were to abscond and so our proposal includes provision for electronic monitoring as a standard condition. We also propose that line-of-sight monitoring should be required only for the time that a person spends outside the secure facility. This would mean a repeal of current arrangements for intensive monitoring in its current form.
- 1.115 To maintain order at a residential facility, the new Act should provide that residents must comply with directions issued by the facility manager in relation to prohibited items. This is necessary to ensure the orderly function and safety of the facility. On the basis of standard conditions relating to prohibited items, residents should be required to submit to rub-down searches and confiscations of prohibited items in their possession. Facility managers should not have powers to enforce a search or confiscation by force. Any person who refuses to comply would be in breach of a standard condition and, as such, commit an offence making them eligible for escalation or sentence.
- 1.116 Continuing the current law on ESOs, we propose maintaining as a standard condition that residents must not associate with people with whom the facility manager has, in writing, directed the person subject to the order not to associate. As with community preventive supervision, we propose that facility managers should be able to define conditions for contacting or associating with specified people. This will allow for a more nuanced approach.
- 1.117 Our proposal would allow for the court to add special conditions as necessary on a case-by-case basis. Providing for special conditions allows the residential preventive supervision regime to be tailored to the particular offending risks of each person in each case. It would also equip facility managers with legal grounds to monitor or restrict a particular person.

## PROPOSAL

### P65

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should have legal custody of the residents, while the facility manager should be entrusted with the residents' care and be responsible for the day-to-day operation of the facility.

- 1.118 Under the Corrections Act and the PPO Act, people subject to preventive detention or PPOs are in the custody of the chief executive. We are not aware of any issues in this regard and propose maintaining this rule under the new Act in relation to the custody of people subject to residential preventive supervision. The facility manager should have day-to-day responsibility for the care of the resident and running of the facility.

#### PROPOSAL

P66

The new Act should set out a procedure for the responsible Minister to designate a residential facility by *New Zealand Gazette* notice.

- 1.119 Under the new Act, we consider it should be made clear which facilities are being used as residential facilities.

#### PROPOSAL

P67

The new Act should provide for residential facilities to be subject to examination by a National Preventive Mechanism under the Crimes of Torture Act 1989 and to periodic inspections every six months by specialised inspectors.

- 1.120 As “places of detention”, residential facilities should be subject to National Preventive Mechanism examination under the Crimes of Torture Act 1989. A National Preventive Mechanism would need to be designated for this purpose by the Minister of Justice. Additionally, to provide for a broader inspection mandate, the chief executive should be required to appoint inspectors to periodically inspect residential facilities. The ambit of review should be to address compliance with all requirements concerning residential preventive supervision under the new Act. We consider these reviews should take place every six months.

### Secure preventive detention (Chapter 16)

- 1.121 In Chapter 16, we set out our proposals for the administration of a new preventive measure — secure preventive detention. Our overarching proposals for reform of the law are that preventive detention should be repealed. However, we acknowledge that detention may still be necessary to respond to the risk a person poses. As such, our proposal is for the new Act to continue to enable the detention of a person in a secure facility when no less restrictive preventive measure would protect the community.



## PROPOSAL

P68

The new Act should provide for the following core features of secure preventive detention:

- a. People subject to secure preventive detention are detained in secure facilities.
- b. Detainees must not leave the facility without permission of the facility manager.
- c. Detainees are in the custody of the chief executive of Ara Poutama Aotearoa | Department of Corrections.

1.122 We suggest that secure preventive detention should operate in a similar way to PPOs. It will still involve severe restrictions on a person's right to liberty and so could still be punitive. Crucially, secure facilities should be designed to physically prevent people detained there from leaving. We consider, however, that our proposal for preventive measures to be imposed post-sentence along with our proposals for particular conditions and a stronger rehabilitative and reintegrative focus will go some way towards militating that and justifying any limitation of rights.

## PROPOSALS

P69

The new Act should provide that secure preventive detention is administered in secure facilities separate from prisons.

P70

The new Act should set out a procedure for the responsible Minister to designate a secure facility by *New Zealand Gazette* notice.

1.123 We consider that secure facilities separate from prisons are the most effective way to make secure preventive detention distinct from custodial prison sentences and allow for facilities to be run in a way that minimises restrictions on detainees' living environment and quality of life. This will ensure both compliance with the right to be free from arbitrary detention and justify any limitations of the right not to be subject to second punishment. This approach has been successfully implemented in Germany.

1.124 We acknowledge that this proposal has associated resourcing and infrastructure considerations. We consider these can be justified.

## PROPOSAL

P71

The new Act should provide that people subject to secure preventive detention should have rooms or separate, self-contained units to themselves. The rooms or units should be materially different from prison cells and provide the detainee with privacy and a reasonable level of comfort.

- 1.125 We propose that living spaces in secure facilities should resemble life in the community as much as possible. This aligns with the guiding principle that people subject to any preventive measure should have as much autonomy and quality of life as reasonably possible. Our proposal would include rooms or units with a separate bathroom and, where reasonably practical, a kitchenette that people do not need to share with others.

## PROPOSALS

P72

The new Act should state that the detainee's rights are only restricted to the extent they are limited by the new Act.

P73

The new Act should carry over the rights of detainees expressed in sections 27–39 of the Public Safety (Public Protection Orders) Act 2014.

- 1.126 Ordering a person to be detained in a secure facility is a significant restriction of that person's rights. As we emphasise throughout this Preferred Approach Paper, this can only be lawful if (in line with our proposed legislative tests for imposition) the restriction is necessary and justified to prevent the person in question from serious reoffending. The nature of secure preventive detention means there are some rights restrictions that are necessary to secure a person's detention and prevent them from serious reoffending. For example, a secure facility can only be run if the facility manager has the authority to restrict detainees' rights to the extent necessary to prevent them from harming themselves or another person, escaping custody or otherwise disrupting the orderly functioning of the facility.
- 1.127 There should not, however, be any restrictions of rights that are neither inherent to the measure nor necessary to administer it. For this reason, we propose that the new Act should include a list of affirmed rights to provide clear and detailed rules under which circumstances rights may be limited. We propose that the list of detainees' rights under the new Act should replicate the list of detainees' rights currently affirmed under the PPO Act.

## PROPOSAL

P74

The new Act should clarify that, subject to reasonably necessary restrictions, detainees are entitled to:

- a. cook their own food;
- b. wear their own clothes;
- c. use their own linen;
- d. have regular supervised outings; and
- e. access the internet.

- 1.128 In addition to the rights already set out in the PPO Act, we consider that some other entitlements should also be expressly provided for in the new Act. Our proposal includes entitlements that would, at the very least, comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Mandela Rules).

## PROPOSALS

**P75**

Under the new Act, to ensure the orderly functioning of the facility, the manager of a secure facility should have powers to:

- a. check and withhold certain written communications;
- b. inspect delivered items;
- c. monitor and restrict phone calls and internet use;
- d. restrict contact with certain people outside a facility;
- e. conduct searches;
- f. inspect and take prohibited items;
- g. carry out drug or alcohol tests;
- h. seclude detainees;
- i. restrain detainees; and
- j. call on corrections officers to use physical force in a security emergency.

**P76**

The new Act should provide for a facility manager to have the power to make appropriate rules for the management of the facility and for the conduct and safe custody of the detainees.

**P77**

Under the new Act, the manager of a secure facility should have the ability to delegate any of their powers to suitably qualified staff, except the powers to make rules and to delegate.

- 1.129 We consider managers of secure facilities should have an appropriate set of coercive powers to ensure the orderly functioning and safety of the facility. The powers in our proposal reflect the coercive powers currently available to facility managers under the PPO Act. These can only be exercised in accordance with the guiding principles of the Act and must not be more severe than necessary to ensure the orderly functioning and safety of the facility.
- 1.130 Our proposal would allow for facility managers to make appropriate rules for the management of the facility rather than having to direct each detainee individually. This power could not, however, be used to confer any additional coercive powers on the manager. As is currently the case under the PPO Act, the manager should also be able to delegate some appropriate powers to suitably qualified staff.

**PROPOSAL****P78**

The new Act should provide for secure facilities to be subject to examination by a National Preventive Mechanism under the Crimes of Torture Act 1989 and to periodic inspections at least every six months by specialised inspectors.

- 1.131 Similarly to our proposals for residential facilities, our proposal for secure facilities would include a provision subjecting them to National Preventive Mechanism examination under the Crimes of Torture Act and regular, six-month inspections to ensure compliance with requirements under the new Act.

**Non-compliance and escalation (Chapter 17)**

- 1.132 In Chapter 17, we consider what the consequences for non-compliance with the conditions of a preventive measure should be and when and how a person can be escalated to a more restrictive preventive measure. We propose that the new Act should continue to provide for conviction and sentence as a means to respond to non-compliance. Where a person cannot be safely managed on an existing preventive measure or their risk subsequently changes, we propose mechanisms for escalation to a more restrictive measure.

**PROPOSAL****P79**

The new Act should provide that a person subject to a preventive measure who breaches any conditions of that measure without reasonable excuse commits an offence and is liable on conviction to imprisonment for a term not exceeding two years.

- 1.133 Our proposal would make non-compliance with preventive measures an offence. Police would have the power to arrest any person found to be in breach of conditions, for example, if a person absconded from a residential facility. Breaches of conditions could then be prosecuted, with the courts having flexibility as to what, if any, sentence to impose on the offender. Conviction and sentence for breach of conditions are conventional means of responding to non-compliance and deterring future non-compliance. Non-compliance can indicate unmanaged risk and may represent offence-parallel behaviour. Robust measures are needed to be able to respond to this.
- 1.134 Our intention is for prosecution of a breach of conditions to be one of several possible responses to non-compliance and to be imposed only in sufficiently serious cases rather than as a de facto response. In our view, prosecution should only be considered if the breach undermines the purposes of the regime — the protection of the community from serious reoffending and the rehabilitation and reintegration of people considered at high risk of serious reoffending. If a breach of condition does not meet this threshold, a criminal conviction may be a disproportionate response and unjustifiably heighten the punitive character of the regime. It may also be counter-productive to the long-term goal of community safety through the rehabilitation and reintegration of people subject to preventive measures. A decision to prosecute a breach should therefore engage with

whether it is the appropriate response when considered against the alternative options available.

## PROPOSAL

P80

Te Kōti Matua | High Court should have power to order that a preventive measure to which a person is subject be terminated and a more restrictive preventive measure be imposed if:

- a. the person would, if they were to remain subject to the preventive measure, pose such an unacceptably high risk to the community, themselves or others that they cannot be safely managed under that preventive measure; and
- b. all less restrictive options for managing the behaviour of the person have been considered and any appropriate options have been tried.

- 1.135 The new Act should provide an avenue to escalate a person to a more restrictive preventive measure. There may be some people who cannot be safely managed on the preventive measure to which they were initially made subject whether because their risk of serious reoffending has changed or was not fully appreciated at the time of the original order or because a facility or programme is not adequate to respond to a person's risk.
- 1.136 To escalate a person to a more restrictive measure, the chief executive should be required to apply to the High Court. We consider this is consistent with our approach that the High Court has jurisdiction to impose and review the two more restrictive measures – residential preventive supervision and secure preventive detention.
- 1.137 We propose a separate and more targeted test for the determination of whether someone should be escalated to a more restrictive measure, which differs from the test for imposition of a preventive measure. This is because the test for escalation exists in a different context from that of imposition – it should focus on the risk posed by the person with a preventive measure already in place. Additionally, imposing a more restrictive measure further infringes the protection against second punishment under the NZ Bill of Rights beyond the imposition of the initial measure and so must be justified.
- 1.138 The wording of our proposed test for escalation is focused on whether the person presents an “unacceptable risk”. This would require the court to make a value judgement as to what risk should be accepted against the alternative of escalating the person to a more restrictive measure. Our proposal also requires the chief executive to demonstrate that other options for managing the behaviour of the person have been considered or tried before the option of escalation.
- 1.139 Our proposal does not limit the court to imposing the next most restrictive preventive measure. It would be possible for the court to order that a person subject to community preventive supervisions be made subject to secure preventive detention. We would, however, expect this to be rare.

## PROPOSALS

**P81**

Te Kōti Matua | High Court should have power to order that a person subject to secure preventive detention be detained in prison if:

- a. the person would, if they were to remain subject to secure preventive detention, pose such an unacceptably high risk to the community, themselves or others that they cannot be safely managed on secure preventive detention; and
- b. all less restrictive options for managing the behaviour of the person have been considered and any appropriate options have been tried.

**P82**

A person who te Kōti Matua | High Court has ordered to be detained in prison should:

- a. be treated in the same way as a prisoner who is committed to prison solely because they are awaiting trial;
- b. have the rights and obligations of such a prisoner; and
- c. have all the rights conferred on that person under the new Act to the extent that those rights are compatible with the provisions of the Corrections Act 2004 that apply to prisoners who are committed to prison solely because they are awaiting trial.

- 1.140 In our view, recall to prison should not be a means of escalation. The preventive measures we propose under the new Act would operate as a post-sentence regime. The sentence in respect of a person's qualifying offending will come to an end before a preventive measure takes effect. It follows that there should be no recall to prison under the new Act tied to a prior prison sentence.
- 1.141 Under our proposals, secure preventive detention would be administered in secure facilities separate from prison. At the same time, we recognise that there may be people who need to be placed in prison-like conditions to manage their behaviour (for example, to be secluded). This might be, for example, because they pose significant risk to the safety of other staff or detainees. We propose that detention in prison should be available as an option of last resort to respond to these circumstances. This is on the basis that not all behaviour can be safely managed within secure facilities due to the impact of heightened security on other detainees or space and resource constraints within secure facilities.
- 1.142 Where a person is detained in prison, they should be treated in the same way as prisoners on remand, subject to the additional rights given to people under preventive measures in the new Act. In particular, it is important that people detained in prison continue to have the same access to rehabilitative and reintegrative treatment and programmes.
- 1.143 The continuing justification for detention in prison should be periodically and regularly reviewed by both the High Court and the independent review panel.

## Duration and reviews of preventive measures (Chapter 18)

- 1.144 In Chapter 18, we consider the duration for which preventive measures are imposed and the ways in which they should be reviewed, varied and terminated under the new Act.

### PROPOSAL

**P83**

The new Act should provide that a preventive measure is indeterminate and remains in force until it is terminated by a court.

- 1.145 We propose the period of preventive measures should be indeterminate. The aim of this is to provide the flexibility needed to ensure that they are in place for only as long as necessary to protect the community – not any longer or shorter. We consider that this is preferable to other options such as providing for fixed-term orders that can be renewed (which may exacerbate the feelings of frustrations of those subject to a fixed-term order) or imposing preventive measures as determinate orders without any possibility of renewal (which would not be able to respond to ongoing risks of reoffending and so undermine community safety). We consider an indeterminate approach more accurately and clearly communicates the nature and intent of a preventive measure and better provides for community safety. This proposal would be combined with rigorous review obligations, which we discuss below.

### PROPOSALS

**P84**

Under the new Act, a preventive measure to which a person is subject should be suspended while that person is detained in a prison (except under a prison detention order or a sentence of life imprisonment). Community preventive supervision and residential preventive supervision should remain suspended during any period the person is released from prison (if applicable) until the sentence expiry date. Secure preventive detention should reactivate once the person is no longer detained in a prison.

**P85**

A preventive measure a person is subject to should continue in force while that person is serving a community-based sentence or a sentence of home detention.

- 1.146 It is possible for a person to be made subject to a new criminal sentence while they are subject to a preventive measure. This will usually be if the person is reconvicted and sentenced during the time a preventive measure is in effect. We consider that sentences of imprisonment should operate in place of a preventive measure, so any preventive measure in force should be suspended while the person is detained in prison.
- 1.147 We also propose that community preventive supervision and residential preventive supervision should, in line with the current rules of the Parole Act, continue to be suspended if a person serving an intervening long-term sentence of imprisonment is released on parole. While a person is on parole, they can be made subject to similar conditions as the conditions that are available under community preventive supervision

and residential preventive supervision. Although unlikely to arise in practice, we do not consider it should be possible for a person subject to secure preventive detention who is currently serving an intervening long-term prison sentence to be released on parole, and our proposal expressly provides for this scenario.

- 1.148 Community-based sentences and sentences of home detention may not provide the same level of community safety as the preventive measure. The preventive measure should therefore remain in force alongside such sentences. Suspending preventive measures for sentences of imprisonment but not for community-based sentences and sentences of home detention is in line with the current provisions on the suspension of ESOs under the Parole Act.

#### PROPOSAL

P86

A preventive measure to which a person is subject should be suspended while an interim preventive measure is in force in relation to that person. If the court declines the application for the substantive preventive measure to which the interim measure relates, the suspended preventive measure should reactivate. If the court grants the application for the new substantive preventive measure, the suspended preventive measure should terminate.

- 1.149 In Chapter 17, we propose that the chief executive should be able to apply to the court for the imposition of a more restrictive preventive measure on a person already subject to a preventive measure. It should also be possible for the chief executive to seek interim orders pending the application for the more restrictive measure. We propose that preventive measures should be suspended while an interim preventive measure is in force. If the court ultimately declines the substantive application, the former preventive measure should reactivate.

#### PROPOSAL

P87

A preventive measure to which a person is subject should terminate if a sentence of life imprisonment is imposed on that person.

- 1.150 Under a sentence of life imprisonment, a person must remain in prison until they are released on direction of the Parole Board on the basis they do not pose an undue risk to the community. Like preventive detention, a person subject to a sentence of life imprisonment will remain on parole conditions and be subject to recall for life. Life imprisonment therefore contains features to protect the public without the need for preventive measures. It follows that a preventive measure should terminate if a sentence of life imprisonment is imposed on a person subject to a preventive measure as is currently the case with people subject to ESOs.



**PROPOSALS****P88**

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should apply to the court for a review of a preventive measure no later than three years after the court has finally determined the application to impose the measures. For subsequent reviews, the chief executive should apply for a review of the preventive measure no later than three years after the court has finally determined the previous application for review.

**P89**

Applications for a review of community preventive supervision should be made to te Kōti-a-Rohe | District Court. Applications for the review of residential preventive supervision or secure preventive detention should be made to te Kōti Matua | High Court.

**P90**

To accompany an application, the chief executive of Ara Poutama Aotearoa | Department of Corrections should submit:

- a. one health assessor report for the review of community preventive supervision or two health assessor reports for the review of residential preventive supervision and secure preventive detention; and
- b. the decisions of the review panel since the last court review.

**P91**

The health assessor reports should address whether:

- a. the eligible person is at high risk of committing a further qualifying offence in the next three years if the person does not remain subject to the preventive measure; and
- b. having regard to the nature and extent of the high risk the person will commit a further qualifying offence, the preventive measure is the least restrictive measure adequate to address the high risk that the eligible person will commit a further qualifying offence.

**P92**

When determining an application for review of a preventive measure, the court should review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures.

## PROPOSALS

**P93**

The court should determine an application for the review of a preventive measure by:

- a. confirming the preventive measure and, if applicable, its conditions;
- b. confirming the preventive measure but varying the special conditions of the preventive measure to make them less restrictive (in the case of community preventive supervision or residential preventive supervision);
- c. terminating the preventive measure and imposing a less restrictive measure; or
- d. terminating the preventive measure without replacement.

**P94**

If the court confirms the preventive measure or orders the imposition of a less restrictive measure, it should review the person's treatment and supervision plan. The court should have the power to make recommendations to the person responsible for developing and administering the plan.

- 1.151 Periodic reviews of the ongoing justification for a preventive measure are essential to make the regime under the new Act compliant with human rights standards and, in particular, to avoid a finding that secure preventive detention or residential preventive supervision amounts to arbitrary detention. It is also essential given we propose that preventive measures should be in place for an indeterminate period. The review mechanisms we propose consist of periodic reviews every three years by the courts and annual reviews during the intervening periods by a specialist review panel established under the new Act.
- 1.152 Entrusting the review of the ongoing justification for a preventive measure to the courts (as opposed to the Parole Board) will ensure a high degree of scrutiny and reflects the severity of preventive measures and the importance of the reviews. It also avoids concerns raised that preventive detention does not comply with international human rights law because the Parole Board's reviews do not constitute reviews by a "court".
- 1.153 We propose that the chief executive should have responsibility for initiating reviews of a preventive measure by applying to the court that imposed the measure within the first three years of its imposition. We have suggested a three-year period as a midway point between the five-year review intervals for PPOs and through comparative analysis of review periods in preventive regimes overseas, which tend to be every three years or more frequently. We consider this is appropriate given the severity of the human rights restrictions engaged by preventive measures but acknowledge the implications for the courts' workload. To alleviate some of the pressure on the senior courts, we propose that both the High Court and the District Court have reviewing responsibility under the new Act.
- 1.154 The primary purpose of reviewing a preventive measure is to test its continued justification. It is appropriate, therefore, that the courts apply the same tests as for the imposition of preventive measures (see Chapter 10). This requires the courts to also have the same type of information as for imposition. We propose that the chief executive

should be required to submit the same number of health assessor reports as for the initial imposition of that preventive measure — one report for community preventive supervision and two reports for residential preventive supervision and secure preventive detention. We consider this is appropriate as the consequences of review (namely, the continuation of a preventive measure until the next review) warrant the same level of assessment as for imposition. At the same time, we are mindful of the current resource constraints on health assessor reports.

- 1.155 There will be four possible outcomes of court review: confirmation of the preventive measure; variation of the component special conditions; moving to a less restrictive measure; or termination of the preventive measure. Where a court confirms a preventive measure, we consider this should trigger an automatic court review of a person's treatment or supervision plan to examine why insufficient progress is being made and what might be altered.

## PROPOSALS

P95

The new Act should provide for the establishment of a review panel. The review panel should:

- a. be chaired by a judge or former judge;
- b. include other judges or former judges or experienced solicitors or barristers as members and panel convenors;
- c. include psychiatrists and clinical psychologists as members;
- d. include members with Parole Board experience and have at least one member who is also a current member of the Parole Board; and
- e. include members with knowledge of mātauranga Māori (including tikanga Māori).

P96

The review panel should review the preventive measure annually except in the years during which an application for a court review of a preventive measure is pending.

P97

The review panel should be able to request information relevant to the review from those responsible for the administration of a preventive measure. It should also be able to conduct interviews with a person subject to a preventive measure if they consent.

P98

The review panel should review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures.

**PROPOSAL****P99**

The review panel should conclude a review of a preventive measure by issuing a decision:

- a. confirming the ongoing justification for preventive measure and, if applicable, its conditions;
- b. confirming the ongoing justification for the preventive measure but varying the special conditions to make them less restrictive (in the case of residential preventive supervision or community preventive supervision); or
- c. if it considers the preventive measure may no longer be justified, directing the chief executive of Ara Poutama Aotearoa | Department of Corrections to apply to the relevant court to terminate the measure.

1.156 We consider that, given the restrictiveness of the preventive measures, they should be comprehensively reviewed more frequently than the three-yearly review period allows. Such a high frequency of court reviews would not be an efficient use of court resources, however, and so our recommendation is to create a review panel to carry out yearly reviews in between the three-year court reviews.

1.157 We consider that the review panel should be an independent, multidisciplinary panel. Its function and constitution would be similar to the review panel established under the PPO Act and to the Parole Board.

1.158 Like court reviews, we propose that the review panel test whether the preventive measure remains justified by applying the legislative tests used to impose preventive measures. The review panel should conclude a review by confirming the measure, confirming the measure but varying the special conditions to make them less restrictive or, if it considers the preventive measure may no longer be justified, directing the chief executive to apply to the relevant court to terminate the measure.

1.159 In order to carry out this task, the review panel should have broad powers to request relevant information from the chief executive, the person's probation officer or the manager of a facility. We stop short, however, of proposing that new health assessment reports should be prepared for each annual panel review. The focus of the panel should be on assessing the rehabilitation or reintegration progress the person concerned may have made in the previous year, which can be done by collating and scrutinising relevant documentation from probation officers or facility managers as well as interviewing the person themselves.

## PROPOSALS

**P100**

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections and, with the leave of the court, the person subject to a preventive measure should be able to apply to the court to terminate the preventive measure. An application concerning community preventive supervision should be submitted to te Kōti-a-Rohe | District Court. An application concerning residential preventive supervision or secure preventive detention should be submitted to te Kōti Matua | High Court.

**P101**

The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to community preventive supervision or residential preventive supervision should be able to apply to the review panel to vary the special conditions of community preventive supervision or residential preventive supervision.

**P102**

The new Act should allow the chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to a preventive measure to appeal to the relevant court (te Kōti-a-Rohe | District Court for community preventive supervision or te Kōti Matua | High Court for residential preventive supervision) against a decision by the review panel to vary special conditions.

- 1.160 In addition to the periodic reviews by the courts and the review panel, it is important that the person subject to a preventive measure and the chief executive can apply to the relevant court for a variation or termination of the measure in force at any time. This is to ensure that the court can respond to sudden changes in a person's risk profile or in case the applicant thinks that the review panel erred in their assessment. Unlike an application for a periodic review where the chief executive seeks a review without specifying the desired outcome, we propose here that applications outside the periodic reviews should be aimed at a specific outcome. We expect that more targeted submissions would allow the court to more efficiently determine whether a preventive measure should be terminated or not.
- 1.161 To alleviate some of the review workload pressure on the courts, we propose that it should be possible to apply to the review panel rather than the courts to vary special conditions of residential preventive supervision or community preventive supervision. The review panel would have the power to vary special conditions to make them either less or more restrictive. If the review panel was not to have this power, any type of increase in restrictiveness — even if it is just an adjustment of one special condition — would have to go through a court. This could take longer and be an unnecessary use of court resources when the review panel could undertake this function.
- 1.162 By varying special conditions, the review panel has the authority to significantly change the character of community preventive supervision or residential preventive supervision. We therefore consider that both the person subject to the preventive measure and the chief executive should have appeal rights to the court that imposed the measure.

## PROPOSALS

**P103** Under the new Act, prison detention orders should remain in force until terminated by te Kōti Matua | High Court.

**P104** The new Act should provide for the following review procedure for prison detention orders:

- a. The same legislative test for imposing a prison detention order should be applied for reviewing it.
- b. A prison detention order should be reviewed annually by te Kōti Matua | High Court upon application by the chief executive of Ara Poutama Aotearoa | Department of Corrections.
- c. A prison detention order should be reviewed by the review panel every six months or, if there is an application for a court review pending, within six months after the court review is finalised.
- d. The chief executive of Ara Poutama Aotearoa | Department of Corrections and, with leave of the court, a person subject to a prison detention order should be able to apply to the High Court for the termination of a prison detention order.

1.163 In Chapter 17, we propose that the High Court should have the power to order that a person subject to secure preventive detention be detained in prison if a person cannot be safely managed on secure preventive detention (and other requirements are fulfilled). In line with our reasoning about the duration of preventive measures, we consider that prison detention orders should be in place for as long as the test for imposing it is met.

1.164 Given that the new Act aims to set up a preventive regime that is strictly separated from prisons, we consider that every reasonable effort should be made to end a prison detention order as soon as possible. This is why we propose more frequent reviews by both the High Court and the review panel than for the periodic review of preventive measures. Our proposal is modelled on the current review mechanisms for prison detention orders under the PPO Act.

### Transitional arrangements (Chapter 19)

1.165 In Chapter 19, we consider the transitional arrangements that might be put in place to repeal the current law governing preventive detention, ESOs and PPOs and move to the proposed new regime under a new Act. We propose that Ara Poutama should determine how the new Act should come into effect. Without making more detailed proposals about the prospective and retrospective application of the Act, we share our thoughts on how this might be approached.

## PROPOSAL

P105

Ara Poutama Aotearoa | Department of Corrections should consider the appropriate transitional arrangements to bring the new Act into effect.

- 1.166 It will take time to implement the reforms contemplated in this paper. It will require consideration of numerous logistical and operational matters, and additional resourcing. As the agency that we propose should be responsible for implementing and administering the Act, we consider Ara Poutama will be best placed to determine the appropriate time for when the new Act should come into effect. We therefore propose that Ara Poutama consider when the new Act should commence when work for the preparation of the Bill is under way.
- 1.167 The date of commencement should strike an appropriate balance between the time required to resource and establish the administration of the new Act and the need for reform in light of the manifold issues with the current law we have identified throughout this Preferred Approach Paper.
- 1.168 We offer the following observations on other elements of enactment and transition that should be considered by Ara Poutama:
- (a) Prospective application of the Act. We see no difficulty concerning the prospective application of the new Act. The new Act should therefore be applied to all people whose qualifying offending occurs after the commencement of the new Act.
  - (b) Retrospective application of the new Act to people not yet subject to preventive measures. We suggest that most aspects of the new Act could apply retrospectively to people who, at the time of commencement of the new Act, are awaiting sentencing or serving a determinate prison sentence for qualifying offending (except strangulation or suffocation and the imprisonable offences under the Films, Videos, and Publications Classification Act that are currently qualifying offences for an ESO). We make this suggestion because we consider that the nature and effect of the preventive measures proposed in this paper would be less harsh than the current law. Retrospective application (with the exceptions noted would, in our view, be permissible under the NZ Bill of Rights.
  - (c) Transitioning people already subject to preventive measures to the new Act. The second group of people to whom the new Act could apply retrospectively is those who are already subject to preventive detention, ESOs or PPOs.
    - (i) We suggest that one approach would be for existing ESOs to continue to be in force until they expire but for no new ESOs to be imposed. All ESOs that are in force when the new Act commences would either be succeeded by a new preventive measure or simply end without a new measure being imposed. This would mean that all ESOs would fade out of operation within 10 years of commencement of the Act.
    - (ii) We suggest a different approach for those on PPOs. We suggest that, as soon as reasonably practicable after the commencement of the new Act, the chief executive should apply to the High Court to impose an appropriate new preventive measure on the person in question. As soon as the new measure would take effect, the PPO would end. We make this suggestion because it

would be inefficient to maintain the PPO regime side by side with the new Act given the low numbers of people affected. We also consider the especially severe nature of PPOs makes it particularly important that people are swiftly transitioned to the new Act.

- 1.169 There are a large number of people currently subject to preventive detention. The question of whether and if so how to transition these individuals to preventive measures under the new Act is difficult. There are significant resourcing implications for Ara Poutama, health assessors and the courts. One approach could be to apply the new Act to people subject to preventive detention at the time of enactment, whether released on parole or not. In our view, this approach would be the most principled and consistent with the general reasoning behind our proposals for reform. It would, however, create resourcing pressure on Ara Poutama. An alternative approach could be that people serving a sentence of preventive detention at commencement of the new Act remain subject to preventive detention unless released on parole. For those released on parole, the sentence would end after a certain period such as five or 10 years provided the person has not been recalled to prison. We do not prefer this latter approach because it would continue indefinite imprisonment as a preventive measure for all those who are not granted parole.
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## CHAPTER 2

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# Introduction

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### IN THIS CHAPTER, WE:

- set out the background to this review and our process so far;
- outline the purpose and approach of this Preferred Approach Paper and our next steps; and
- provide an overview of the law relating to current preventive measures, and how they operate in practice.

2.1 Te Aka Matua o te Ture | Law Commission is reviewing the laws governing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs). These are the laws that aim to protect the community from reoffending risks posed by some people convicted of serious crimes. They achieve this aim by providing for the detention or supervision of people beyond a determinate prison sentence.

2.2 This Preferred Approach Paper outlines the issues we have identified with the current law and the views of submitters put to us during our consultation exercise. We have concluded that significant reform is required to the law governing preventive measures. This Preferred Approach Paper sets out our detailed proposals for reform, including for a new Act to govern preventive measures. We seek feedback on these proposals.

### BACKGROUND TO THE REVIEW

2.3 The focus of this review is the law relating to:

- (a) preventive detention under the Sentencing Act 2002;
- (b) ESOs under the Parole Act 2002; and
- (c) PPOs under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).

2.4 Under the terms of reference of our review, we are examining, among other issues:

- (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 (the Treaty), 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.
- 2.5 Consideration of these measures involves addressing some difficult questions. The law must balance significant interests — on the one hand, the need to keep the community safe from harm, and on the other, the rights of people who have already served a prison sentence for their offending. The imposition of further restrictions after this point can result in serious intrusions on their rights and freedoms.
- 2.6 In recent years, the laws governing these measures have come under criticism for their inconsistency with human rights law. In *Miller v New Zealand*, the United Nations Human Rights Committee found that preventive detention breaches the protections against arbitrary detention under the International Covenant on Civil and Political Rights.<sup>1</sup> In *Chisnall v Attorney-General*, te Kōti Pira | Court of Appeal made declarations that the ESO and PPO regimes were inconsistent with the protection against second penalties under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and that those inconsistencies had not been justified in terms of section 5 of the NZ Bill of Rights.<sup>2</sup> The decision is on appeal to te Kōti Mana Nui | Supreme Court and a judgment is awaited.
- 2.7 This Preferred Approach Paper sets out the issues we have identified with the current law and the results of our consultation exercise. It presents our proposals for reform on which we seek feedback.
- 2.8 Readers should be aware that some of the discussion in this Preferred Approach Paper includes references to serious offending, which may be distressing.

## OUR PROCESS SO FAR

- 2.9 The Commission has been reviewing the law relating to preventive detention and post-sentence orders since July 2022, when we published our terms of reference. We spent the first part of this review researching the law and issues, including the relevant case law and commentary, human rights jurisprudence and an analysis of the law in comparable jurisdictions. We also undertook some preliminary engagement with experts and stakeholders, including with various Ara Poutama Aotearoa | Department of Corrections teams who administer preventive detention, ESOs and PPOs.
- 2.10 We published an Issues Paper for consultation in May 2023.<sup>3</sup> This set out the issues we had identified with the current law and presented our preliminary views and proposals for reform. We then held an eight-week period of consultation. We invited feedback from submitters on the issues identified and our preliminary views on reform. We received 39 submissions in total. Twenty-two of these submissions were from interviews with people subject to preventive detention, ESOs and PPOs. These interviews were aimed at understanding their experiences of preventive measures.<sup>4</sup> Our analysis of these

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<sup>1</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

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

<sup>3</sup> Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper).

<sup>4</sup> A summary of the key themes to emerge from these interviews can be found alongside written submissions received on the project webpage at [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

submissions has informed the development of our proposals for reform set out in this Preferred Approach Paper.

- 2.11 In addition to submissions received through consultation, we have continued to engage with other key stakeholders to receive feedback. We also discussed our draft proposals with our Expert Advisory Group.
- 2.12 In respect of the specific issues relating to tikanga and te ao Māori, our analysis has been informed by several engagement hui with Māori who have expertise in tikanga and/or criminal justice issues. In the initial stages of the review, we explored the tikanga concepts that may be engaged. We commissioned a literature review, hosted a wānanga with pūkenga tikanga and commissioned a working paper. In 2024, we hosted a wānanga with pūkenga tikanga, academics and Māori criminal lawyers to discuss our proposals for reform. The Commission's Māori Liaison Committee has also provided input at various stages of the project.

## PURPOSE AND APPROACH OF THIS PREFERRED APPROACH PAPER

- 2.13 This Preferred Approach Paper sets out our preferred approach for reform of the law relating to preventive measures. In each chapter, we:
- (a) provide an overview of the issues with the current law identified in our Issues Paper;
  - (b) set out the results of our consultation; and
  - (c) outline our conclusions and proposals for reform of the law — in some cases, our preferred approach to reform is expressed more tentatively, and we require further feedback from submitters before we develop a more detailed proposal for reform.
- 2.14 This Preferred Approach Paper is structured in five parts:
- (a) Part 1 (Chapters 1 and 2) sets out introductory matters, including an executive summary of this Preferred Approach Paper as a whole and a brief overview of the current law on preventive measures.
  - (b) Part 2 sets out foundational matters relating to our proposals for reform:
    - (i) In Chapter 3, we explain our conclusion on why the law should continue to provide for preventive measures to protect community safety. We consider what preventive measures the law should provide for.
    - (ii) In Chapter 4, we set out our overarching proposal for a single, post-sentence regime contained in a new Act to govern preventive measures.
    - (iii) In Chapter 5, we outline our proposals to reorient the law to facilitate a more humane approach focused on the rehabilitation and reintegration of people subject to preventive measures.
    - (iv) In Chapter 6, we address matters relating to how the law should respond to issues of tikanga Māori and the Crown's obligations under the Treaty.
  - (c) Part 3 considers the eligibility criteria for a preventive measure:
    - (i) In Chapter 7, we discuss the age of eligibility for preventive measures.
    - (ii) In Chapter 8, we consider the offences that we think should qualify a person for eligibility for preventive measures.
    - (iii) In Chapter 9, we explain how the new law should deal with overseas offending.

- (d) Part 4 sets out our conclusions on how a court should determine whether to impose a preventive measure:
    - (i) In Chapter 10, we set out our proposals for the legislative tests the courts should apply for imposing a preventive measure.
    - (ii) In Chapter 11, we address what evidence of reoffending risk should guide a court’s decision.
    - (iii) In Chapter 12, we explore a range of matters relating to proceedings under our proposed new Act and how these should be administered.
  - (e) Finally, Part 5 deals with the administration of preventive measures:
    - (i) In Chapter 13, we explain our conclusions on a number of overarching operational matters, including entitlements to rehabilitative treatment and reintegration support.
    - (ii) In Chapters 14–16, we set out how our proposed new preventive measures — community preventive supervision, residential preventive supervision and secure preventive detention — should be administered.
    - (iii) In Chapter 17, we present our proposals for how non-compliance with, and escalation between, preventive measures should be handled.
    - (iv) In Chapter 18, we outline how preventive measures should be reviewed, varied and terminated.
    - (v) In Chapter 19, we suggest how the new Act might come into effect and how people already subject to preventive measures should be transitioned to the new Act.
- 2.15 We do not pose specific questions in this Preferred Approach Paper but seek views on our proposals for reform. Submitters can provide feedback on any or all of the proposals we have set out.

## NEXT STEPS

- 2.16 The feedback we receive will inform the development of our recommendations for reform to the Government. We will deliver those recommendations in our Final Report to the Minister Responsible for the Law Commission in early 2025.

## OVERVIEW OF THE LAW RELATING TO PREVENTIVE MEASURES

- 2.17 We refer to preventive detention, ESOs and PPOs collectively as “preventive measures” throughout this Preferred Approach Paper. We also use the same phrase to refer collectively to our proposed new preventive measures. We make it clear in our discussion when we are talking about existing measures and when we are talking about our proposed new regime.
- 2.18 We discussed the origins and history of each of the current preventive measures in detail in Chapter 1 of our Issues Paper.<sup>5</sup>

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<sup>5</sup> Issues Paper at [1.1]–[1.86].

## Preventive detention

- 2.19 Preventive detention is governed by the Sentencing Act. It 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.<sup>6</sup> It is the most restrictive preventive measure that can be imposed.
- 2.20 Preventive detention may only be imposed when a person is convicted of certain sexual or violent offending. It is an alternative to a fixed term of imprisonment. It is an indeterminate sentence, imposed when someone is sentenced for their offending. This means there is no fixed expiry date. Persons subject to preventive detention are detained in prison.
- 2.21 Before imposing preventive detention, the court must be satisfied that the person is likely to commit another qualifying sexual or violent offence if they were released at the expiry date of any other sentence the court could impose.<sup>7</sup> In making this assessment, the court must consider reports from two health assessors (registered psychologists or psychiatrists) about the likelihood of the person committing a further qualifying sexual or violent offence.<sup>8</sup> It must also take into account a number of factors relating to the person, including any pattern of previous offending, the seriousness of that offending, any information indicating a tendency to commit serious offences in the future and any attempts by the person to address the cause of that offending.<sup>9</sup> The court must also be guided by the principle that, in general, a lengthy determinate sentence is preferable if this would provide adequate protection for society.<sup>10</sup>
- 2.22 When the court sentences a person to preventive detention, it must also impose a minimum period of imprisonment that the person must serve before they will be eligible for release from prison on parole. This must be at least five years and must be the longer of the minimum period of imprisonment required either to reflect the gravity of the offence or 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.<sup>11</sup>
- 2.23 The New Zealand Parole Board (Parole Board) is responsible for deciding if and when a person can be released from prison. When someone is eligible for parole at the end of the minimum period of imprisonment, the Parole Board may direct their release if satisfied, on reasonable grounds, that the person, if released, will not pose an undue risk to the safety of the community or any person or class of persons.<sup>12</sup>

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<sup>6</sup> Sentencing Act 2002, s 87(1).

<sup>7</sup> 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 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 Sentencing Act 2002, s 90).

<sup>8</sup> Sentencing Act 2002, s 88(1)(b).

<sup>9</sup> Sentencing Act 2002, s 87(4).

<sup>10</sup> Sentencing Act 2002, s 87(4)(e).

<sup>11</sup> Sentencing Act 2002, s 89(2).

<sup>12</sup> Parole Act 2002, s 28(2).

- 2.24 “Undue risk” requires the Parole Board to consider both the likelihood of further offending and its nature and seriousness.<sup>13</sup> The Parole Board must also consider the support and supervision available to the person following release and the public interest in the reintegration of the person into society as a law-abiding citizen.<sup>14</sup>
- 2.25 Once released on parole, a person sentenced to preventive detention is subject to parole conditions for life and may be recalled to prison at any time for a breach of conditions.
- 2.26 In the year ending June 2023:<sup>15</sup>
- (a) Four people were sentenced to preventive detention. Three of these sentences were imposed on the basis of sexual offending and one on the basis of violent offending.
  - (b) The total number of people subject to preventive detention was 297. Of those, 76 people had been released from prison into the community on parole (and so were not in custody).
  - (c) The majority of people subject to preventive detention had it imposed on the basis of sexual offending (240 people, or 81 per cent).
  - (d) The majority of people subject to preventive detention are aged 50 and over (214, or 72 per cent).
  - (e) Forty-six per cent of those currently subject to preventive detention identify as Māori.
  - (f) The majority of people subject to preventive detention are men. According to available records, only one woman has been sentenced to preventive detention since its introduction.

### Extended supervision orders

- 2.27 ESOs are governed by the Parole Act. They are orders that allow a person to be supervised and monitored in the community. An ESO can be imposed on a person who has finished their determinate sentence for serious sexual or violent offending and who continues to “pose a real and ongoing risk of committing serious sexual or violent offences”.<sup>16</sup>
- 2.28 The chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) may apply to the court for an ESO if a person is an “eligible offender”.<sup>17</sup> The court may impose an ESO if satisfied that a person has or has had “a pervasive pattern of serious sexual or violent offending” and poses a “high risk” of committing a future

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<sup>13</sup> Parole Act 2002, s 7(3).

<sup>14</sup> Parole Act 2002, s 28(2)(a)–(b).

<sup>15</sup> This is the most recent year for which there is a full set of data available. Email from Phil Meredith (Manager Strategic Analysis — Research & Analysis, Ara Poutama Aotearoa | Department of Corrections) to Samuel Mellor (Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (15 February 2024).

<sup>16</sup> Parole Act 2002, s 107I(1).

<sup>17</sup> 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.

relevant sexual offence and/or a “very high risk” of committing a future relevant violent offence.<sup>18</sup>

- 2.29 In determining the required level of risk, the court must be satisfied that the person displays particular traits or behavioural characteristic as set out in the legislation.<sup>19</sup> The court must consider a report from at least one health assessor (a registered psychologist or psychiatrist) about whether the person displays those traits or characteristics and whether there is the requisite risk of further offending.<sup>20</sup>
- 2.30 People on ESOs are subject to conditions similar to parole, which are set by the Parole Board. These may include conditions relating to where they can live and work and with whom they can associate 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. Breaching ESO conditions is an offence punishable by up to two years’ imprisonment.
- 2.31 An ESO can be imposed for up to 10 years.<sup>21</sup> Before an ESO expires, a court may impose a new, consecutive ESO.<sup>22</sup> This means ESOs can be imposed repeatedly, without limit. If, because of the imposition of successive ESOs, a person has not ceased to be subject to an ESO for 15 years, the sentencing court must review whether the risk the person poses still satisfies the legislative tests for imposing ESOs.<sup>23</sup> After the initial review, the court must review the ESO within five years after the imposition of each new ESO and either confirm or cancel the ESO.<sup>24</sup>
- 2.32 In the year ending June 2023:<sup>25</sup>
- (a) ESOs were imposed on 25 people — 23 of these were for sexual offending and two for violent offending.
  - (b) The total number of people subject to an ESO was 197. The majority of ESOs were imposed on people who had been convicted for sexual offending (190, or 96 per cent).
  - (c) The majority of people subject to an ESO are aged 50–59 (48 people, or 24 per cent) followed by those aged 30–39 (46 people, or 23 per cent) and those aged 60 and over (44 people, or 22 per cent).
  - (d) Of those currently subject to an ESO, 41 per cent identify as Māori.

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<sup>18</sup> Parole Act 2002, s 107I(2).

<sup>19</sup> Parole Act 2002, s 107IAA.

<sup>20</sup> Parole Act 2002, s 107I(2).

<sup>21</sup> Parole Act 2002, s 107I(4).

<sup>22</sup> Parole Act 2002, s 107C(1)(a)(iii).

<sup>23</sup> Parole Act 2002, s 107RA(1)–(2).

<sup>24</sup> Parole Act 2002, s 107RA.

<sup>25</sup> This is the most recent year for which there is a full set of data available. Email from Phil Meredith (Manager Strategic Analysis — Research & Analysis, Ara Poutama Aotearoa | Department of Corrections) to Samuel Mellor (Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (15 February 2024).

- (e) The majority of people subject to an ESO are men. We are only aware of one woman who has been made subject to an ESO since the regime began.

### Public protection orders

- 2.33 PPOs are governed by the PPO Act. They allow for a person to be detained in a secure facility if they have served a determinate sentence of imprisonment for certain serious sexual or violent offending. The purpose of a PPO is to “protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences”.<sup>26</sup>
- 2.34 The chief executive can apply to the court for a PPO generally before a person ceases to be subject to a sentence of imprisonment, an ESO or a protective supervision order.<sup>27</sup> The court may impose a PPO on a person if satisfied, on the balance of probabilities, that the person meets the threshold for a PPO and represents a “very high risk” of imminent serious sexual or violent offending if released into the community or otherwise left unsupervised.<sup>28</sup>
- 2.35 As with ESOs, the court must be satisfied that a person displays certain traits and characteristics, although these traits and characteristics differ from those assessed under the ESO regime.<sup>29</sup> In making this determination, the court must consider reports from two health assessors, one of whom must be a registered psychologist.<sup>30</sup>
- 2.36 Persons subject to a PPO are detained in a secure residence. At present, Matawhāiti, located in the ground of Christchurch Men’s Prison, is the only PPO residence in Aotearoa New Zealand. It is contained within a four-metre-high electric fence and is staffed 24 hours a day.<sup>31</sup> Residents may not leave without approval and must be under escort and supervision.<sup>32</sup> Although there are fewer statutorily imposed restrictions than for a person detained in prison, residents at Matawhāiti are subject to various rules and restrictions regarding their movement, communications and property. They must also submit to security measures in certain situations, including searches, drug and alcohol tests, and seclusion and restraint.<sup>33</sup> Residence managers have powers to make additional rules for the safe running of the facility and the safety of residents.<sup>34</sup>
- 2.37 In some circumstances, if a person subject to a PPO cannot be safely managed in a PPO residence, the court may impose a prison detention order.<sup>35</sup> A person subject to a prison

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<sup>26</sup> Public Safety (Public Protection Orders) Act 2014, s 4(1).

<sup>27</sup> Public Safety (Public Protection Orders) Act 2014, ss 7–8. For people who are eligible on the basis of overseas offending, the application must be made within six months of a 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.

<sup>28</sup> Public Safety (Public Protection Orders) Act 2014, s 13.

<sup>29</sup> Public Safety (Public Protection Orders) Act 2014, s 13(2).

<sup>30</sup> Public Safety (Public Protection Orders) Act 2014, s 9.

<sup>31</sup> *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [45].

<sup>32</sup> Public Safety (Public Protection Orders) Act 2014, ss 26 and 73.

<sup>33</sup> Public Safety (Public Protection Orders) Act 2014, ss 63, 68 and 71–72.

<sup>34</sup> Public Safety (Public Protection Orders) Act 2014, s 119.

<sup>35</sup> Public Safety (Public Protection Orders) Act 2014, s 85.



detention order is detained in prison and treated in the same way as a person held in prison awaiting trial.<sup>36</sup>

- 2.38 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.<sup>37</sup> If the court is satisfied that there is no longer a “very high risk” of further serious sexual or violent offending, the PPO must be cancelled and a protective supervision order imposed instead.<sup>38</sup>
- 2.39 Very few PPOs have been imposed to date. As of July 2024:<sup>39</sup>
- (a) Two people are detained at Matawhāiti under PPOs.
  - (b) One person previously subject to a PPO is subject to a prison detention order.
  - (c) The qualifying offending in respect of two of these people was sexual offending, and violent offending in respect of the other person.
  - (d) Two people identify as Māori.
  - (e) No women have been made subject to PPOs since the regime began.
- 2.40 Only five people in total have been subject to PPOs since their introduction, two of which were overturned on appeal.
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<sup>36</sup> Public Safety (Public Protection Orders) Act 2014, s 86.

<sup>37</sup> Public Safety (Public Protection Orders) Act 2014, ss 15–16.

<sup>38</sup> Public Safety (Public Protection Orders) Act 2014, s 93(1).

<sup>39</sup> Ara Poutama Aotearoa | Department of Corrections *Annual Report: 1 July 2022–30 June 2023* (2023) at 64. See also *The Chief Executive, Department of Corrections v Waiti* [2024] NZHC 1682.

## **PART TWO:**

# **FOUNDATIONAL MATTERS**

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## CHAPTER 3

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# Preventive measures, community safety and human rights

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### IN THIS CHAPTER, WE CONSIDER:

- the importance of keeping the community safe from serious reoffending;
- the role of preventive measures in contributing to community safety;
- the challenge for preventive measures to comply with human rights standards; and
- proposals for what preventive measures should continue under New Zealand law.

## INTRODUCTION

- 3.1 Ensuring community safety is a fundamental responsibility of government. The law of Aotearoa New Zealand has long recognised the need to respond to the reoffending risks posed by some people who have been convicted of serious sexual and violent offences. Our sentencing and parole statutes rest, among other things, on this community safety objective. Preventive measures in the form of preventive detention and more recently through extended supervision orders (ESOs) and public protection orders (PPOs) have a key role in this task.
- 3.2 Te Aka Matua o te Ture | Law Commission has been asked to review the law governing preventive detention, ESOs and PPOs. Our review is taking place against a backdrop of concerns that have been raised by the domestic courts and international bodies that New Zealand law does not comply with human rights standards. When people convicted of offences have completed criminal sentences, they are ordinarily free to return to the community and enjoy the same rights and freedoms as everyone else. The continuing detention or restriction of people through preventive measures after they would have otherwise completed a sentence operates as an exception to this general rule and necessarily limits the rights and freedoms of those subject to them.

- 3.3 The courts have signalled that human rights should be considered more carefully in the design and implementation of preventive measures. This involves several elements, including limiting the rights of those subject to preventive measures to only what is necessary, reasonable and in due proportion to the risks they pose to the community. Throughout this Preferred Approach Paper, we propose reforms that we consider do better than the current law in this regard.
- 3.4 In this chapter, we consider a primary issue from a human rights perspective — is there a need for any regime at all? We explain that protecting the community from serious reoffending is an important and legitimate objective. Preventive measures play a role in meeting that objective, although there are some difficulties in marshalling evidence to demonstrate their need. We then consider the challenge of how preventive measures can be designed and implemented to comply with human rights law.
- 3.5 We conclude this chapter by proposing that New Zealand law should continue to provide for preventive measures. We introduce three types of preventive measures that the law should provide for, which we go on to develop through the rest of this Preferred Approach Paper.

## PREVENTIVE MEASURES IN THE CONTEXT OF NEW ZEALAND LAW

- 3.6 We start with two initial observations about preventive measures under New Zealand law.

### Preventing serious reoffending is an important and legitimate objective of the law

- 3.7 First, protecting the community from serious sexual and violent offending is important. Serious sexual and violent offending causes considerable harm. Victims of these offences suffer psychological, emotional and physical injuries. They experience significant trauma that is likely to have a severely detrimental impact such as feelings of anger, shame and guilt through to mental health illnesses such as anxiety, post-traumatic stress disorder and depression.<sup>1</sup> The toll serious offending takes on victims impacts on the wider community.
- 3.8 Some international instruments require Aotearoa New Zealand to implement measures to uphold the fundamental rights of individuals in the community who may be the victims of reoffending:<sup>2</sup>
- (a) The United Nations Convention on the Rights of the Child requires states parties to take “all appropriate legislative, administrative, social and educational measures” to protect children from physical and sexual abuse.<sup>3</sup>
  - (b) The Committee on the Elimination of Discrimination against Women recommends that the Convention on the Elimination of All Forms of Discrimination Against Women

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<sup>1</sup> Te Tāhū o te Ture | Ministry of Justice *Te Rangahau o Aotearoa mō te Taihara me te Haumarutanga 2014* | 2014 New Zealand Crime Survey (2015) at 130–131; and “Victims’ experiences & needs” (4 March 2020) Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>2</sup> In addition to the instruments listed here, scholars in New Zealand suggest there may be a positive obligation on the state to prevent criminal offending in order to prevent interference with the protections against the infliction of torture or cruel, degrading or disproportionately severe punishment or treatment under ss 8 and 9 of the New Zealand Bill of Rights Act 1990: Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, 2015) at 10.13.1–10.13.2.

<sup>3</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 19. See also art 34.

requires states parties to provide “appropriate and accessible protective mechanisms to prevent further or potential violence”.<sup>4</sup> Those mechanisms should include “risk assessment and protection”, which may involve “eviction, protection, restraining or emergency barring orders” against perpetrators.<sup>5</sup>

- (c) The United Nations Human Rights Committee (UNHRC) has commented that article 6 of the International Covenant on Civil and Political Rights governing the right to life requires states parties to take “special measures of protection” towards persons in vulnerable situations whose lives are at particular risk because of “specific threats or pre-existing patterns of violence”.<sup>6</sup>

3.9 Considerable precedent exists for establishing laws to protect the community against reoffending risks. Preventing reoffending has long been an accepted purpose of the sentencing and corrections systems in Aotearoa New Zealand.<sup>7</sup> Preventive measures, particularly preventive detention, have been part of this law for some time. Similarly, all comparable jurisdictions overseas we have examined provide for some form of preventive measure additional to the imposition of determinate prison sentences.

3.10 Several submitters to the Issues Paper emphasised the importance of preventive measures.<sup>8</sup> Te Roopū Taurā Ture o Aotearoa | New Zealand Law Students’ Association (NZLSA) explained that the preventive regimes have an important purpose given the severity of the crimes and impact they have on the community. Manaaki Tāngata | Victim Support described the severe effects of sexual and violent offending on victims, including psychological, emotional, spiritual and/or financial effects. Victim Support said this points to the need for preventive measures. It highlighted too that New Zealand’s Victims Code states that victims should be treated on the principle that their safety and the reduction of harm is put first.

### Other measures aimed at preventing serious reoffending

3.11 The need for preventive measures should be considered in relation to how the wider law in Aotearoa New Zealand provides for community protection. Aside from preventive detention, ESOs and PPOs, several other measures are aimed at protecting the community from reoffending. These include:

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<sup>4</sup> *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19* CEDAW/C/GC/35 (26 July 2017) at [31].

<sup>5</sup> *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19* CEDAW/C/GC/35 (26 July 2017) at [31]. See too *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].

<sup>6</sup> *United Nations Human Rights Committee General comment No 36, Article 6 (Right to Life)* CCPR/C/GC/36 (3 September 2019) at [22]–[25].

<sup>7</sup> Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper) at [3.28], n 38.

<sup>8</sup> Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Roopū Taurā Ture o Aotearoa | New Zealand Law Students’ Association, Manaaki Tāngata | Victim Support.

- (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;<sup>9</sup>
  - (b) determinate prison sentences;<sup>10</sup>
  - (c) extended minimum periods of imprisonment before a person becomes eligible for parole;<sup>11</sup>
  - (d) parole conditions that can last up to six months beyond the expiry date of a sentence of imprisonment;<sup>12</sup>
  - (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;<sup>13</sup>
  - (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;<sup>14</sup>
  - (g) police safety orders that police can impose on a person for up to 10 days if necessary to help keep another person safe from family violence;<sup>15</sup> and
  - (h) protection orders that 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.<sup>16</sup>
- 3.12 In addition, there are laws applying at other parts of the criminal justice process aimed at keeping the community safe from reoffending more generally.<sup>17</sup>
- 3.13 To the extent there is a need for preventive measures, it is because preventive detention, ESOs and PPOs are considered to address reoffending risks that are not sufficiently addressed by these other measures. This is likely to be because these other measures

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<sup>9</sup> 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).

<sup>10</sup> 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 [SA7.06] 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.

<sup>11</sup> Under the Sentencing Act 2002, s 86(2), the court can also impose a minimum period of imprisonment 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.

<sup>12</sup> Parole Act 2002, s 18(2).

<sup>13</sup> Criminal Procedure (Mentally Impaired Persons) Act 2003, s 24.

<sup>14</sup> Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

<sup>15</sup> Family Violence Act 2018, pt 3.

<sup>16</sup> Family Violence Act 2018, s 79.

<sup>17</sup> 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).

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 supervision.

## THE CASE FOR PREVENTIVE MEASURES

3.14 We set out here the evidence that we consider supports the role preventive measures play in contributing to the objective of community safety. In our view, this evidence demonstrates that preventive measures do in fact address reoffending risks and thereby contribute to community safety. However, as we explain below, there are difficulties in obtaining comprehensive evidence that reoffending would occur without preventive measures.

### Past cases

3.15 Under the current law, a court can only impose a preventive measure if it has concluded there is a sufficient risk of reoffending.<sup>18</sup> In order to reach this conclusion, the court must consider expert psychological evidence, including any evidence elicited in cross-examination and any competing expert evidence presented by the defence. For preventive detention and PPOs, the court should have concluded that a person's risk cannot be adequately managed by less restrictive means.<sup>19</sup>

3.16 These are high thresholds that must be met for a preventive measure to be imposed. The fact courts have reached these determinations on many past occasions following this process indicates that there are certain people who, if not subjected to some form of preventive measure, are likely to commit further serious sexual or violent offences.

3.17 We are not aware of research in Aotearoa New Zealand that attempts to study whether the imposition of preventive measures in past cases has reduced serious reoffending. There are three points to make in relation to this absence of research:

- (a) First, people subject to preventive detention or a PPO are detained and will have minimal opportunity to harm the community until released. Despite an absence of research, it can be assumed that detention is effective at achieving community safety (although significant questions arise regarding whether imprisonment is necessary and proportionate to the risks people pose). The more pressing question is how

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<sup>18</sup> Section 87(2)(c) of the Sentencing Act 2002 requires the court to be satisfied the person is "likely" to commit another qualifying offence in order to impose preventive detention. The threshold is, however, different for ESOs and PPOs. The Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 focus on the "high" or "very high risks" of reoffending the person poses coupled with whether they display certain traits and behavioural characteristics. We discuss these thresholds further in Chapter 10.

<sup>19</sup> *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [42]; and *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [40]. See for example recent cases where the courts have concluded that ESOs with the most restrictive conditions that could be imposed were insufficient to protect public safety: *Chief Executive of the Department of Corrections v Waiti* [2023] NZHC 2310 (interim detention order application pending determination of a PPO application); and *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305 (PPO application). We also note that, when deciding whether to impose an ESO, the courts now determine whether there is a "strong justification" for the ESO (see *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53]; and *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31]). It is implicit in this inquiry that there will not be a strong justification for an ESO if an alternative and less restrictive way of addressing the person's risk is available.

effective preventive measures are as people transition to unrestricted life in the community.

- (b) Second, it is unlikely that comprehensive empirical research will ever be available. If the preventive regimes are functioning as intended, most people who pose a high risk of serious reoffending should already be subject to preventive detention, ESOs or PPOs, thereby restricting their opportunities to reoffend. Release from these preventive measures is contingent upon the person demonstrating a sufficiently low risk of reoffending. Obvious practical and ethical obstacles prevent researching what offending may occur if people considered at high risk of reoffending are released from restrictions.
- (c) Third, general information about recidivism, including the rates of reoffending among those subject to preventive measures, is available but it is difficult to draw relevant conclusions from that information. Rates of recidivism include reoffending that may not correspond with the qualifying offending the regimes are aimed at preventing and may be less serious.<sup>20</sup> Additionally, while the information about recidivism may explain what reoffending has occurred, there is no way of determining what reoffending the preventive measures prevented.

### Reasons given in support of ESOs and PPOs at the time of enactment

- 3.18 The introduction of the ESO regime in 2004 was prompted by concerns from Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) about several people who had received finite sentences for child sex offending and were considered at risk of future offending on release.<sup>21</sup> 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.<sup>22</sup>
- 3.19 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.<sup>23</sup> Those offences included an instance where the person had sexually offended against a 16-year-old girl.<sup>24</sup> Other offences included arson, assault, damaging property and theft. Ara Poutama noted, however, that these offences were mainly against the employees or property of the organisations supervising the offender.

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<sup>20</sup> Criminologists suggests that desistance from criminal behaviour is best seen as a “zig-zag path” during which the person may still reoffend although, compared to former standards, at a less severe level. This can still be regarded as progress even though the person has reoffended. See Jay Gormley, Melissa Hamilton and Ian Belton *The Effectiveness of Sentencing Options on Reoffending* (Sentencing Council, 30 September 2022) at 12–13; and *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at [8.7]–[8.8].

<sup>21</sup> Parole (Extended Supervision) and Sentencing Amendment Bill 2004 (88-2) (select committee report) at 3.

<sup>22</sup> Parole (Extended Supervision) and Sentencing Amendment Bill 2004 (88-2) (select committee report) at 2.

<sup>23</sup> Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (20 March 2012) at [17].

<sup>24</sup> Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (20 March 2012) at [17].



## Experience overseas

- 3.20 The laws of all comparable jurisdictions we have researched provide for preventive measures.<sup>25</sup> Nearly all provide secure detention as a preventive measure. Similarly, every jurisdiction we have examined provides for a form of supervision in the community for people considered at high risk of reoffending.
- 3.21 There are some studies in comparable jurisdictions that have examined the reoffending of those living in the community subject to preventive measures:<sup>26</sup>
- (a) A study of 104 people managed in the community under Queensland’s Dangerous Prisoners (Sexual Offenders) Act 2003 examined their recidivism rates based on available court data.<sup>27</sup> Recidivism rates over a six-year period were measured based on convictions and contraventions of orders involving sexual behaviour. The authors of the study found that the recidivism rate was low — 7.69 per cent. The study found very few instances of sexual reoffending over the six-year period. Only eight people had been convicted of sexual offences (four were considered “contraventions” and four were reconvictions).<sup>28</sup>
  - (b) The Victorian Post Sentence Authority has commented on the recidivism rates of those monitored and supervised in the community subject to post-sentence orders in Victoria under the Serious Offenders Act 2018.<sup>29</sup> For the three reporting years between 2018 and 2021, there were an average of 136 people on supervision or interim supervision orders. During that period, 10 people subject to orders were convicted of serious sexual offences (an average of 3.3 per year) and one convicted of a serious violent offence (an average of 0.3 per year).

## Conclusions

- 3.22 We conclude that there is sufficient evidence that there are certain people who have been convicted of serious sexual or violent offending and who pose a risk of further serious offending after completing a determinate prison sentence. It is also evident that the courts consider alternative means of addressing the risks posed by these individuals to offer inadequate community protection. The studies of community-based preventive measures in comparable jurisdictions reinforce the case for preventive measures. They record that the rate of serious reoffending is low for people subject to these measures in those jurisdictions.
- 3.23 We are also mindful that preventive measures are an established part of Aotearoa New Zealand’s legal framework to address reoffending risks. They are widespread in

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<sup>25</sup> We have considered the law in New South Wales, Queensland, Victoria, Western Australia, Tasmania, South Australia, Northern Territory, England and Wales, Scotland, Ireland, Canada, Finland and Norway.

<sup>26</sup> We have not examined reoffending rates for people who are subject to imprisonment or other forms of secure detention because, while offending in custodial environments can have severe impact on staff and other prisoners, it does not relate to the safety of the community.

<sup>27</sup> Michael Rowlands, Gavan Palk and Ross Young “Recidivism rates of sex offenders under the Dangerous Prisoners (Sexual Offenders) Act 2003: an evaluation of actuarial justice” (2021) 28 *Psychiatry, Psychology and Law* 310.

<sup>28</sup> Michael Rowlands, Gavan Palk and Ross Young “Recidivism rates of sex offenders under the Dangerous Prisoners (Sexual Offenders) Act 2003: an evaluation of actuarial justice” (2021) 28 *Psychiatry, Psychology and Law* 310 at 317.

<sup>29</sup> Post Sentence Authority “Submission to the Inquiry into Victoria’s Criminal Justice System” (September 2021) at [46].

comparable jurisdictions. The strength of this precedent indicates a community expectation that preventive measures continue.

- 3.24 We therefore conclude that preventive measures of some form meet a need in Aotearoa New Zealand in contributing to the objective of community safety. What those measures are, to whom they should apply and how they should be administered are, however, important questions that we address throughout the remainder of this Preferred Approach Paper.

## COMPLIANCE WITH HUMAN RIGHTS STANDARDS

- 3.25 Although we consider that preventive measures meet a need in Aotearoa New Zealand, an aim of this review is to develop proposals for the reform so that preventive measures comply with human rights standards.
- 3.26 Preventive measures seek to prevent a person from reoffending by subjecting them to ongoing detention or long-term restrictions and supervision when living in the community. Given the severity of the restrictions, their lengthy or indeterminate nature and that they can endure well beyond other criminal sentences, preventive measures are some of the most coercive exercises of state power known to New Zealand law. They raise a host of human rights issues.
- 3.27 In particular, the courts in Aotearoa New Zealand and international bodies have criticised how preventive measures interfere with the right to be free from arbitrary detention<sup>30</sup> and the protection against second punishment.<sup>31</sup> Other rights engaged by preventive measures are likely to include:<sup>32</sup>
- (a) the right to freedoms of expression, association and movement;<sup>33</sup>
  - (b) the right not to be subject to cruel, degrading or disproportionately severe treatment or punishment;<sup>34</sup> and
  - (c) rights relating to the minimum standards of criminal procedure and retrospective penalties.<sup>35</sup>

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<sup>30</sup> New Zealand Bill of Rights Act 1990, s 22; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 9. See in particular *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) discussed further in Chapters 4 and 13.

<sup>31</sup> New Zealand Bill of Rights Act 1990, s 26(2). See *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.

<sup>32</sup> The following list of rights that are engaged by preventive measures is drawn from our review of the case law in which a court or international body has found the measure to engage the particular right or that a party to the proceedings has argued the right is engaged.

<sup>33</sup> New Zealand Bill of Rights Act 1990, ss 14, 17 and 18.

<sup>34</sup> New Zealand Bill of Rights Act 1990, s 9.

<sup>35</sup> New Zealand Bill of Rights Act 1990, ss 25 and 26(1). These rights are triggered when the implementation of preventive measures has had retrospective effect.

- 3.28 To comply with domestic and international human rights standards, any limits that preventive measures place on human rights must be reasonable and demonstrably justified in accordance with section 5 of the New Zealand Bill of Rights Act 1990.<sup>36</sup>
- 3.29 The courts in Aotearoa New Zealand use different approaches to determine whether a limit on a right is demonstrably justified. However, they often require some common questions to be addressed. These include whether:<sup>37</sup>
- (a) the reason for limiting the right is sufficiently important to justify restricting rights or freedoms;
  - (b) the measure is sufficiently well designed to ensure both that it actually achieves its aim and that it impairs the right or freedom no more than is necessary; and
  - (c) the gain to society justifies the extent of the intrusion on the right.
- 3.30 Based on the discussion earlier in this chapter, we conclude that, as a general proposition, the need to protect the community by preventing serious reoffending is a sufficiently important reason to justify restricting rights through preventive measures. We also consider that preventive measures successfully advance this objective.<sup>38</sup> Although more information as to whether preventive measures are effective at achieving their community safety objective would be beneficial, we have canvassed above the difficulties with researching this area.
- 3.31 In our view, however, a significant overhaul of the current legal regimes is required to ensure that preventive measures are carefully tailored to address the relevant risk while impeding no more than is needed the rights and freedoms of those who are made subject to them. Throughout this Preferred Approach Paper, we address in depth the protections that we think should be in place to ensure preventive measures in Aotearoa New Zealand are human rights compliant. These include, for example, provisions to ensure the nature and conditions of the preventive measures are carefully tailored to the person's risks and stronger entitlements to rehabilitative treatment and reintegrative support.
- 3.32 A key element in what we propose is that there should continue to be a range of preventive measures with varying degrees of restrictions. This gradation of measures will facilitate the imposition of a measure that is appropriate to the risks a person poses. Relatedly, in Chapter 10, we propose revisions to the legislative tests on which the courts should determine whether to impose a preventive measure. We propose that the court should be satisfied that the particular measure sought against a person is necessary and justified when balanced against any interference with that person's human rights.

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<sup>36</sup> With some rights such as the right to be free from arbitrary detention, these inquiries into reasonableness, necessity and proportionality are said to be built into the right itself rather than into a separate inquiry into demonstrable justification.

<sup>37</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [103]–[104]. 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 te Kōti Mana Nui | Supreme Court preferred a “simpler proportionality analysis”.

<sup>38</sup> In the context of determining the limits ESOs and PPOs place on the right to protection against second punishment, te Kōti Pira | Court of Appeal in *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [195] and [217] accepted the importance of the ESO and PPO regimes' purpose and accepted ESOs and PPOs are rationally connected to that objective.

## Results of consultation

- 3.33 In the Issues Paper, we discussed how the current preventive measures engage human rights. We asked for feedback on what types of preventive measures would be a justified limit on human rights. Several submitters who addressed this question noted the difficulty of concluding whether preventive measures are justified. This was because, they said, there is a need to balance the rights of the person subject to the regimes against the community safety objective on a case-by-case basis.<sup>39</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) explained that there is no clear “right” answer when considering what is needed to address “some of the most difficult cases in the criminal justice system”. The NZLS commented that, while the preventive regimes are capable of justification, it is difficult to draw a “firm line” between which specific measures are justified and which are not. Rather, it will depend on an assessment of the risk posed by an individual and on the strength of that evidence.
- 3.34 Some submitters said that preventive measures would be justified in individual cases because of the risk a person presents.<sup>40</sup> Other submitters, however, did not think that certain preventive measures could be justified. The NZLSA and South Auckland Bar Association said that preventive detention as an indeterminate prison sentence under the current law cannot be justified. Dr Jordan Anderson submitted that all post-sentence preventive measures are inconsistent with the fundamental principles that underpin the justice system. The New Zealand Council for Civil Liberties said it opposes preventive measures in principle. In relation to preventive detention, it explained that alternative systems are in such an unsatisfactory state that it could not recommend abolishing preventive detention at this time. Rather, it suggested that there be an eventual decommissioning of preventive detention in favour of other measures to manage those who presented dangers to themselves or others.

## PREFERRED APPROACH

### PROPOSALS

P1

The law should continue to provide for preventive measures to protect the community from serious sexual or violent reoffending by those who would otherwise be released into the community after completing a determinate sentence of imprisonment.

P2

The preventive measures the law should provide for are:

- a. community preventive supervision;
- b. residential preventive supervision; and
- c. secure preventive detention.

<sup>39</sup> Submitters who stressed the need to assess justification on a case-by-case basis were Criminal Bar Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>40</sup> For example, Te Roopū Tauria Ture o Aotearoa | New Zealand Law Students' Association submitted that ESOs are justified.

## The law should continue to provide for preventive measures

- 3.35 We conclude in this chapter that, based on the evidence available, there are likely to be some people who pose risks of committing further serious sexual or violent offences if they were released into the community after completing a determinate sentence. Preventing reoffending of this nature is an important and legitimate objective of the law. Preventive measures play a role in meeting this objective. We therefore propose that the law of Aotearoa New Zealand should continue to provide for some form of preventive measures.
- 3.36 To comply with human rights standards, however, several aspects of the law require reform. Throughout the remainder of this Preferred Approach Paper, we consider the reforms needed to achieve compliance. In particular, we consider how preventive measures can impair rights to the least extent possible and provide an overall proportionate response to addressing risks to community safety. We consider these questions as we examine:
- (a) to whom preventive measures should apply;
  - (b) how a court should determine whether to impose a measure; and
  - (c) how those measures should be implemented in practice.

## Three types of preventive measures under reformed law

- 3.37 We propose that there should be three types of preventive measures. We discuss the features of these preventive measures and how they would operate in practice in more detail in other chapters. We introduce the preventive measures at this point in this Preferred Approach Paper because it is necessary to discuss our proposed reforms in the following chapters in relation to them.
- 3.38 The three preventive measures we propose are intended to form a gradation of measures at different levels of restriction from supervised life in the community at one end to secure detention at the other. In many ways, these measures resemble the current law. However, as we explain further in Chapter 4, the three measures should better form a cohesive regime and enable the court to impose the appropriate and least severe measure to address the risks of reoffending.
- 3.39 In order of the severity of the restrictions they would impose from least to most restrictive, the preventive measures we propose should be provided for under reformed law are:
- (a) community preventive supervision.
  - (b) residential preventive supervision; and
  - (c) secure preventive detention.

## Community preventive supervision

- 3.40 The least restrictive preventive measure we propose the law should provide for is for the person subject to the measure to live in the community subject to several conditions requiring their supervision and monitoring. We call this measure “community preventive supervision”. We suggest it should operate in a similar way to ESOs. Community preventive supervision should comprise a core set of standard conditions with the option

of the court imposing special conditions. The main difference with the current law governing ESOs is that we propose no condition should be available that would result in the detention of the person subject to the measure. That type of condition should be reserved for residential preventive supervision or secure preventive detention. We discuss our proposals regarding community preventive supervision further in Chapter 14.

### **Residential preventive supervision**

- 3.41 The law should provide for a form of detention that requires a person to stay at a residential facility. We call this preventive measure “residential preventive supervision”. In contrast to secure preventive detention, the facility should not have security features designed to stop people from leaving and facility staff should have minimal coercive powers. The aim should be to provide a structured and supported living arrangement in a residential setting that is as close to life in the community as possible.
- 3.42 Residential preventive supervision would be similar to the current practice of detaining people subject to ESOs through a combination of programme and residential restriction conditions.<sup>41</sup> A key difference is that residential preventive supervision should be a stand-alone preventive measure that is recognised as a form of detention. We discuss our proposals regarding residential preventive supervision further in Chapter 15.

### **Secure preventive detention**

- 3.43 As the most severe preventive measure, the law should continue to enable the detention of a person in a facility with security features designed to stop them from leaving when no less restrictive preventive measure would provide adequate community protection. We call this type of preventive measure “secure preventive detention”. We propose that, subject to key reforms set out in this Preferred Approach Paper, secure preventive detention should operate in a similar way to PPOs. In particular, a secure preventive detention facility should be separate to and distinct from prison. We discuss our proposals regarding secure preventive detention further in Chapter 16.

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<sup>41</sup> See the discussion of this practice in *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 and in Chapter 15.

**CHAPTER 4**

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# A single, post-sentence regime

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**IN THIS CHAPTER, WE CONSIDER:**

- issues relating to the way in which the law governing preventive detention, extended supervision orders and public protection orders is spread across three different statutes;
- issues relating to the timing of the imposition of preventive measures – at sentencing or as post-sentence orders; and
- proposals for reform to consolidate the law in a single, post-sentence regime under a new Act.

**INTRODUCTION**

- 4.1 This chapter considers two related matters of:
- (a) the fragmentation of current law across three statutory regimes; and
  - (b) the time at which a court should impose preventive measures.
- 4.2 These two matters are particularly important in this review. The current arrangement of three separate but interrelated regimes addressing the same policy objective creates difficulties. A single, cohesive regime would, in our view, be a more efficient approach that provides for community safety while better aligning with human rights requirements. This option for reform must, however, be considered alongside the point in time when preventive measures are to be imposed. Preventive measures could be provided for under a sentencing regime, a post-sentence regime or both. In which legal regime preventive measures should sit will depend on when preventive measures are imposed.
- 4.3 The question of the timing of imposition is an important issue for other reasons. The courts have found extended supervision orders (ESOs) and public protection orders (PPOs) to be penalties and that, because they are imposed after sentencing, they limit the right to protection against second punishment under the New Zealand Bill of Rights Act 1990 (NZ

Bill of Rights). On the other hand, preventive measures imposed at sentencing rely on the court determining the likelihood a person will reoffend when they would otherwise finish a determinate prison sentence. This assessment will not be as accurate as assessments of a person's risk at the point they are due to be released from prison.

- 4.4 In this chapter, we examine these issues. We then propose that the law be reformed by:
- (a) introducing a comprehensive, single, stand-alone statutory regime; and
  - (b) requiring that all preventive measures be imposed as post-sentence orders.

## ISSUES AND RESULTS OF CONSULTATION

### Fragmentation of the law

- 4.5 In the Issues Paper, we observed that, despite sharing the same community safety objectives, preventive detention, ESOs and PPOs are governed by independent but interrelated statutes.<sup>1</sup>
- 4.6 The separation of the current law is largely a result of the historical development of the preventive measures.
- 4.7 As we set out in the Issues Paper, 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 and revised through a series of statutory amendments through to its current form under the Sentencing Act 2002.
- 4.8 The development of ESOs and PPOs was reactive and favoured over reforms to existing measures. In 2004, ESOs were introduced through amendments to the parole regime to address a "critical gap" in the ability of Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) to manage child sex offenders who were not subject to preventive detention.<sup>2</sup>
- 4.9 Ten years later, PPOs were introduced to manage a small number of people who reach the end of a determinate prison sentence or are subject to the most intensive form of ESO and pose a very high risk of imminent and serious sexual or violent reoffending.<sup>3</sup> The Public Safety (Public Protection Orders) Act 2014 (PPO Act) was designed to be separate from preventive detention and ESOs and created as a "civil regime" as distinct from

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, 2023) (Issues Paper) at [4.1].

<sup>2</sup> Office of the Minister for Justice *Paper for Cabinet Social Development Committee: Extended Supervision of Child Sex Offenders* (2003) at [13].

<sup>3</sup> Public Safety (Public Protection Orders) Bill 2012 (68-1) (explanatory note) at 1. See too Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (20 March 2012) at [17].



criminal proceedings.<sup>4</sup> The Act states “it is not an objective of this Act to punish persons”.<sup>5</sup> Applications for PPOs are made by originating application to the Kōti Matua | High Court.<sup>6</sup> A person against whom an order is sought is called a “respondent” (rather than an “offender” as with ESOs).

### *Fragmentation hinders the imposition of the appropriate preventive measure*

- 4.10 Despite the separation of preventive detention, ESOs and PPOs into three 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. In particular, 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.<sup>7</sup> Similarly, the courts will not impose a PPO unless the risks posed by the respondent cannot be managed adequately under an ESO.<sup>8</sup>
- 4.11 Problems arise with this approach. The legislation does not always facilitate the imposition of the least restrictive order as best it could and, in some instances, actively prevents it:
- (a) When considering preventive detention at sentencing, the court must consider the likely effectiveness of an ESO if it were imposed at the end of a determinate sentence. That may be several years in the future and therefore difficult to assess.
  - (b) Express legislative prohibitions prevent the court from imposing the least restrictive option in some instances:
    - (i) A person subject to preventive detention cannot be considered for an ESO.<sup>9</sup> It is possible that a person subject to preventive detention who does 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.
    - (ii) The PPO Act provides that, when a court is considering whether to impose preventive detention, the court must not take into account its jurisdiction to impose PPOs.<sup>10</sup> Consequently, to the extent a PPO may constitute a less

<sup>4</sup> 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 the Kōti Pira | 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 punishment under s 26(2) of the New Zealand Bill of Rights Act 1990.

<sup>5</sup> Public Safety (Public Protection Orders) Act 2014, s 4(2).

<sup>6</sup> Public Safety (Public Protection Orders) Act 2014, s 104.

<sup>7</sup> *T (CA502/2018) v R* [2022] NZCA 83 at [30]; and *R v Mist* [2005] 2 NZLR 791 (CA) at [100]–[101]. For a recent example see *R v Brown* [2023] NZCA 487 at [98]–[100].

<sup>8</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [40] per Elias CJ; and *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [42].

<sup>9</sup> Section 107C(1)(a) of the Parole Act 2002 defines an “eligible offender” as an offender who “is not subject to an indeterminate sentence”.

<sup>10</sup> Public Safety (Public Protection Orders) Act 2014, s 138.

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

- 4.12 We also note that the terminology and tests across the different Acts vary. As we discuss in Chapter 10, the thresholds for whether the court should impose a measure differ and do not reflect the severity of the relevant measure. While the tests for ESOs and PPO require the risk that the person will reoffend to be “high” or “very high”, for the much more restrictive preventive detention, the person must simply be “likely” to commit a further qualifying offence. In addition, the tests for ESOs and PPOs tie the likelihood of reoffending to whether the person displays certain traits and behavioural characteristics whereas the test for preventive detention does not.

### **Fragmentation causes procedural inefficiencies**

- 4.13 Procedural issues arising from the fragmentation of the regimes may cause inefficiencies. When Ara Poutama applies for a PPO or an ESO in the alternative, the Parole Act 2002 prohibits the court from hearing the ESO application until it has determined the PPO application.<sup>11</sup> Nevertheless, to determine whether to impose a PPO, the court will consider whether an ESO should be granted. The requirement for ESOs and PPOs to be determined in separate hearings is unnecessarily duplicative.

- 4.14 In the recent case *Chisnall v Chief Executive of the Department of Corrections*, te Kōti Pira | Court of Appeal expressed dissatisfaction with this approach, saying:<sup>12</sup>

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.

- 4.15 In addition, as noted, PPOs must be made by originating application to the High Court, which is a civil rather than criminal process. Lawyers who have acted for an individual in other parts of the criminal justice process may be unfamiliar with civil procedure and may not be approved legal aid providers for civil services. This may result in lawyers who are preferred by defendants and familiar with their history being unavailable to act.

### **Results of consultation**

- 4.16 In the Issues Paper, we asked submitters whether they agreed with the issues identified regarding fragmentation and whether there were any other matters we should consider. Several submitters responded to this question. Half those submitters, including Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Criminal Bar Association and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, expressly agreed with the issues identified. The NZLS thought that “given the common purpose of the separate regimes, an approach with consistent terminology and coherently linked tests would be appropriate”.

- 4.17 The two proposals we presented in the Issues Paper to address the issues of fragmentation were:

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<sup>11</sup> Parole Act 2002, s 107GAA(2).

<sup>12</sup> *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402 at [15].

- (a) to retain preventive detention, ESOs and PPOs within their existing statutory regimes but make certain amendments to address fragmentation; or
  - (b) to enact a single statutory regime to replace the regimes in the Sentencing Act, Parole Act and PPO Act.
- 4.18 Several submitters commented on these proposals. One submitter supported the first proposal. Four submitters, including the NZLS, the Public Defence Service and the New Zealand Council for Civil Liberties (NZCCL), supported the second proposal. Two submitters did not express a preference. In answer to a separate question, however, The Law Association and the South Auckland Bar Association thought it satisfactory that preventive detention, ESOs and PPOs be provided for in separate regimes.

### Timing of imposition: preventive detention versus post-sentence orders

- 4.19 Preventive detention is imposed by the court as a sentence at the time of conviction for a criminal offence. ESOs and PPOs, on the other hand, are post-sentence orders. There are issues with both approaches, which we discuss in turn.

### *The law fails to distinguish between the punitive and protective periods of preventive detention*

- 4.20 The United Nations Human Rights Committee (UNHRC) has considered whether preventive detention in Aotearoa New Zealand breaches the protection against arbitrary detention under article 9 of the International Covenant on Civil and Political Rights.<sup>13</sup> Even though preventive detention is imposed as a single sentence, the UNHRC views preventive detention as comprising two periods. The first is a period that has been referred to as the “tariff element”, “punitive period” or the “just deserts” in respect of the qualifying offending.<sup>14</sup> In the second period, the person remains detained solely for preventive reasons.<sup>15</sup> The UNHRC has said that several elements must be present during the preventive period to avoid a finding that the detention is arbitrary:
- (a) The ongoing detention must be justified by compelling reasons relating to the gravity of the qualifying offending and the likelihood of the detainee committing similar crimes in the future.<sup>16</sup>
  - (b) Regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.<sup>17</sup>

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<sup>13</sup> Issues Paper at [3.5]–[3.12].

<sup>14</sup> *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [85]; *Miller v New Zealand Parole Board* [2010] NZCA 600 at [30]; *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [71]; and *Rameka v New Zealand* (2003) 7 HRNZ 663 (UNHRC).

<sup>15</sup> *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [85]; *Miller v New Zealand Parole Board* [2010] NZCA 600 at [30]; and *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [71].

<sup>16</sup> Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [21].

<sup>17</sup> *Rameka v New Zealand* (2003) 7 HRNZ 663 (UNHRC) at [7.3]; and Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [21].

- (c) 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.<sup>18</sup>
- 4.21 Despite the importance the UNHRC has placed on preventive detention comprising two periods, the distinction is not reflected in the provisions of the Sentencing Act and Parole Act. Rather, preventive detention is a single sentence without clearly defined periods within it. In particular, the minimum period of imprisonment a court must set for preventive detention under section 89 of the Sentencing Act blurs any distinction between punitive and preventive period because the minimum period of imprisonment 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. This is consistent with the broader approach taken by the Sentencing Act that any sentence may reflect a blend of retributive and community protection purposes based on the principles listed under sections 7–8 of that Act.
- 4.22 The lack of a clear distinction between the two periods in the Sentencing Act and the confusion it may cause in practice is evidenced by the UNHRC's decisions. When it has considered cases involving preventive detention in Aotearoa New Zealand, the UNHRC has identified different periods as the punitive period.<sup>19</sup>
- 4.23 In the Issues Paper, we observed that the distinction between an initial punitive period and a second preventive period requiring an ongoing community safety justification is now an established element of a rights-consistent approach to preventive detention. If the law is to continue to provide for preventive detention, we suggested that it is desirable for the law to distinguish more clearly between the criminal sentence that responds to past offending and any subsequent period during which a person is required to remain detained solely on the grounds of community safety.
- 4.24 People sentenced to preventive detention will remain in prison conditions beyond the punitive component of the prison sentence. The UNHRC expressed concern with this approach in *Miller v New Zealand*.<sup>20</sup> In this case, two individuals were subject to preventive detention. One had been in prison for 16 years and the other for 19 years. Most of their time in prison had been spent in high security units. 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.<sup>21</sup> 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

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<sup>18</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

<sup>19</sup> *Rameka v New Zealand* (2003) 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 (29 March 2009): the maximum sentence available for the qualifying offence under the Crimes Act 1961; and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC): the 10 year minimum period of imprisonment then applying to preventive detention.

<sup>20</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

<sup>21</sup> *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].

rehabilitation and reintegration into society.<sup>22</sup> The UNHRC expressed concern that these elements were not met owing to the protracted length of the sentences and that the individuals remained in the same prison conditions throughout the preventive detention.<sup>23</sup>

- 4.25 In the Issues Paper, based on the UNHRC's views, we expressed a preliminary view that people detained solely for reasons of community protection should be managed in different conditions to prisoners serving punitive sentences. We discuss this matter further in Chapter 16 in respect of our proposals for secure preventive detention.

### **Risk assessments at sentencing are less accurate**

- 4.26 The legislative tests for preventive detention require the court to assess at sentencing the likelihood that the person will reoffend if released at the sentence expiry date of a determinate sentence.<sup>24</sup> Because that assessment entails prediction of risk years into the future, it is likely to be less accurate than if undertaken at the end of a sentence when the person's actual release into the community is imminent. As a result, there is a danger some people who may need to be made subject to a preventive measure may be missed or, conversely, some people may be unjustifiably made subject to a preventive measure.
- 4.27 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 the relevant period for sexual offending and two to five years for violent offending.<sup>25</sup> Risk assessments and tools devised for this purpose are based on these periods. They are not suited to assess risk beyond the relevant periods.
- 4.28 In addition, more may be known about the person if their risk is assessed at the end of their sentence. In contrast, assessments at sentencing cannot take into account changes in dynamic factors such as how a person may respond to treatment while in prison. Whether or not there is a high risk that a person will reoffend may only become apparent once they have received healthcare, including mental health support, rehabilitative programmes and support from psychologists or counsellors. Assessments of reoffending risk at the end of a sentence when the person is due to be released into the community can take these matters into account.
- 4.29 In the Issues Paper, we expressed the preliminary view that requiring an assessment of whether someone will pose a risk of reoffending well into the future is problematic. We said it may be preferable that the assessment of the person's risk be carried out closer to the time they are to be released from prison.<sup>26</sup>

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<sup>22</sup> *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].

<sup>23</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

<sup>24</sup> Sentencing Act 2002, s 87(2)(c).

<sup>25</sup> Lucy Moore *Literature Review – Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 17.

<sup>26</sup> Issues Paper at [8.49].

### **Imposing indeterminate preventive measures at sentencing can cause feelings of hopelessness**

4.30 In the Issues Paper, we noted the effect that the imposition of indeterminate prison sentences for community protection reasons can have on individuals. We cited a recent report from the House of Commons Justice Committee on indeterminate sentences of imprisonment for public protection (IPP sentences), which formerly operated in England and Wales.<sup>27</sup> The Committee reported that the sentence and conditions attached to it caused psychological harm.<sup>28</sup> The Committee observed:<sup>29</sup>

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.

4.31 The United Kingdom Ministry of Justice has reported that, since 2006, there have been 86 self-inflicted deaths among people serving IPP sentences.<sup>30</sup> The rate of self-harm is twice that of individuals serving life sentences.<sup>31</sup>

4.32 These findings echo feedback we have received in engagement and consultation in this review. The people we have spoken who are on indeterminate sentences described how they felt hopelessness and lost confidence in their eventual release. When they were first sentenced, they explained that the prospect of indefinite imprisonment was “shocking” and “daunting” and they were “freaking out”. One person explained that the indeterminate nature of preventive detention meant it was “hard to look forward”. One interviewee described how he felt he could never free himself from his past offending.

4.33 We note that any preventive measure of an indeterminate nature is likely to give rise to feelings of hopelessness. We consider this issue is heightened when the measure is imposed as a sentence that requires a person to remain in prison until they are no longer an undue risk to the community. We discuss this issue further in Chapter 5.

### **Post-sentence preventive measures engage the protection against second punishment**

4.34 While there are issues with imposing preventive measures at sentencing, preventive measures imposed after sentencing have their own difficulties. Human rights law guards against the state repeatedly punishing a person for the same crime. Preventive measures may be regarded as penalties and therefore engage this human right.

4.35 In *Chisnall v Attorney-General*, the full bench of the Court of Appeal found that the ESO and PPO regimes limited the protection against second punishment under section 26(2) of the NZ Bill of Rights and that the Attorney-General had not presented a convincing

<sup>27</sup> House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (28 September 2022).

<sup>28</sup> House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (28 September 2022) at [48]–[59].

<sup>29</sup> House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (28 September 2022) at [58]. See too Independent Monitoring Boards *The impact of IPP sentences on prisoners’ wellbeing* (May 2023).

<sup>30</sup> UK Ministry of Justice and HM Prison and Probation Service *Safety in custody: quarterly update to September 2023, Deaths in prison custody 1978–2023 spreadsheet* (September 2023) at Table 1.6. See too Zinat Jimada, Dirk van Zyl Smit and Catherine Appleton *Informal life imprisonment: A policy briefing on this harsh, hidden sentence* (Penal Reform International, February 2024) at 11.

<sup>31</sup> Zinat Jimada, Dirk van Zyl Smit and Catherine Appleton *Informal life imprisonment: A policy briefing on this harsh, hidden sentence* (Penal Reform International, February 2024) at 11.

case for justification.<sup>32</sup> A decision on appeal from te Kōti Mana Nui | Supreme Court is pending.

4.36 The Court of Appeal was clear that ESOs and PPOs constitute penalties. It identified several elements of ESOs that, notwithstanding their preventive focus, make them punitive, including that:<sup>33</sup>

- (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”;
- (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; and
- (f) it is an offence to breach an ESO.

4.37 Having found ESOs were penalties, the Court held that PPOs, being much more restrictive, were also penalties.<sup>34</sup> The Court was not persuaded by the attempt in the PPO Act to avoid presenting PPOs as punitive. Nor 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.<sup>35</sup> Their movements and who may visit them are controlled by the residence manager. 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.

4.38 Because ESOs and PPOs are imposed as post-sentence orders, the Court of Appeal held that they engaged the protection against second punishment in section 26(2) of the NZ Bill of Rights. The Court considered whether the regimes were a justified limitation on that right for the purposes of section 5 of the NZ Bill of Rights. The Court described the protection as being of “fundamental importance”.<sup>36</sup> It said that any departure from its protection required strong justification shown by appropriate affidavit evidence that the regimes are a minimum and necessary response to the potential harm caused by those against whom such orders would be made.<sup>37</sup> 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.<sup>38</sup>

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<sup>32</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484; and *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107.

<sup>33</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [115]–[138]. Not all factors are repeated here. Note that te Kōti Pira | Court of Appeal relied heavily on its earlier decision in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

<sup>34</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [148] and [177].

<sup>35</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [161].

<sup>36</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190] and [219].

<sup>37</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190] and [219].

<sup>38</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [223]–[226].

4.39 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 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 statutory purpose to protect the public from the risks of further offending.<sup>39</sup> Put simply, a “strong justification” is required.<sup>40</sup>

### Results of consultation

4.40 To gauge submitters' views on the issue of inconsistency with the protection against second punishment, we set out three alternative proposals in the Issues Paper to encourage feedback on the most appropriate time to impose a preventive measure:

- (a) Proposal 3A: 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.
- (b) Proposal 3B: 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.
- (c) Proposal 3C: 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.

4.41 Of the submitters who addressed these proposals, the NZLS preferred 3A, whereas four other submitters preferred 3C — Te Kāhui Tika Tangata | Human Rights Commission, Te Roopū Taura Ture o Aotearoa | New Zealand Law Students' Association, Public Defence Service and the NZCCL.

4.42 People we interviewed who were subject to preventive measures expressed mixed views. As noted above, people subject to indeterminate sentences explained that the prospect of indefinite imprisonment was difficult to deal with and made it “hard to look forward” or to leave past offending behind them. On the other hand, people subject to ESOs or PPOs expressed dissatisfaction with being placed on an order after completing a prison sentence. One interviewee said that he felt the ESO was punishing him twice, and one described feeling suicidal at the prospect of having an order imposed. When questioned on alternatives to the status quo, there were again mixed views. Some said that the imposition of an ESO or PPO at sentencing would have made them feel worse, whereas one interviewee said that he would have preferred knowing at the time of sentencing that he would be subject to an ESO or PPO upon release from prison.

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<sup>39</sup> *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

<sup>40</sup> *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].



## PREFERRED APPROACH

### PROPOSALS

**P3** A new statute should be enacted to govern all preventive measures (the new Act).

**P4** Sections 87–90 of the Sentencing Act 2002 providing for preventive detention should be repealed. Part 1A of the Parole Act 2002, providing for ESOs, should be repealed. The Public Safety (Public Protection Orders) Act 2014, providing for PPOs, should be repealed.

**P5** All preventive measures should be imposed as post-sentence orders. The new Act should require applications for a preventive measure against an eligible person under a sentence for a qualifying offence to be made prior to the person’s sentence expiry date or the date when the individual ceases to be subject to any release conditions, whichever is later.

**P6** If it appears to a court sentencing an eligible person following conviction for a qualifying offence that it is possible an application for a preventive measure will be made against that person, the court should, at sentencing, have power to:

- a. notify the eligible person of the possibility a preventive measure may be sought against them; and
- b. record that the person has been notified.

For the avoidance of doubt, when a sentencing court has not given notice, a person’s eligibility to have a preventive measure imposed on them should not be affected.

### A new Act

4.43 We think the current laws governing preventive measures should be consolidated into a single statutory regime. A new statute should be enacted to be a comprehensive source of law to govern all preventive measures we propose in Chapter 3 (the new Act). Unlike the current law, all preventive measures under the new Act would be coherently linked. The Act would provide for the gradation of preventive measures and facilitate the imposition of the least restrictive preventive measure appropriate in the circumstances. It would allow for a determination within a single hearing, addressing some of the practical and procedural issues noted above. In Chapter 10, we propose revised tests for imposing the preventive measures to achieve this.

4.44 The introduction of a new, stand-alone statutory regime would also provide an opportunity for the legislation to assert its own purpose and principles. It could avoid being coloured by the different (albeit overlapping) objectives of the Sentencing Act and Parole Act. Of particular importance, in light of the Court of Appeal’s comments in *Chisnall*, rehabilitation and reintegration of people subject to preventive measures could be a

central focus of the new Act alongside community safety. We discuss this further in Chapter 5.

- 4.45 We have considered whether the PPO Act could be amended to retrofit the legislation to govern all preventive measures. We do not think this is practical given the extent of amendments needed.<sup>41</sup>

### Repeal of preventive detention and repeal and replacement of ESOs and PPOs

- 4.46 Because of our proposal to consolidate the law governing preventive measures in the new Act, we propose that the legislation governing preventive detention, ESOs and PPOs be repealed.
- 4.47 As we set out in other chapters, some core aspects of the law governing ESOs and PPOs should be carried forward into the new Act. We do not, however, consider indeterminate imprisonment beyond a punitive prison sentence to be an appropriate way of addressing the risks a person may reoffend. As set out above, the international human rights jurisprudence provides that, if community safety requires that a person be detained beyond a punitive prison sentence, detention must occur in distinct conditions. Otherwise, the ongoing detention may be viewed as arbitrary under the International Covenant on Civil and Political Rights for failing to meet the requirements of reasonableness, necessity and proportionality.<sup>42</sup>
- 4.48 We are also mindful of the impacts on those sentenced to indeterminate imprisonment highlighted above in relation to IPP sentences in England and Wales. This relates to the wider issue we discuss in Chapter 5 that indefinite imprisonment is inhumane because of the restrictions it places on every aspect of a person's life and the physical, psychological and social detriments it imposes. For these reasons, we do not consider that imprisonment beyond a punitive prison sentence is a humane and proportionate means of achieving the community protection objective. We therefore propose that the current law governing preventive detention be repealed and not continued under the new Act.

### An entirely post-sentence regime

#### *Reasons for preferring a post-sentence regime*

- 4.49 We propose that the preventive measures we introduce in Chapter 3 should all be imposed as post-sentence orders. Specifically, we propose that the new Act should require applications for a preventive measure against an eligible person to be made prior to the person's sentence expiry date or the date when the individual ceases to be subject to any release conditions, whichever is later. This reflects the position in relation to ESO applications under the current law.<sup>43</sup>

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<sup>41</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [3.1]. The Legislation Design and Advisory Committee state:

If existing legislation is to be heavily amended (or it is already old or heavily amended), consideration should be given to replacing it instead ... If multiple amendments will cause the resulting law to be so complex it becomes difficult to understand, replacing the legislation should be preferred. Complexity can arise through grafting new policies onto existing frameworks so that the overall coherence of the legislation is lost.

<sup>42</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.4].

<sup>43</sup> Parole Act 2002, s 107F(1)(a). In respect of PPOs, see s 7(1)(a) of the Public Safety (Public Protection Orders) Act 2014.

4.50 The ordinary rules governing the release of prisoners on parole need not change on account of the proposed post-sentence regime. The New Zealand Parole Board (Parole Board) will consider whether prisoners eligible for parole should be released depending on whether they pose an “undue risk to the safety of the community”.<sup>44</sup> That will mean that, usually, people eligible for a preventive measure will already have had the risks they pose assessed for the purposes of parole. The Parole Board’s decisions and risk assessments undertaken for that purpose could inform Ara Poutama of whether to seek a preventive measure. We note, however, a possible concern that it may be appropriate for Ara Poutama to delay steps to apply for a preventive measure until after the Parole Board has considered whether to release the person. This delay may limit the window for the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) to apply for a preventive measure. In Chapter 10, we propose the availability of interim orders to cover any period between the time an application is made and finally determined if the person would otherwise be released from prison without restrictions. The availability of interim orders may alleviate timing pressures.

4.51 Our reasons for preferring an entirely post-sentence regime are as follows:

(a) As discussed above, assessing at sentencing what a person’s reoffending risk will be when they would be released from prison under a determinate sentence is problematic. To summarise:

- (i) Risk assessment practice is founded on studies that assess risk within certain periods not exceeding five to seven years. A punitive prison sentence may exceed these periods.
- (ii) Assessments at sentencing cannot take into account changes in dynamic factors such as how a person may respond to treatment while in prison. Whether or not there is a high risk that a person will reoffend may only become apparent once they have received healthcare, including mental health support, rehabilitative programmes and support from psychologists or counsellors. Assessments of reoffending risk at the end of a sentence when the person is due to be released into the community can take these matters into account.

Consequently, we are concerned that assessments of risk at sentencing may not accurately identify people who are considered at high risk of reoffending. Conversely, they may cause the unnecessary imposition of measures on a person who, at the end of a punitive prison sentence, is not at high risk of reoffending.

(b) The most severe form of preventive measures — indeterminate detention — should not be considered unless all less restrictive measures for managing that person’s risk have been shown to be inadequate. Currently, when a court considers whether to impose preventive detention at sentencing, it will consider whether an ESO will offer adequate protection for the community. All the court can do is consider the *possibility* an ESO will be imposed and on what conditions. It may be difficult for the court to assess the potential efficacy of an ESO to be imposed several years ahead. Considering all measures together post-sentence, with the ability to impose the most appropriate, is the best way for the court to undertake this exercise.

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<sup>44</sup> Parole Act 2002, s 28(2).

- (c) A preventive measure imposed post-sentence can focus on the rehabilitative needs of the offender together with the minimal intervention necessary to keep the community safe. It is difficult to maintain that focus at sentencing, which has different (albeit overlapping) concerns.
- (d) As discussed, evidence suggests indeterminate prison sentences can have significant psychological impact on people. While the post-sentence preventive measures we propose are still indeterminate in nature (discussed further in Chapters 14–18), we consider they can be better implemented in a way as to mitigate feelings of hopelessness and despair.
- 4.52 Most submitters who addressed this matter during consultation supported an entirely post-sentence regime.
- 4.53 Comparative jurisdictions provide for a mix of at-sentencing and post-sentencing regimes. The laws of some jurisdictions such as England and Wales,<sup>45</sup> Scotland<sup>46</sup> and Canada<sup>47</sup> provide for the imposition of preventive measures only at sentencing. Some jurisdictions provide that, following the punitive component of the sentence, ongoing detention must occur in different conditions.<sup>48</sup> Australian jurisdictions all have post-sentence preventive regimes,<sup>49</sup> and most also have preventive measures that can be imposed at sentencing.<sup>50</sup> Given the diversity of approaches, it is difficult to discern trends or best practices for the law in Aotearoa New Zealand to follow.

### *Possible concerns with removing preventive measures at sentencing*

- 4.54 We are mindful that there are several possible arguments against moving to an entirely post-sentence regime.
- 4.55 First, some may consider that preventive detention serves a useful purpose within the sentencing exercise. Because preventive detention is usually imposed in respect of the most harmful qualifying offending, the ability to sentence a person to indeterminate imprisonment at the time of sentencing may have an important denunciatory function. It may also instil public confidence and provide assurances for community safety as an immediate response to a person's offending.
- 4.56 We do not, however, consider that preventive detention is necessary to perform these functions. The general rules applying to the imposition of determinate sentences already provide ways of denouncing serious offending and attaining public confidence such as enlarging sentence lengths or imposing minimum periods of imprisonment. The availability

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<sup>45</sup> For example, Sentencing Act 2020 (UK), ss 254–259, 279–282 and 285.

<sup>46</sup> Criminal Procedure (Scotland) Act 1995, s 210F.

<sup>47</sup> Criminal Code RSC 1985 c C-46, s 752.01.

<sup>48</sup> Such as the law in Germany (German Criminal Code (Strafgesetzbuch – StGB), ss 66 and 66c) and Norway (Penal Code 2005 (Norway), s 40). We discuss this law further in Chapter 16.

<sup>49</sup> Crimes (High Risk Offenders) Act 2006 (NSW); Serious Sex Offenders Act 2013 (NT); Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld); Criminal Law (High Risk Offenders) Act 2015 (SA); Dangerous Criminals and High Risk Offenders Act 2021 (Tas); Serious Offenders Act 2018 (Vic); and High Risk Serious Offenders Act 2020 (WA).

<sup>50</sup> Sentencing Act 1995 (NT), ss 65–66; Penalties and Sentences Act 1992 (Qld), s 163; Sentencing Act 2017 (SA), s 57; Sentencing Act 1991 (Vic), s 18A; and Sentencing Act 1995 (WA), s 98.

of post-sentence measures should provide further assurances that community safety will be considered and high-risk offenders appropriately managed.

- 4.57 A second possible concern is that the courts will sentence the people it would have otherwise sentenced to preventive detention to long determinate sentences for reasons of community protection. A purpose of the Sentencing Act is “to protect the community from the offender”.<sup>51</sup> In some cases, the courts have imposed determinate sentences of greater severity for community protective reasons than would otherwise have been justified.<sup>52</sup> Without the option of preventive detention for the most high-risk offenders, it is likely that the courts will sentence them to long determinate sentences. Some advocates for penal reform may consider that long prison sentences should be avoided if a person’s risk to the community can be managed in other ways (such as detention in facilities that are not prison). They may raise a concern that there is limited evidence to support a relationship between longer prison sentences and lowering recidivism<sup>53</sup> and that prison is considered criminogenic rather than rehabilitative.<sup>54</sup>
- 4.58 It is unclear, however, whether the move to an entirely post-sentence regime would result in people spending longer periods in prison on determinate sentences than if they had been sentenced to preventive detention. As we discuss further in Chapter 5, the average time people sentenced to preventive detention spend in prison prior to their first release on parole is 18.2 years. We note, too, the possible criticism that, under our proposals, a person could serve a long determinate sentence and then be further detained pursuant to secure preventive detention. Under the current law, a person presenting this level of risk would either remain in prison subject to preventive detention or, if on a determinate sentence, be further detained under a PPO. We do not anticipate that our proposals would be more restrictive than the current law.
- 4.59 Lastly, these arguments relate to functions of the sentencing regime. In our view, it is not appropriate to maintain preventive measures at sentencing to avoid any issues caused by other aspects of the sentencing regime. Those aspects should be addressed directly. Also, community protection is an established purpose of sentencing.<sup>55</sup> Any issues relating to lengthened determinate sentences arise from the general rules applying to sentencing, which are outside the scope of this review.

### **The second punishment issue**

- 4.60 Another possible objection to our proposal for a post-sentence regime is that post-sentence preventive measures are likely to continue to engage the NZ Bill of Rights protection against second punishment. We accept it will likely be engaged. Our proposals, however, are aimed at mitigating the punitive nature of preventive measures. The

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<sup>51</sup> Sentencing Act 2002, s 7(1)(g).

<sup>52</sup> Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at SA7.06 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.

<sup>53</sup> See for example Tadhg Daly and Matthew McClennan *Three Strikes Law: Evidence Brief* (Te Tāhū o te Ture | Ministry of Justice, December 2018); and Te Tāhū o te Ture | Ministry of Justice *Impact Summary: Repeal of the three strikes Law* (4 March 2021) at 4–5.

<sup>54</sup> Peter Gluckman *Using evidence to build a better justice system: The challenge of rising prison costs* (Office of the Prime Minister’s Chief Science Adviser, 29 March 2018) at [102].

<sup>55</sup> Sentencing Act 2002, s 7(1)(g).

proposal for a new Act is intended to provide greater separation between the criminal justice system and preventive measures. We propose in Chapter 16 that ongoing detention for protective reasons should not require a person to be detained in prison but instead at other facilities affording a better quality of life. We propose, too, in Chapters 5 and 13 that the new Act have a central focus on rehabilitation and reintegration.

- 4.61 Nevertheless, the courts and human rights bodies may continue to view preventive measures as forms of punishment. We suggest that, to the extent post-sentence preventive measures limit the protection against second punishment, limitation is capable of justification for the purposes of section 5 of the NZ Bill of Rights for the following reasons.
- 4.62 First and foremost, following the Court of Appeal's decision in *Chisnall*, the courts have continued to impose post-sentence preventive measures on the grounds that they are justified. Since *Chisnall*, the courts have taken the approach that, if the statutory criteria for ESOs are met, the NZ Bill of Rights requires that the courts make an additional inquiry. The courts balance the right not to be subject to second punishment against the statutory purpose to protect the public from the risk that an offender will commit a relevant sexual or violent offence. The courts have described this approach as a “simple proportionality analysis”<sup>56</sup> requiring there to be a “strong justification” for an ESO.<sup>57</sup> It is significant then that, despite the Court of Appeal's declarations in *Chisnall*, the courts have continued to find that ESOs are strongly justified in some cases.<sup>58</sup> The courts have also applied this approach to PPOs. The courts have found a PPO,<sup>59</sup> a prison detention order,<sup>60</sup> an interim detention order<sup>61</sup> and the continuation of a PPO have been found to be strongly justified.<sup>62</sup>
- 4.63 We note too that, while the right not to be subject to second punishment serves several purposes, its main objectives include:
- (a) achieving finality by preventing a defendant from being subject to repeated harassment, embarrassment and expense and to enable the defendant to live their life with closure;<sup>63</sup>
  - (b) imposing a fair and proportionate punishment;<sup>64</sup> and

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<sup>56</sup> *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [30]-[31].

<sup>57</sup> *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53]; and *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

<sup>58</sup> See for example *Madden v Chief Executive of the Department of Corrections* [2024] NZCA 8 at [52]; *Chief Executive of the Department of Corrections v White* [2023] NZHC 3870 at [57]; *McGuinness v Chief Executive of the Department of Corrections* [2023] NZCA 387 at [33]; *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 at [51]; *Bannan v Chief Executive of the Department of Corrections* [2023] NZCA 227 at [42]; and *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [72].

<sup>59</sup> *Chief Executive, Department of Corrections v Waiti* [2024] NZHC 1682 at [54]-[55] and [127].

<sup>60</sup> *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [131]-[137].

<sup>61</sup> *Chief Executive of the Department of Corrections v Waiti* [2023] NZHC 2310.

<sup>62</sup> *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085.

<sup>63</sup> *Mitchell v Police* [2023] NZSC 104, [2023] 1 NZLR 238 at [39].

<sup>64</sup> See Don Stuart *Charter Justice in Canadian Criminal Law* (5th ed, Carswell, Scarborough, 2010) at 464 as cited in *Canada (Attorney General) v Whaling* [2014] SCC 20, [2014] 1 SCR 392 at [34]; *Pearce v R* [1998] HCA 57, [1998] 194 CLR 610 at [40]; and John Anderson, Mirko Bagaric and Brendon Murphy “Conditioning Sentencing to Prevent Double Punishment of Offenders Who Commit Offences While on Conditional Liberty” (2022) 46 *Melb.U.L.Rev.* 1 at 24–25.

- (c) maintaining public confidence in verdicts reached in criminal proceedings.<sup>65</sup>
- 4.64 The following design features of the proposed post-sentence regime address concerns that post-sentence measures may undermine these objectives:
- (a) The preventive measures could only be imposed within a limited window at the end of a sentence — the chief executive could not make applications beyond the cut-off.
  - (b) The punitive aspects will be mitigated by a reorientation of the regimes towards a more humane, therapeutic and rehabilitative approach.
  - (c) The imposition of a preventive measure does not call into question the conviction for the qualifying offending.
- 4.65 In addition, in Chapter 10, we propose safeguards within the legislative tests the courts should apply to impose a preventive measure. We propose that the court should be satisfied in each case that the nature and extent of any limits a preventive measure would place on a person's rights and freedoms affirmed under the NZ Bill of Rights are justified by the nature and extent of the risk the person poses to the community.
- 4.66 Lastly, it should be noted that alternatives to post-sentence preventive measures raise other issues. We have set out above some of the issues relating to preventive measures imposed at sentencing such as accuracy of risk assessment and the adverse psychological impact of indeterminate sentences. The imposition of a preventive measure unavoidably involves significant trade-offs — at whichever point in time it occurs. We are satisfied that the problems of imposing measures at sentencing outweigh the potential second punishment concerns of post-sentence measures.
- 4.67 The Supreme Court's impending decision in the *Chisnall* proceeding may be relevant to our assessment as to the circumstances in which post-sentence measures can be justified limitations on the protection against second punishment. We will consider our proposals afresh in light of that decision when it is released.

### **Notification at sentencing**

- 4.68 One way of partially meeting the purposes underlying the right not to be subject to second punishment might be for people at sentencing to be notified of the possibility they will be made subject to a preventive measure at their sentence expiry.
- 4.69 We propose that, when sentencing an eligible person upon conviction for a qualifying offence, the court should have the ability to notify the person that they may be made subject to a post-sentence preventive measure. We would expect that the court would exercise this ability when the qualifying offending demonstrates risks the person will reoffend in the future such as repeat serious offending.
- 4.70 The rationale for this proposal is as follows:
- (a) A formal notice at sentencing may help offenders understand the possibility they may be made subject to a preventive measure in the future. While notice may not remove a person's anxiety about being made subject to a preventive measure, they will at least receive fair warning of the possibility.

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<sup>65</sup> *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 at [39]; and Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure Bill* (2004) at [10].

- (b) A formal notice and record of that notice can signal the need for the provision of rehabilitative treatment to the person during their prison sentence. As we discuss in Chapter 13, we suggest that treatment should be provided to the extent needed to minimise the time a person is subject to a preventive measure to the least time possible. It follows that treatment should be provided during a person's determinate sentence to reduce their risks of reoffending and so minimise, or avoid altogether, the need for any preventive measure.
- (c) The ability for a judge to signal the possibility that a person may be made subject to a preventive measure will, to an extent, perform a similar role to preventive detention in responding at sentencing to particularly harmful offending and providing the community with assurances that the person's risk of reoffending will be managed.

4.71 We recognise, however, that this proposal has limitations, and we are interested in feedback on this proposal. A court at sentencing is unlikely to receive health assessment reports to indicate a person's risk of reoffending. The court would most likely rely on the facts of the qualifying offending and anything else disclosed in the person's criminal history. The limited information may restrict the court's ability to make notifications in appropriate cases. For some people, a notification at sentencing may be an ineffective way of ensuring they comprehend the possibility of post-sentence preventive measures.

4.72 An alternative approach to notification could be that taken in New South Wales. A court sentencing a person for a qualifying offence is required to "cause the person to be advised of the existence of this Act and of its application to the offence".<sup>66</sup> We do not, however, prefer this approach. Only a minority of people sentenced to qualifying offences are realistic candidates for a preventive measure. A blanket approach, like that taken in New South Wales, would unnecessarily notify many people.

4.73 There may be some people whose risk only becomes apparent during the course of their determinate prison sentence. For this reason, we suggest the new Act is clear that, if a sentencing court has not given notice, a person's eligibility to have a preventive measure imposed over them should not be affected.

### **An alternative to an entirely post-sentence regime**

4.74 We have considered an alternative reform option whereby:

- (a) residential preventive supervision and community preventive supervision would be imposed as post-sentence measures; but
- (b) secure preventive detention would be imposed at sentencing to take effect after the person has served a "punitive" prison sentence.

4.75 This option would be based on the possible desirability of having options to impose preventive measures at sentencing. It could also be suggested that the punitive quality of secure preventive detention is so severe that its interference with the protection against second punishment cannot be justified. It must therefore be imposed at sentencing rather than as a post-sentence measure.

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<sup>66</sup> Crimes (High Risk Offenders) Act 2006 (NSW), s 25C(1).



4.76 We do not prefer this approach for the following reasons:

- (a) As explained above, risk assessments at sentencing are likely to be less accurate than assessments taken at the point the person would otherwise be released into the community.
  - (b) Residential preventive supervision and community preventive supervision would involve significant restrictions on freedom. We are not convinced secure preventive detention is materially distinct to the extent it requires a different approach to the timing of imposition.
  - (c) It is possible there will be people who, once made subject to community preventive supervision or residential preventive supervision, will demonstrate risks that cannot be safely addressed by those measures. They may need to be escalated to secure preventive detention.<sup>67</sup> An ability to escalate people from other preventive measures to secure preventive detention undermines the reasons for restricting the imposition of secure preventive detention to sentencing.
  - (d) A single regime that enables the most appropriate preventive measure to be considered at a single point in time would facilitate the imposition of the most appropriate and least restrictive measure. Separating this exercise across different points in time could, like the current law, present problems.
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<sup>67</sup> We discuss the ability to escalate people from one preventive measure to a more restrictive measure in Chapter 17.

## CHAPTER 5

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# Reorienting preventive measures

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### IN THIS CHAPTER, WE CONSIDER:

- the issue that the current law does not facilitate the humane treatment of people subject to preventive measures and does not adequately address their rehabilitative, therapeutic and other needs; and
- proposals to reorient the law to facilitate a more humane and rehabilitative approach toward people subject to preventive measures.

## INTRODUCTION

- 5.1 Preventive measures aim to protect the community from people considered at high risk of serious reoffending. They do this by providing for the indeterminate detention of those individuals or severe and potentially indefinite restrictions on their freedoms.
- 5.2 A significant complaint with the current law is that it emphasises incarceration and restriction while neglecting the rehabilitative, therapeutic and other needs of people subject to preventive measures.
- 5.3 In this chapter, we examine this complaint and consider how the law might be reoriented towards a more rehabilitative and reintegrative approach. We will also indicate the places later in this Preferred Approach Paper where we set out additional proposals to give effect to the reoriented approach.

## ISSUES

- 5.4 As we explained in the Issues Paper, the three preventive regimes authorise some of the most coercive exercises of state power known to New Zealand law.<sup>1</sup> The subjection of an individual to any of them engages a host of human rights issues.
- 5.5 As part of that discussion, we identified parts of the current regimes where reform could facilitate the more humane treatment of people subject to preventive measures. In the following section, we recap some of that discussion and build on it from further research, engagement and consultation.

### Indeterminate detention in prison conditions is inhumane

- 5.6 Preventive detention is an indeterminate sentence. People sentenced to preventive detention must remain in prison until the New Zealand Parole Board (Parole Board) directs their release on the grounds they no longer present an undue risk to the community. People on preventive detention will often spend long periods in prison, potentially much longer than if they had been given a determinate sentence. Between 2012 and 2024, those who were sentenced to preventive detention and subsequently released on parole spent an average of 18.2 years in prison prior to their first release on parole.<sup>2</sup>
- 5.7 Of the five interviews we held during consultation with people subject to preventive detention who had been released on parole, interviewees told us their periods in prison before release were 17 years, 20 years, 24 years, 27 years and 30 years respectively. Two interviewees were in their late 60s when released from prison on parole. One interviewee was aged 81 years when released from prison.
- 5.8 The age of people subject to imprisonment on preventive detention is an issue of concern to Te Tari Tirohia | Office of the Inspectorate at Ara Poutama Aotearoa | Department of Corrections (Ara Poutama). It found that one in five people imprisoned on preventive detention were aged 65 or older.<sup>3</sup> It found that 40 per cent of these people were between six and 10 years beyond their parole eligibility date. The Inspectorate identified barriers to release on parole as being access to necessary rehabilitation programmes or individual psychological treatment, access to suitable accommodation on release or the absence of family, whānau or community support.
- 5.9 The case of *Vincent v New Zealand Parole Board* is an extreme example of a person who had been imprisoned on preventive detention for 52 years.<sup>4</sup> He successfully applied to judicially review the Parole Board's decision to decline his release from prison. At that

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<sup>1</sup> See generally Chapter 3 of Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper).

<sup>2</sup> Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to Samuel Mellor (Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (15 February 2024). We note that, in more recent years, people subject to preventive detention have spent even longer times in prison before being released for the first time on parole. However, these times may have been affected by other factors, especially the COVID-19 pandemic.

<sup>3</sup> Te Tari Tirohia | Office of the Inspectorate *Thematic Report: Older Prisoners* (Ara Poutama Aotearoa | Department of Corrections, August 2020) at [175]–[179].

<sup>4</sup> *Vincent v New Zealand Parole Board* [2020] NZHC 3316.

stage, he was aged 83 and suffering from dementia. Had he not received preventive detention, he would have received a finite sentence of under 10 years.

- 5.10 Indeterminate detention in prison conditions for reasons of community safety exposes people to the detrimental effects of prison for longer periods of time than people imprisoned on determinate sentences as a sanction for prior offending. We explained in the Issues Paper how 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.<sup>5</sup> The prison environment negatively affects physical and mental health generally.<sup>6</sup> The isolation, overcrowding, victimisation and poor physical environment of prisons likely contributes to the deterioration in the mental health of prisoners.<sup>7</sup> Prisons have been described as “toxic environments” in which antisocial behaviour is often reinforced by criminally minded peers.<sup>8</sup>
- 5.11 A recent report from the Chief Ombudsman, *Kia Whaitake | Making a Difference*, has reinforced many of these concerns.<sup>9</sup> The report sheds light on what the Chief Ombudsman describes as a failure of Ara Poutama to ensure the “fair, safe, and humane treatment” of those within prisons.<sup>10</sup> The report notes various instances where the Office of the Ombudsman in its inspectorate role has found substandard conditions. In his submission to us, the Chief Ombudsman summarised the concerns described in the report as being:
- (a) undignified and barren facilities that are not fit for purpose;
  - (b) ongoing pressure in the prison system leading to double-bunking;
  - (c) limited hours of unlock leading to people being permitted very little time outside of their cells;
  - (d) difficulties in accessing appropriate health care and support;
  - (e) a lack of meaningful and constructive activities;
  - (f) insufficient protections against de facto solitary confinement;<sup>11</sup> and

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<sup>5</sup> Issues Paper at [2.64] and [3.57]. 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, 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).

<sup>6</sup> 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, 2010) at 28.

<sup>7</sup> 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.

<sup>8</sup> Jeremy Skipworth “The Australian and New Zealand prison crisis: Cultural and clinical issues” (2019) 53 *Australian & New Zealand Journal of Psychiatry* 472 at 472.

<sup>9</sup> Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023).

<sup>10</sup> Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [505].

<sup>11</sup> The Chief Ombudsman explained that solitary confinement is the isolation of people in places of confinement for 22 to 24 hours a day. This includes situations where a person is not necessarily held in the same cell for 22 to 24 hours a day.

(g) insufficient protection against inter-prisoner violence and sexual assault.

- 5.12 The Chief Ombudsman found too that Ara Poutama adopted a view of public safety that was too narrow and often focused exclusively on prison containment for community and/or staff safety. The Chief Ombudsman suggested adopting a different understanding of public safety:<sup>12</sup>

A broader view of public safety would recognise the critical role of the fair and humane treatment of prisoners (such as through the provision of rehabilitation and reintegration programmes, constructive activities, timely meals, and healthy living conditions), in terms of promoting the safety of the public and communities when a prisoner is released. It also creates a less hostile environment within prisons, thereby enhancing the health and safety of those within.

- 5.13 We also note jurisprudence from the United Nations Human Rights Committee (UNHRC) under the International Covenant on Civil and Political Rights (ICCPR) provides that people who are detained beyond a punitive prison sentence to keep the community safe should be kept in different prison conditions to offenders serving punitive sentences.<sup>13</sup> We discuss this jurisprudence further in Chapters 4 and 14.
- 5.14 Given these concerns, there is a fundamental question as to whether it is appropriate to detain people in prison conditions indefinitely to protect the community from the risk that they may reoffend. We expressed the preliminary view in the Issues Paper that people detained solely for community safety reasons should be managed in different conditions to people serving punitive prison sentences.

### **Insufficient provision of rehabilitative and reintegrative treatment**

- 5.15 Two main concerns have emerged from our research, engagement and consultation relating to the provision of rehabilitative treatment to those subject to preventive measures.

#### ***Deferral of treatment for people subject to preventive detention***

- 5.16 First, rehabilitative treatment for people imprisoned on preventive detention is usually deferred until they are eligible for parole. Ara Poutama will refer prisoners to rehabilitative programmes when it considers their release to be imminent — either because the sentence will expire or because the Parole Board may direct the release of the prisoner on parole.<sup>14</sup> This is mainly because of limited resources and because treatment is considered most effective the closer it is provided to a person's release. A recurring theme in our interviews with people subject to indeterminate sentences was their frustration at not being able to participate in rehabilitation programmes earlier in their

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<sup>12</sup> Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [326].

<sup>13</sup> Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [21]. See also *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3], discussed in Chapters 4 and 14.

<sup>14</sup> See the discussion in *Smith v Attorney-General* [2020] NZHC 1848 at [25]–[27]. See also *Brown v R* [2023] NZCA 487 at [82]; *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [182]; and *Miller v New Zealand Parole Board* [2010] NZCA 600 at [158].

sentence. Several people have complained that they felt inadequately prepared for release when they became eligible for parole.

- 5.17 Despite these concerns, the courts have found the level of treatment provided to people subject to preventive detention to be lawful in the cases brought before them. The legislative duties on Ara Poutama to provide rehabilitative programmes to prisoners is qualified by “the extent consistent with the resources available” and the opinion of Ara Poutama as to who “will benefit from these programmes”.<sup>15</sup> The courts have accepted that Ara Poutama may prioritise people on preventive detention for treatment only when their parole eligibility approaches.<sup>16</sup> The courts have also accepted arguments from Ara Poutama that no programmes have been available relevant to the prisoners’ needs<sup>17</sup> or that prisoners have been considered unsuitable for certain programmes, for example, because of their learning difficulties.<sup>18</sup>
- 5.18 Jurisprudence under the ICCPR holds that the “preventive” period of detention must be distinct from the conditions for convicted prisoners serving a punitive sentence. It must be “aimed at the detainee’s rehabilitation and reintegration into society”.<sup>19</sup> The state has a duty to provide the necessary assistance to “allow detainees to be released as soon as possible without being a danger to the community”.<sup>20</sup> Otherwise, the detention will be considered arbitrary for the purposes of article 9 of the ICCPR.
- 5.19 In the cases concerning preventive detention in Aotearoa New Zealand, the UNHRC has been satisfied that adequate treatment has been offered to the individual complainants.<sup>21</sup> In *Miller v New Zealand*, the UNHRC found the duties were satisfied because the complainants had received treatment through: individual counselling; educational, vocational and life skills programmes; programmes to address alcohol and drug abuse; and violence and anger management programmes.<sup>22</sup> The UNHRC also accepted Aotearoa New Zealand’s submission that, at the start of the sentences, there had been no adult sex offence programmes proven to be effective.<sup>23</sup> Similarly, in *Isherwood v New Zealand*, the UNHRC noted the several opportunities for Mr Isherwood to attend programmes after becoming eligible for parole.<sup>24</sup> The UNHRC also noted the treatment and assistance he had received — being employed in the prison, receiving pastoral care and psychological assistance and completing two rehabilitation programmes.

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<sup>15</sup> Corrections Act 2004, s 52.

<sup>16</sup> See for example *Smith v Attorney-General* [2020] NZHC 1848 at [122].

<sup>17</sup> *Miller v New Zealand Parole Board* [2010] NZCA 600 at [156]–[157].

<sup>18</sup> *Miller v Attorney-General* [2022] NZHC 1832 at [131]–[137].

<sup>19</sup> Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [21]; *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.6]; and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.6].

<sup>20</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2].

<sup>21</sup> *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC); and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

<sup>22</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2].

<sup>23</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2].

<sup>24</sup> *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.2]. See too *Dean v New Zealand* CCPR/C/95/D/1512/2006 (17 March 2009) at [75] in which the detained person had refused to participate in rehabilitative treatment.

### Public protection orders are punitive because of the qualified right to rehabilitative treatment

5.20 Te Kōti Pira | Court of Appeal in *Chisnall v Attorney-General* concluded that the public protection order (PPO) regime is penal and engages the protection against second punishment under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).<sup>25</sup> Central to its reasoning was its finding that rehabilitative treatment was not a central aim of the Public Safety (Public Protection Orders) Act 2014 (PPO Act). The Court observed that the PPO Act's statement of principles makes no reference to rehabilitative treatment.<sup>26</sup> Additionally, section 36 of the Act provides those subject to PPOs have a right to rehabilitative treatment, but only "if the treatment has a reasonable prospect of reducing the risk to the public safety" posed by that person.<sup>27</sup> The Court concluded:<sup>28</sup>

In the context that PPOs inevitably result in very comprehensive restrictions on rights, the legislative scheme must guarantee therapeutic and rehabilitative interventions by the state in order to avoid the conclusion that it is penal. Unless the guarantee is in the statute itself, consistency with the Bill of Rights Act cannot be assured.

5.21 In the Issues Paper, we explained that a question for reform 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.<sup>29</sup> We cautioned that a stronger focus on rehabilitative treatment may not avoid a finding that preventive measures are forms of penalty. It is, however, relevant to whether the preventive regimes can be demonstrably justified for the purposes of section 5 of the NZ Bill of Rights.<sup>30</sup> A regime that gives greater priority to rehabilitative treatment than the current preventive regimes will help satisfy several elements the courts look for when assessing whether limits on rights are justified. For instance, a more rehabilitative regime would likely constitute a lesser impairment of a person's rights and be a more proportionate response to achieving community safety.

### Prevalence of disabled people, people with mental health issues and people with complex behavioural conditions

5.22 In the Issues Paper, we noted that preventive detention, extended supervision orders (ESOs) and PPOs are often imposed on people who:<sup>31</sup>

- (a) present with both diagnosed and undiagnosed brain, behavioural or mental health issues; and
- (b) themselves have been a victim of adverse experiences, particularly sexual abuse and other types of violence.

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<sup>25</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.

<sup>26</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [175].

<sup>27</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [175].

<sup>28</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [176].

<sup>29</sup> Issues Paper at [3.61]–[3.62].

<sup>30</sup> Issues Paper at [3.71]–[3.73].

<sup>31</sup> Issues Paper at [3.63]–[3.69].

- 5.23 We suggested this adds weight to the argument that the preventive regimes should be predominantly therapeutic and rehabilitative.
- 5.24 Our further research, engagement and consultation has reinforced the significance of this issue. The prevalence of mental illness and disorders among the prison population generally is well documented.<sup>32</sup> A 2016 study found that 91 per cent of prisoners had a lifetime diagnosis of a mental health or substance use disorder.<sup>33</sup> It also found that 62 per cent of prisoners had a diagnosis of mental disorder in the past 12 months.<sup>34</sup>
- 5.25 In his recent report *Kia Whaitake | Making a Difference*, the Chief Ombudsman noted statistics from Ara Poutama that:<sup>35</sup>
- (a) 41 per cent of men in prison have both (comorbid) mental health and substance addiction issues;
  - (b) 61 per cent of men have been diagnosed as having mental health needs within the last 12 months;
  - (c) 35 per cent of men in prison have lifetime alcohol dependence;
  - (d) 40 per cent of men in prison have a lifetime diagnosis of post-traumatic stress disorder; and
  - (e) 15 per cent of men in prison have experienced sexual assault.
- 5.26 We do not have the ability in this review to comprehensively assess the prevalence of these issues among those subject to preventive measures. However, from our review of the case law, discussions with Ara Poutama staff and the interviews we held with people subject to preventive measures, we have been struck by what appears to be very high rates of disability, mental health issues and complex behavioural conditions among people within the preventive regimes. Common presentations described in the case law include autism spectrum disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, traumatic brain injury, fetal alcohol spectrum disorder and what the cases often describe as “low levels of intellectual functioning”. As we explained in the Issues Paper, in some cases, these conditions have been an important factor in the court considering the person to pose risks to community safety.<sup>36</sup> This is not surprising given that at least some

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<sup>32</sup> See Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Ara Poutama Aotearoa | Department of Corrections, June 2016); *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (November 2018) at 73-74; Erik Monasterio and others “Mentally ill people in our prisons are suffering human rights violations” (2020) 113(1511) NZ Med J 9; and Erik Monasterio “It is unethical to incarcerate people with disabling mental disorders. Is it also unlawful?” (2024) 137(1588) NZ Med J 9.

<sup>33</sup> Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Ara Poutama Aotearoa | Department of Corrections, June 2016) at v and 9.

<sup>34</sup> Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Ara Poutama Aotearoa | Department of Corrections, June 2016) at v.

<sup>35</sup> Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [162].

<sup>36</sup> Issues Paper at [3.64], n 64.



of these conditions may affect a person's ability to regulate their behaviour and appreciate the consequences of their actions.<sup>37</sup>

- 5.27 Within the general prison population, there are high rates of people who report being survivors of severe abuse and who are potentially suffering the effects of trauma. A 2016 study of a representative sample of New Zealand prisoners found that:<sup>38</sup>
- (a) over 75 per cent 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
  - (c) nearly 20 per cent had experienced sexual violence (including rape).
- 5.28 While these statistics relate to the general prison population, we suspect they may be even higher in relation to people subject to preventive detention, ESOs or PPOs. That is because people subject to preventive measures are more likely to have committed more serious offences than the general prison population. In the Issues Paper, we identified 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 other types of violence.<sup>39</sup> 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 the preliminary view we expressed in the Issues Paper that therapeutic treatment should be a central focus of the preventive regimes.

### A culture of monitoring and compliance

- 5.29 We have discerned a culture across the preventive regimes that is primarily concerned with the management of risk rather than the support and wellbeing of people subject to preventive measures. We did not discuss this matter in detail in the Issues Paper as it has mainly come to light through consultation with those subject to preventive measures and through further engagement.
- 5.30 The issue is evident in several ways. First, a particular complaint is that Ara Poutama too readily applies for recall or prosecutes breaches of conditions. People we interviewed who were subject to preventive measures spoke about having the threat of recall or prosecution hanging over them. Those who were recalled or “breached” described the negative effects of this such as feelings of being punished again and having to “reset” their lives once more. We discuss this issue further in Chapter 17.
- 5.31 Second, another recurring complaint we heard is the failure of probation services to build positive relationships with people on parole from preventive detention and ESOs. People

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<sup>37</sup> 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 reoffences and are more likely to have a conviction for a sexual or violent offence: Natalie Horspool, Laura Crawford and Louise Rutherford *Traumatic Brain Injury and the Criminal Justice System* (Justice Sector – Crime and Justice Insights, December 2017).

<sup>38</sup> Marianne Bevan “New Zealand prisoners’ prior exposure to trauma” (2017) 5 Practice: The New Zealand Corrections Journal 8.

<sup>39</sup> Issues Paper at [3.69].

we interviewed who were subject to preventive measures often identified a positive relationship with their probation officer as being a key factor in their rehabilitation. This reflects the widely accepted view in criminal psychological literature that “firm, fair and caring” relationships between offenders and staff facilitating rehabilitative interventions is essential for successful rehabilitation.<sup>40</sup> On the other hand, some interviewees described their relationship with probation as being about “compliance and enforcement”. They often felt Ara Poutama staff were “on my shoulder” and waiting for them to trip up. Several interviewees described the upheaval when their probation officer changed. They explained the difficulty forming a trusting relationship with a new person. They described having to answer the same questions and repeat the same material. One interviewee said he had had 18 different probation officers since his ESO began in 2019.

- 5.32 Third, some consider Ara Poutama provides only limited opportunities to engage with the community for those on preventive detention and PPOs. People we interviewed who were subject to preventive detention explained that they had few chances to interact with the community before release on parole. This meant that, when they were released, they felt overwhelmed by and unequipped for life in the community. A common suggestion was the idea of “staggered release” while still in prison to provide a slow immersion into society.<sup>41</sup> We are also mindful that a previous manager of the PPO residence implemented a policy under which no outings were permitted except for very limited reasons.<sup>42</sup>

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

- 5.33 As we explain in Chapter 6, responses to risks of reoffending grounded in tikanga take a different approach to the current law. Tikanga requires people to act in ways to strengthen and maintain relationships. Public safety is achieved when communities and whānau reflect a collective sense of wellbeing. When a person is considered at risk of serious reoffending, responses grounded in tikanga should work to restore the person’s mana, protect their tapu and achieve ea by restoring them “back to their community as a fully functioning human being”. Conversely, isolating a person from their community may undermine and disrupt whakapapa and whanaungatanga. In Chapter 6, we propose

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<sup>40</sup> Jennifer L Skeem and Devon L L Polaschek “High Risk, Not Hopeless: Correctional Interventions for People at Risk for Violence” (2020) 103 Marq L Rev 1129 at 1135 and 1145. See too James Bonta and DA Andrews *The Psychology of Criminal Conduct* (7th ed, Routledge, Abingdon (UK), 2023) at 254. The authors describe the “relationship principle” for staff practices. They note that interpersonal influence is greatest in situations characterised by “open, warm, and nonblaming communication, and by collaboration, mutual respect, liking, and interest”. See also the recent report of the Scottish Risk Management Authority that identified positive relationships with justice agency staff was helpful for reintegration into the community for those on indeterminate sentences: Risk Management Authority *Initial Insights into Experiences of Release, Community Integration and Recall for Individuals on the Order for Lifelong Restriction* (July 2023) at 31.

<sup>41</sup> A recurring complaint has been that Ara Poutama Aotearoa | Department of Corrections pulled back on opportunities to engage with the community since a prisoner absconded to Brazil while on a “release to work” scheme. The Chief Ombudsman in his recent report described how this incident has had a “negative and long-lasting ripple effect” across prisons, particularly in terms of prisoners’ reintegration needs: Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [327].

<sup>42</sup> See Peter Boshier *OPCAT Report: 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, December 2020) at 24-25; and *Douglas v Chief Executive of the Department of Corrections* [2022] NZHC 600.

reforms to reorient the current law to better enable Māori to live in accordance with tikanga.

## RESULTS OF CONSULTATION

- 5.34 In the Issues Paper, we asked consultation questions relating to:
- (a) whether people who are detained after completing a punitive prison sentence should be managed in different conditions to prison; and
  - (b) whether the preventive regimes should have a stronger focus on therapeutic and rehabilitative treatment and provide stronger rights to treatment for people detained.
- 5.35 We also reflected these questions with a proposal for feedback that if people must be detained after completing a punitive prison sentence, the law should provide that:
- (a) people detained should have as much autonomy and quality of life as possible;
  - (b) people detained should be managed in different conditions to prison;
  - (c) rehabilitation and reintegration should be central objectives of the law; and
  - (d) people detained should be guaranteed therapeutic and rehabilitative interventions.
- 5.36 Submitters generally agreed that people detained for preventive reasons beyond a punitive prison sentence should be managed in different conditions.<sup>43</sup> Some of these submitters added that separate conditions would allow for greater prominence of tikanga.
- 5.37 Submitters generally supported a greater focus on therapeutic and rehabilitative treatment.<sup>44</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and the Chief Ombudsman noted the detrimental impact of prolonged prison sentences and argued for the better provision of rehabilitative and reintegrative treatment. Additionally, the Chief Ombudsman highlighted the need to mitigate the risks of deteriorating mental wellbeing. Fewer submitters responded to the specific proposal for reform, but those that did agreed with the focus on the provision of rehabilitative treatment.<sup>45</sup>

## PREFERRED APPROACH

- 5.38 We consider that the law should be reoriented to facilitate a more humane and rehabilitative approach towards people subject to preventive measures. We set out below proposals to achieve this reorientation.
- 5.39 The proposals we make in this chapter are in addition to those made in Chapter 4. In Chapter 4, we propose that there should be a new Act to govern preventive measures. The introduction of the new Act would provide an opportunity to reorient preventive

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<sup>43</sup> Bond Trust, Lara Caris, Chief Ombudsman, Criminal Bar Association, Dr Tony Ellis, Te Kāhui Tika Tangata | Human Rights Commission, New Zealand Council for Civil Liberties, New Zealand Law Students' Association, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>44</sup> Chief Ombudsman, Criminal Bar Association, Te Kāhui Tika Tangata | Human Rights Commission, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association, and several people subject to preventive measures who we interviewed.

<sup>45</sup> Chief Ombudsman, Te Kāhui Tika Tangata | Human Rights Commission, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

measures. As we explain in Chapter 4, by removing preventive measures from their current statutory contexts, the new Act could focus the law on its own purpose and principles.

- 5.40 We also propose in Chapter 4 that preventive detention as a sentence should be abolished. Consistent with international human rights jurisprudence, people detained solely for preventive reasons should be managed in different conditions to prison, otherwise the detention is arbitrary. The issues canvassed in this chapter reinforce the case to abolish preventive detention. People on preventive detention are exposed to the serious detrimental impacts of prison for prolonged periods — well beyond what would be considered a punitive prison sentence to respond to a person’s past offending. In our view, if detention beyond a punitive prison sentence is required in response to the risks that a person may reoffend, it is not appropriate that they remain in prison until that risk subsides.

### Reorientation signalled in the purposes of the new Act

#### PROPOSAL

P7

The purposes of the new Act should be to:

- a. protect the community by preventing serious sexual and violent reoffending;
- b. support a person considered at high risk of serious sexual and/or violent reoffending to be restored to safe and unrestricted life in the community; and
- c. ensure that limits on a person’s freedoms to address the high risk they will sexually and/or violently reoffend are proportionate to the risks and are the least restrictive necessary.

- 5.41 Purpose clauses that express the policy objective of legislation are important because they direct interpreters to what the statute is aiming to achieve and highlight the policy considerations that need to be balanced in applying the legislation.<sup>46</sup> They can also prevent interpreters from looking to other places to make their own policy and purposes.<sup>47</sup> The Legislation Design and Advisory Committee has commented that:<sup>48</sup>

policy purpose clauses may perform a signaling function, a concrete administrative, or legal function, an interpretative function, or all of these. They are particularly useful to set (or change) the policy direction of a regime and to be tied into decision-making criteria under the legislation.

<sup>46</sup> Legislation Act 2019, s 10(1)-(2); Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 310-311 and 340-343; and Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines (2021 edition): Designing purpose provisions and statements of principle* (29 May 2024) <[www.ldac.org.nz](http://www.ldac.org.nz)>.

<sup>47</sup> Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 311–312.

<sup>48</sup> Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines (2021 edition): Designing purpose provisions and statements of principle* (29 May 2024) <[www.ldac.org.nz](http://www.ldac.org.nz)>.

- 5.42 Accordingly, to reorient the law, we propose that the new Act have a purpose section that expresses the policy objectives the legislation is intended to achieve.
- 5.43 The first purpose that we propose is the objective of protecting the community by preventing serious sexual and violent reoffending. As we conclude in Chapter 3, the law should continue to provide for preventive measures to protect the community from those at risk of serious sexual or violent offending. It is important that the new Act express this purpose.
- 5.44 The second purpose, which should have equal prominence, is the restoration of people to safe and unrestricted life in the community. Given the issues discussed in this chapter, we consider it essential that the new Act maintain a central focus on the humane treatment of people subject to preventive measures and on support for their rehabilitation and reintegration to life in the community. We suggest the terminology of “restoration” in the proposed purpose provision to describe this objective. While including the provision of rehabilitative treatment and reintegration support, the “restoration” of an individual implies a more holistic transition, including the reconnection of a person with their community and kin groups, which, as we discuss in Chapter 6, is a prominent aspect of tikanga. The operative sections of the Act should govern the availability of more particular treatment, programmes and support, which we summarise below and discuss further in Chapter 13.
- 5.45 A greater restorative approach would help achieve the following:
- (a) **Enhancing public safety.** Plainly, public safety is enhanced if preventive measures can support people to address the factors that can trigger risks of reoffending. In Chapter 13, we discuss in more detail what rehabilitative treatment and reintegration support should be made available to people subject to preventive measures. Alongside formal programmes, basic fair and humane treatment, constructive activities and positive relationships with Ara Poutama staff are likely to play a critical role in the positive development of those subject to preventive measures towards safe and unrestricted life in the community.
  - (b) **Alignment with human rights.** As expressed in this chapter and throughout this Preferred Approach Paper, the courts and human rights bodies are clear that a central focus on rehabilitation and reintegration is essential to ensure compliance of preventive measures with human rights standards. As we note above, the provision of treatment and support to people who are detained or restricted beyond a punitive prison sentence is critical to avoiding the arbitrary detention of those individuals or constituting an unjustified interference with their right to protection against second punishment. Other rights are also likely to be engaged.<sup>49</sup>
  - (c) **Supporting needs.** The prevalence of disability, mental health issues and complex behavioural conditions among those subject to preventive measures reinforces the importance of supporting the needs of these individuals.
- 5.46 We recognise that full restoration may be a long-term or perhaps unrealistic goal for some individuals, but that does not detract from its importance as a central objective of the Act.

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<sup>49</sup> We identify other rights that are likely to be engaged by preventive measures in Chapter 3.

5.47 Lastly, we propose that the purposes of the new Act communicate that the regime is to ensure that restrictions on a person are limited to only those justified for community safety. The rights and freedoms of people considered at risk of serious reoffending should be affirmed and protected except where limitations are expressly permitted by the Act. While this objective should be embedded within the Act's operative provisions (such as the tests for imposing preventive measures that we discuss in Chapter 10), we think it warrants inclusion in the new Act's purpose provision. The need to better align preventive measures with human rights standards provides such an important case for reform it should act as an interpretive guide as an overarching purpose of the entire statutory regime.

### **Proposals elsewhere in this Preferred Approach Paper to provide a more humane and rehabilitative focus to preventive measures**

5.48 We make several other proposals across this Preferred Approach Paper to implement the purpose of restoring a person to safe and unrestricted life in the community. We summarise them here to give a better picture of the reorientation we envisage for a reformed law.

5.49 The preventive measures we propose should operate under reformed law will have potential to provide living arrangements through which people's needs are supported while maintaining community safety. We describe further how this might be achieved in Chapters 13–16. We also recognise the potential for certain facilities to specialise in providing treatment and support for people with particular needs such as disabled people and people with mental health issues or behavioural conditions.

5.50 In Chapter 13, we propose a series of reforms to ensure that people who are subject to preventive measures are offered rehabilitative treatment and reintegration support. We suggest that entitlements to treatment and support are greater than those under the current law. We also propose that people subject to secure preventive detention or residential preventive supervision are entitled to participate in therapeutic, recreational, cultural and religious activities, regardless of the rehabilitative and reintegrative effect they may have for the person.

5.51 Part of our proposals regarding rehabilitative treatment and reintegration support is that each person subject to a preventive measure should have a treatment and supervision plan developed for them, which maps the steps to be taken to work towards the person's restoration to a safe and unrestricted life in the community (including the rehabilitative and reintegrative treatment to be offered).

5.52 We also propose in Chapter 13 that the part of the new Act governing the administration of the preventive measures should contain an overarching principles provision. Alongside the Act's purpose provision, this principles provision would give guidance to those exercising powers over people subject to preventive measures. The principles are generally aimed at recognising that people subject to preventive measures should be given as much autonomy and quality of life as possible and their rights limited to the minimal extent possible. The principles also promote the need to support and prepare people to transition to less restrictive measures and, ultimately, safe and unrestricted life in the community.

## Pathways into the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

- 5.53 As discussed above, there are people subject to preventive measures who are disabled or who have mental health issues or other complex behavioural conditions. Our other proposals to reorient to a more humane and rehabilitative approach should provide better conditions for people’s care and support if they are subject to preventive measures. We consider, however, that there should continue to be ways of supervising and supporting people with particular needs outside the preventive regimes.
- 5.54 Under the current law, there are pathways to move a person subject to preventive detention or a PPO to regimes that provide for compulsory care and treatment for mental health issues or intellectual disabilities.
- 5.55 The Mental Health (Compulsory Assessment and Treatment) Act 1992 provides for compulsory treatment for people assessed as being “mentally disordered”.<sup>50</sup> If assessed as being mentally disordered, the person may be made subject to a compulsory treatment order.
- 5.56 Section 45 of the Mental Health (Compulsory Assessment and Treatment) Act provides an assessment and determination process that enables a prisoner to be considered for a compulsory treatment order. If imposed, the person is considered a “special patient” and then detained and receives treatment in hospital rather than prison.
- 5.57 The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 provides for the compulsory treatment and rehabilitation in respect of an “intellectual disability”.<sup>51</sup> If assessed as having an intellectual disability, the person may be made subject to a compulsory care order.
- 5.58 Section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act provides that a manager of a prison may apply for a prisoner to be assessed, which is a necessary first step for an application for a compulsory care order in respect of that prisoner.<sup>52</sup> If a court orders that a compulsory care order be imposed over a prisoner, the prisoner must be detained in a secure facility.<sup>53</sup>
- 5.59 These processes within the Mental Health (Compulsory Assessment and Treatment) Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act can provide an avenue

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<sup>50</sup> Section 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 defines “mental disorder” as:  
 an abnormal state of mind (whether of a continuous or intermittent nature), characterised by delusions, or by disorders of mood or perception of volition or cognition, of such a degree that it—

- (a) poses a serious danger to the health or safety of that person or of others; or
- (b) seriously diminishes the capacity of that person to take care of himself or herself.

<sup>51</sup> Section 7(1) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 defines “intellectual disability” as a permanent impairment that (a) results in “significantly sub-average intelligence”, (b) results in “significant deficits in adaptive functioning”, and (c) “became apparent during the development period of the person” which finishes when the person turns 18 years. Section 7(3) provides that “an assessment of a person’s general intelligence is indicative of significantly sub-average general intelligence if it results in an intelligence quotient that is expressed (a) as 70 or less; and (b) with a confidence level of not less than 95%”.

<sup>52</sup> We understand that s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 has been considered as a transitional provision applying to people who, at the time of enactment, had an intellectual disability but were detained in prison.

<sup>53</sup> Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 63.

for people subject to preventive detention to be moved from prison into an alternative care and treatment regime while still being detained. Section 12 of the PPO Act makes these avenues available to people against whom a PPO is sought. The section provides that, where a court is satisfied that a PPO could be made against a person but it appears they are mentally disordered or intellectually disabled, instead of making a PPO, the court may order that the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) consider an application under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act or section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act. If the chief executive makes such an application, the person is deemed to be detained in prison so as to enable the application of the processes under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act and section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act.

- 5.60 The ESO regime also contemplates that a person subject to an ESO may, during the term of the ESO, be made subject to a compulsory treatment order or compulsory care order. This could occur if the person reoffends while subject to an ESO, but instead of being convicted, they are referred to the Mental Health (Compulsory Assessment and Treatment) Act or Intellectual Disability (Compulsory Care and Rehabilitation) Act through operation of the Criminal Procedure (Mentally Impaired Persons) Act 2003.<sup>54</sup> Section 107P(3) of the Parole Act 2002 provides that, if a person subject to an ESO is detained in a hospital under a compulsory treatment order or detained in a secure facility under a compulsory care order, the conditions of the ESO are suspended but can be reactivated by a probation officer. Time on the ESO continues to run. This procedure contemplates that a compulsory treatment order or compulsory care order can co-exist with an ESO.<sup>55</sup>
- 5.61 In contrast, section 5(c) of the PPO Act provides that a PPO should not be imposed on a person who is eligible to be detained under the Mental Health (Compulsory Assessment and Treatment) Act and the Intellectual Disability (Compulsory Care and Rehabilitation) Act. If, while a person is subject to a PPO, the person is detained pursuant to the Mental Health (Compulsory Assessment and Treatment) Act or Intellectual Disability (Compulsory Care and Rehabilitation) Act, the PPO is suspended until the person is no longer detained under those Acts.<sup>56</sup>

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<sup>54</sup> Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 25–26.

<sup>55</sup> For a discussion on the co-existence of an ESO and compulsory care order, see the discussion in *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2024] NZSC 47 at [55]–[57].

<sup>56</sup> Public Safety (Public Protection Orders) Act 2014, s 139. The suspension also applies to a public supervision order or a prison detention order made under that Act.



**PROPOSALS****P8**

In proceedings under the new Act, if it appears to the court that a person against whom a preventive measure is sought or a person already subject to a preventive measure may be “mentally disordered” or “intellectually disabled”, the court should have power to direct the chief executive of Ara Poutama Aotearoa | Department of Corrections to:

- a. consider an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; and
- b. if the chief executive decides not to make an application, to inform the court of their decision and provide reasons for why the preventive measure is appropriate.

**P9**

If at any time it appears to the chief executive of Ara Poutama Aotearoa | Department of Corrections that a person subject to a preventive measure is mentally disordered or intellectually disabled, the chief executive should have power to make an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

**P10**

For the purposes of any application under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 made in relation to a person against whom a preventive measure is sought or who is already subject to a preventive measure, the person should be taken to be detained in a prison under an order of committal.

**P11**

If a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is imposed on a person subject to a preventive measure, the preventive measure should be suspended. While suspended, a probation officer should be able to reactivate any conditions of the preventive measure to ensure that the person does not pose a high risk to the community or any class of people.

- 5.62 We propose that there continue to be the ability to consider a person subject to a preventive measure, or against whom a preventive measure is sought, for care and treatment under the Mental Health (Compulsory Assessment and Treatment) Act or Intellectual Disability (Compulsory Care and Rehabilitation) Act.
- 5.63 Specifically, the new Act should provide that, in all proceedings under the new Act, the court has powers to direct the chief executive to consider an application under section

45 of the Mental Health (Compulsory Assessment and Treatment) Act or section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act.<sup>57</sup> In addition, we suggest that the chief executive should have power to make applications on their own initiative rather than only in response to the court's direction.

- 5.64 These proposals rest on our view that, where a person meets the eligibility criteria under the Mental Health (Compulsory Assessment and Treatment) Act or Intellectual Disability (Compulsory Care and Rehabilitation) Act, it is generally appropriate for a compulsory treatment order or compulsory care order to operate in place of a preventive measure. We recognise, however, that the regimes under the Mental Health (Compulsory Assessment and Treatment) Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act have their own issues. We are aware that the Government is considering repealing and replacing the Mental Health (Compulsory Assessment and Treatment) Act.<sup>58</sup> There have also been calls for wider reviews and reforms of the way the justice system relates to disabilities.<sup>59</sup> In light of these developments, our proposals for pathways from the preventive regimes into the Mental Health (Compulsory Assessment and Treatment) Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act are best seen as placeholders pending any reforms.
- 5.65 If, during the time a preventive measure is in effect, a compulsory treatment order or compulsory care order is imposed on the person subject to the measure, we propose that the preventive measure should be suspended. This reflects the current position in respect of ESOs and PPOs.<sup>60</sup> We also propose that the current position under the Parole Act regarding ESOs should continue — that a probation officer should have the power to reactivate any conditions of a preventive measure while the person is subject to a compulsory treatment order or compulsory care order.<sup>61</sup> Again this preserves the status quo based on the possibility that the conditions of a preventive measure may enhance the community safety aspects of a compulsory treatment order or compulsory care order.<sup>62</sup>

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<sup>57</sup> We also propose that if, after consideration, the chief executive decides not to make an application but rather continue to seek a preventive measure against the person, the legislation should expressly require the chief executive to inform the court of their decision and why a preventive measure would be appropriate. This reflects the Court of Appeal's comments in *Pori v Chief Executive of the Department of Corrections* [2023] NZCA 407 at [33].

<sup>58</sup> See Manatū Hauora | Ministry of Health "Repealing and replacing the Mental Health Act" (2 October 2023) <[www.health.govt.nz](http://www.health.govt.nz)>.

<sup>59</sup> *Third report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities 2014–2019*, June 2020, recommendations 35 and 38.

<sup>60</sup> Parole Act 2002, s 107P(3); and Public Safety (Public Protection Orders) Act 2014, s 139.

<sup>61</sup> See Parole Act 2002, s 107P(3)(a).

<sup>62</sup> See *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225. In that case, a probation officer had reactivated six ESO special conditions in relation to a person subject to a compulsory care order. Two were of particular impact — GPS monitoring of a whereabouts condition and GPS monitoring of a night-time curfew. The Court found that these conditions offered an extra safeguard than the compulsory care order. They enabled the person to be placed with a care provider who, without the ESO conditions, would not have provided care for the person (at [37]–[41]). We note that this decision was overturned on appeal because the chief executive did not pursue their argument that the ESO was needed to manage risk, yet *te Kōti Mana Nui* | Supreme Court affirmed the view that a compulsory care order and ESO could co-exist: *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2024] NZSC 47 at [55]–[57].

**CHAPTER 6**

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# Te ao Māori and the preventive regimes

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**IN THIS CHAPTER, WE CONSIDER:**

- issues with the current law in relation to tikanga Māori and te Tiriti o Waitangi | Treaty of Waitangi; and
- proposals for how the new Act should respond to these issues.

**INTRODUCTION**

- 6.1 In this chapter, we explain our conclusions that the current law on preventive measures:
- (a) does not enable Māori to live in accordance with tikanga; and
  - (b) does not give effect to the Crown's obligations to Māori under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).
- 6.2 In response to these issues, we propose that the new Act should require the court to consider whether a person should be placed into the care of a Māori group such as their hapū or iwi.
- 6.3 Our analysis in this chapter has been informed by several engagement hui with Māori who have expertise in tikanga and/or criminal justice issues. To explore the relevant tikanga, we commissioned a working paper and hosted a wānanga with tikanga experts. In January 2024, we hosted a further wānanga with tikanga experts, academics and Māori criminal lawyers to present our proposals and receive feedback.

## BACKGROUND

### Tikanga

- 6.4 “Tikanga” derives from the word “tika”, which means “right” or “correct”.<sup>1</sup> Tikanga includes a system of values, principles and rules that guide behaviour and direct rights and obligations in te ao Māori.<sup>2</sup> Tikanga governs relationships by providing a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.<sup>3</sup>
- 6.5 As an independent source of rights and obligations within te ao Māori, tikanga continues to be observed every day within iwi, hapū and whānau and on marae. It is practised to varying degrees in other places as well such as iwi and hapū corporate entities, Māori incorporations and trusts, and urban Māori authorities.
- 6.6 Tikanga is also integral to law reform. In recent reports, Te Aka Matua o te Ture | Law Commission has explained the constitutional significance of tikanga in terms of:<sup>4</sup>
- (a) its status as the first law of Aotearoa;
  - (b) Treaty rights and obligations that pertain to tikanga;
  - (c) the use of tikanga values as a source of New Zealand common law and the incorporation of tikanga into law by statutory reference; and
  - (d) Aotearoa New Zealand’s international obligations in relation to Māori as indigenous people.
- 6.7 Given this significance, analysis of the impact of policy proposals on tikanga has become an established tenet of good law making in Aotearoa New Zealand. For example, the Legislation Design and Advisory Committee Guidelines for good legislation advise that new legislation should, as far as practicable, be consistent with tikanga.<sup>5</sup> It may also be necessary to consider the extent to which legislation should recognise or support the operation of tikanga within te ao Māori and independently of state law.

### *Tikanga relating to community safety and offending*

- 6.8 Before providing our overview of tikanga relating to community safety and offending, it is important to note there are limits to our discussion of tikanga in this chapter. Tikanga operates as a complete, interrelated system within a worldview that is fundamentally

<sup>1</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 29.

<sup>2</sup> Tikanga can be classified into tikanga Māori (the core beliefs, values and principles broadly shared among Māori) and tikanga ā-iwi (encompassing localised expressions). See Te Aka Matua o te Ture | Law Commission He Poutama (NZLC SP24, 2023) at [1.22] and [2.11].

<sup>3</sup> Bishop Manuhua 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. See generally: Te Aka Matua o te Ture | Law Commission He Poutama (NZLC SP24, 2023).

<sup>4</sup> See for example Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [2.30]; 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 [2.10]; and Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at [3.4].

<sup>5</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [3.4]. See also Law Commission Act 1985, s 5(2)(a).

different to the Western worldview. Tikanga concepts cannot be readily explained in English. Our focus in this review is on preventive measures and our discussion of tikanga is limited to this context.

- 6.9 Definitions of unacceptable behaviour according to tikanga are naturally drawn from the values and principles that underpin it. As such, a general understanding of these values and principles facilitates comprehension of how unacceptable behaviours and community safety are managed within te ao Māori. We now outline some key tikanga concepts and how they are relevant to our review.
- 6.10 We begin with whakapapa.<sup>6</sup> Moana Jackson has said that tikanga is a “reiteration of the values and significance of whakapapa”.<sup>7</sup> Whakapapa 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 collective affiliations to iwi, hapū and whānau. Whakapapa frames a person’s identity and purpose and signifies expected roles, shared responsibilities and obligations.<sup>8</sup> Whanaungatanga, or familial obligations, strengthens these connections.<sup>9</sup>
- 6.11 According to a Māori worldview, 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.<sup>10</sup> Tapu is closely associated with mana, which is a broad concept representing a person’s authority and associated responsibilities, reputation and influence.<sup>11</sup> A person can enhance, maintain or diminish their mana through their actions – particularly in relation to the collective.<sup>12</sup>
- 6.12 Whanaungatanga denotes that the individual is secondary to the collective.<sup>13</sup> Tikanga requires people to act in ways that strengthen and maintain relationships with others and with te taiao.<sup>14</sup> Maintaining balance between all these aspects is one of the key ideals in tikanga Māori.<sup>15</sup> 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

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<sup>6</sup> See further Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, 2023) (Issues Paper) at [2.7]–[2.23].

<sup>7</sup> 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].

<sup>8</sup> 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).

<sup>9</sup> 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.

<sup>10</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 51.

<sup>11</sup> 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.

<sup>12</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 50 and 56.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 14.

(satisfaction).<sup>16</sup> Relevantly, it has been suggested that public safety is achieved “when the functioning of communities and whānau reflects a collective sense of wellbeing”.<sup>17</sup>

- 6.13 Referring to past practices, Moana Jackson explained this collective sense of wellbeing included the belief that “society could only function if all things, physical and spiritual, were held in balance”.<sup>18</sup>
- 6.14 Hara<sup>19</sup> were offences involving the violation of tapu or “any action which disrupted relational stability”.<sup>20</sup> The definitions of hara arose from a framework of social relationships based on group rather than individual concerns, meaning the impact of offending was experienced by the victim and the victim’s wider whakapapa:<sup>21</sup>
- 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.
- 6.15 Committing a hara would also negatively affect the mana of the person who committed the hara as well as their associated whakapapa groups.<sup>22</sup> Offending could disrupt an offender’s tapu or diminish their mana to such an extent that they would enter a state of rōrā (powerlessness), also referred to as being mana kore — having no mana and effectively living without purpose.<sup>23</sup>
- 6.16 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”.<sup>24</sup> This made it important to understand and respond to what was out of balance for the person who committed the hara, their whānau and the broader community.<sup>25</sup>
- 6.17 Resolving the causes of a dispute or reasons for committing a hara was the preserve of rangatira (chiefs), supported by their whānau or hapū.<sup>26</sup> Responses were grounded in the need to restore the relationship damaged by the wrong and achieve a state of ea —

<sup>16</sup> 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.

<sup>17</sup> Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 12.

<sup>18</sup> Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 28.

<sup>19</sup> Also denoted by the word hē.

<sup>20</sup> 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].

<sup>21</sup> Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 27.

<sup>22</sup> 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.

<sup>23</sup> 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). See further Issues Paper at [2.13]–[2.14] for examples.

<sup>24</sup> Moana Jackson *The Maori and the Criminal Justice System: A New Perspective / He Whaipaanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) at 39.

<sup>25</sup> Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 13.

<sup>26</sup> 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, Volume 1* (Wai 1040, 2023) at 272.

denoting that the required response had been completed and a resolution reached.<sup>27</sup> In these respects, responsibility for the offending was a collective concern:<sup>28</sup>

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.

- 6.18 We have been told that the obligations and responsibilities of whakapapa are also reciprocal.<sup>29</sup> Therefore, where a person's relationship with their community has been broken through offending, the community is not solely responsible for resolution — the individual concerned must also take responsibility. 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 was 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 to this.<sup>30</sup>
- 6.19 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.<sup>31</sup>
- 6.20 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”.<sup>32</sup> For example, pana was not necessarily permanent and could, in some cases, end when the banished person was prepared to make amends.<sup>33</sup> According to Jackson, to pana was “to send the wrongdoer to another part of his or her whakapapa — it was never to isolate them from it”.<sup>34</sup> The notion of imprisonment and removing a person entirely from their community

<sup>27</sup> 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.

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

<sup>29</sup> *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).

<sup>30</sup> 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).

<sup>31</sup> 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.

<sup>32</sup> Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 2.

<sup>33</sup> 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].

<sup>34</sup> 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].

was “simply unknown — in a very real sense it would have been culturally incomprehensible”.<sup>35</sup>

## Te Tiriti o Waitangi | Treaty of Waitangi

6.21 We said in the Issues Paper that the Treaty is recognised as a foundation of government in Aotearoa New Zealand<sup>36</sup> and of “constitutional significance” to the modern New Zealand state.<sup>37</sup> Consideration of the Treaty and an analysis of its implications has been required in policy making and a feature of Cabinet decisions for almost 40 years. As recorded in guidance issued to public officials by the Cabinet Office:<sup>38</sup>

The Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry.

6.22 The importance of properly taking the Treaty into account in both the development of legislation and in the final product is also emphasised in the Legislation Design and Advisory Committee Guidelines for good legislation.<sup>39</sup>

6.23 The Commission has examined the significance of the Treaty to the development of the law in Aotearoa New Zealand in several recent publications. Rather than restating these discussions, we highlight and develop the aspects of the analysis that are particularly relevant to law reform in this area.

### The Treaty texts

6.24 The Treaty was signed in 1840 by representatives of the British Crown and rangatira representing many, but not all, hapū. It comprises a reo Māori text and an English text, and there are well-known differences between them. In summary:

- (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 their treasures. In the English text, article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.<sup>40</sup>
- (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.<sup>41</sup> A similar undertaking is conveyed in article 3 of the English text, in which the Crown imparted

<sup>35</sup> 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].

<sup>36</sup> Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual 2023* at 1.

<sup>37</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

<sup>38</sup> Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [7].

<sup>39</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 28–32.

<sup>40</sup> Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

<sup>41</sup> IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.



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.<sup>42</sup>

- 6.25 The overwhelming majority of Māori signatories signed the Māori text, as did Lieutenant-Governor William Hobson on behalf of the Crown. It has long been acknowledged that signing followed debate and discussion in te reo Māori. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (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. It reached this view based on these circumstances of signing, debate and discussion and because such precedence is consistent with the *contra proferentum* rule of the law of treaties (that ambiguous provisions should be construed against the party that drafted or proposed them). For the reasons we have discussed in earlier reports, we agree with this approach.<sup>43</sup>

### *Te kāwanatanga me te tino rangatiratanga*

- 6.26 Kāwanatanga, referenced in article 1 of the Māori text, has been translated as government or governorship.<sup>44</sup> The Tribunal has said that governance “includes the power to make laws for peace and order.”<sup>45</sup> It has also noted that, in 1840, rangatira would have expected kāwanatanga to be exercised in relation to non-Māori only.<sup>46</sup>
- 6.27 Keeping communities safe from serious offending falls within the Crown’s kāwanatanga 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, which extends to the safety and wellbeing of Māori communities.<sup>47</sup>
- 6.28 Tino rangatiratanga, referenced in article 2 of the Māori text, has been translated to mean the unqualified exercise of chieftainship.<sup>48</sup> The Tribunal has said that the guarantee of tino

<sup>42</sup> 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.

<sup>43</sup> For example 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].

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> 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.

<sup>47</sup> 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.

<sup>48</sup> 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 *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

rangatiratanga requires the Crown to allow Māori to manage their own affairs in a way that aligns with their customs and values.<sup>49</sup>

- 6.29 Rangatiratanga can embody the authority and responsibilities of a rangatira to maintain the welfare and defend the interests of their people.<sup>50</sup> 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 groups.<sup>51</sup> Traditionally, the authority and responsibilities of rangatiratanga have included managing antisocial behaviour. According to Jackson:<sup>52</sup>

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.

- 6.30 In the Issues Paper, we said 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 individuals and their communities are affected both as people subject to preventive measures and as potential victims of reoffending.

- 6.31 In relation to the interplay between kāwanatanga and tino rangatiratanga in the criminal justice context, we noted the Tribunal’s comment that:<sup>53</sup>

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.

### Treaty principles

- 6.32 We also discussed Treaty principles in the Issues Paper, including their role in understanding the modern application of the Treaty. We noted that, while some regard the principles as distorting or diminishing the terms of the Māori text, the Tribunal has explained that reference to principles “does not mean that the terms [of the Treaty] can

<sup>49</sup> 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.

<sup>50</sup> New Zealand Māori Council *Kaupapa: Te Wahanga Tuatahi* (February 1983) at 5–6; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 25–27 and 30–31.

<sup>51</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26–27. The Tribunal said that rangatiratanga is exercised by Māori groups and Māori communities, whether tribally based or not.

<sup>52</sup> Moana Jackson *The Maori and the Criminal Justice System: A New Perspective* | *He Whaipanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) at 42.

<sup>53</sup> 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.

be negated or reduced”.<sup>54</sup> Rather, the principles “enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.<sup>55</sup>

6.33 We explored the application of the principles of partnership, active protection, equity and options. Reflecting on the Tribunal’s significant work over the years in relation to Māori and criminal justice, we concluded these principles are relevant to this review in several, mutually reinforcing, respects. In summary:<sup>56</sup>

- (a) In its report *Tū Mai te Rangī*, the Tribunal considered the Crown’s Treaty obligations in relation to the disproportionate reoffending and reimprisonment rates for Māori. It said a “bold approach to partnership” is required, where the Crown and Māori work together at a high level to achieve their mutual interests in reducing Māori reoffending.<sup>57</sup> The Tribunal stressed the importance of Māori “being at the table” to design and implement strategies, programmes and initiatives for addressing these issues.<sup>58</sup> This perspective was endorsed by hui participants at *Ināia Tonu Nei*, who said that “Māori want to lead the way in reforming the justice system” but need funding and support to enable this to happen.<sup>59</sup>
- (b) The principle of active protection encompasses an obligation on the Crown to actively protect Māori people, resources and cultural practices.<sup>60</sup> It also encompasses an obligation to actively protect the exercise of tino rangatiratanga by Māori. In some situations, legislation may be required to meet this obligation.
- (c) The principle of equity imposes an obligation on the Crown to act fairly between Māori and non-Māori. 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.<sup>61</sup> This is relevant to this review, given Māori are overrepresented among people subject to preventive detention and ESOs (discussed further below). Māori are also likely to be overrepresented among victims of serious offending.<sup>62</sup> In the

<sup>54</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

<sup>55</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386. In this Preferred Approach 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.

<sup>56</sup> See further Issues Paper at [2.36]–[2.56].

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> *Ināia Tonu Nei Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 16.

<sup>60</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005) at 12.

<sup>61</sup> 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. See also 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; and 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.

<sup>62</sup> Te Tāhū o te Ture | Ministry of Justice *Māori Victimisation in Aotearoa New Zealand: Results Drawn from Cycle 1 and 2 (2018/19) of the New Zealand Crime and Victims Survey* (April 2021). The survey 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.

Issues Paper, we noted the Tribunal’s view that the principle of active protection is heightened in circumstances of inequity.

- (d) In the 1989 *Mataitai* paper, the Commission considered the related principle of equality reflected in article 3 of the Treaty. It noted that subjecting people to the same rules when they are not in like circumstances can deny, rather than promote, equality.<sup>63</sup> In the context of this review, this suggests we should consider the extent to which the responses to the risks of Māori reoffending should be tailored to those specific risks.
- (e) The principle of options is concerned with the choices open to Māori.<sup>64</sup> 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.<sup>65</sup> As we see them, the options are essentially concerned with the choices Māori may make every day to live in and engage with te ao Māori and te ao Pākehā. The principle of options means the Crown should ensure that these options remain open to Māori as genuinely as is possible<sup>66</sup> and are properly resourced.<sup>67</sup>

6.34 Reflecting upon these principles, we referred to the conclusion of Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group 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. Again, however, proper resourcing is imperative — “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”.<sup>68</sup>

## ISSUES

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

6.35 We suggested in the Issues Paper that the preventive regimes under current law, which rely on imprisonment, detention and supervision to reduce risk, do not enable Māori to live in accordance with tikanga. There is no statutory expectation or guidance about when a person should be considered for placement with their own whakapapa (or how that

<sup>63</sup> 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 89–90 (also noting equality means people in like circumstances should be treated alike).

<sup>64</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

<sup>65</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

<sup>66</sup> 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.

<sup>67</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 46.

<sup>68</sup> 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.

placement could occur) in order to be managed and cared for according to relevant tikanga.

- 6.36 We noted the work being done by Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) to reorient the corrections system by prioritising and embedding kaupapa Māori approaches in its practices.<sup>69</sup> Even so, we suggested 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 iwi, hapū and whānau. This may disrupt the fundamental values of whakapapa and whanaungatanga. The restrictions may also be seen as a perpetuation of punishment.<sup>70</sup> The measures may continue to negatively impact a person's mana, tapu and mauri and hinder effective restoration to their community. For these reasons, we suggested the preventive regimes under current law may be irreconcilable with tikanga.
- 6.37 At the same time, we noted recent input from Māori on reform to the criminal justice system accepts that some people will need to be separated from the community for a time due to the risk to themselves and others.<sup>71</sup> They suggested this type of separation should nevertheless have a rehabilitative focus and be a last resort.

### The law fails to give effect to obligations under the Treaty

- 6.38 We also suggested in the Issues Paper that the current law does not give effect to the Crown's obligations to Māori under the Treaty. We drew on the Tribunal's conclusion in *Tū Mai te Rangī* that tino rangatiratanga demands that Māori be substantially involved in maintaining the safety of Māori communities through the successful rehabilitation and reintegration of offenders.<sup>72</sup> This includes the right to ensure that tikanga is followed appropriately and under the correct authority. Currently, however, as noted in relation to tikanga above, there is no statutory provision to safeguard this right and assure the Crown's accountability to Māori. More generally, during consultation, we discerned a clear desire from Māori to manage people at risk of reoffending in different ways to the current preventive regimes.
- 6.39 In addition, we said the overrepresentation of Māori subject to preventive detention and ESOs engages the principle of equity.<sup>73</sup> This heightens the responsibility of the Crown to enable and support tino rangatiratanga and ensure appropriate options are available to meaningfully address the disparity. As we record in Chapter 2, as at 30 June 2023, 46 per cent of those sentenced to preventive detention identified as Māori and 41 per cent of those subject to ESOs identified as Māori.<sup>74</sup> This is significantly higher than Māori

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<sup>69</sup> *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019-2024* (19 August 2019).

<sup>70</sup> Whāia Legal *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, 2023) at [83].

<sup>71</sup> Ināia Tonu Nei *Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 22.

<sup>72</sup> 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.

<sup>73</sup> There have been too few people subject to PPOs for statistical analysis.

<sup>74</sup> Email from Phil Meredith (Manager Strategic Analysis — Research & Analysis, Ara Poutama Aotearoa | Department of Corrections) to Samuel Mellor (Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (15 February 2024).

population rates. In 2018, the Māori population was 17 per cent of Aotearoa New Zealand's population.<sup>75</sup>

- 6.40 The prison environment negatively affects physical and mental health generally.<sup>76</sup> The isolation, overcrowding, victimisation and poor physical environment of prisons likely contributes to the deterioration in the mental health of prisoners.<sup>77</sup> Prisons have been described as “toxic environments” in which antisocial behaviour is often reinforced by criminally minded peers.<sup>78</sup> We discuss the detrimental effects of prison further in Chapter 5.
- 6.41 The disproportionate rate of Māori subject to preventive detention means that the negative effects and impacts of this form of detention are disproportionately felt by Māori. The negative impacts extend beyond those who are detained. In its report on Māori reoffending rates, 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”.<sup>79</sup>

## RESULTS OF CONSULTATION

- 6.42 Given these issues, in the Issues Paper, we proposed that the law should make greater provision for Māori-led and Māori-designed initiatives for managing people at risk of serious reoffending. We asked five questions regarding tikanga and the Treaty, including whether submitters agreed with our proposal for reform. Most submitters agreed with our analysis of the issues in the Issues Paper, with some acknowledging the longstanding nature of concerns in this area. Most also agreed with our proposal, although some cautioned that our consideration of reform should not overlook the interests of public safety.
- 6.43 We first asked submitters whether we had appropriately identified the relevant tikanga. Some submitters supported our explanation,<sup>80</sup> and some agreed consideration of the tikanga we discussed is pertinent to the review.<sup>81</sup> One submitter queried if the question

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<sup>75</sup> Tauranga Aotearoa | Stats NZ “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 Whaipanga 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.

<sup>76</sup> Hunga Kaitihiro 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.

<sup>77</sup> 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.

<sup>78</sup> Jeremy Skipworth “The Australian and New Zealand Prison Crisis: Cultural and Clinical Issues” (2019) 53 *Australian & New Zealand Journal of Psychiatry* 472 at 472.

<sup>79</sup> 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.

<sup>80</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association and Te Hunga Rōia Māori o Aotearoa.

<sup>81</sup> Bond Trust, The Law Association and South Auckland Bar Association.

- was broad enough as it left out Pacific peoples.<sup>82</sup> Members of Te Hunga Rōia Māori o Aotearoa thought the tikanga Māori explored in the Issues Paper was broadly helpful.
- 6.44 Second, we asked submitters if they agreed with our preliminary views about how the Treaty may apply in the context of this review. Several submitters agreed with our overall approach,<sup>83</sup> while one agreed the Treaty may apply to the review but suggested its application should be left to experts in Māoritanga.<sup>84</sup> Members of Te Hunga Rōia Māori o Aotearoa said they consider this area of law engages most Treaty principles.
- 6.45 Some submitters focused on particular aspects of our Treaty analysis. Te Roopū Taurua o Aotearoa | New Zealand Law Students' Association (NZLSA) suggested that tino rangatiratanga over kāinga should be a focus of the law and (referring to Tribunal jurisprudence) commented that this includes strong, connected whānau looking after their own tamariki and thriving as Māori. It said the exercise of tino rangatiratanga involves consideration of the future and of protecting and caring for the children of future generations.
- 6.46 The Bond Trust, The Law Association and the South Auckland Bar Association agreed that Māori and the Crown must work together in this context. Two reasons were given — to address the overrepresentation of Māori in the criminal justice system (The Law Association and South Auckland Bar Association) and to meet the reintegration and public safety objectives of this area of the law (Bond Trust).
- 6.47 Third, we asked whether the law relating to preventive detention, ESOs and PPOs is failing to enable Māori to live in accordance with tikanga. All submitters who responded to the question either agreed with our preliminary view that the law does not enable Māori to do this<sup>85</sup> or highlighted further problems with the law regarding its incompatibility with tikanga.<sup>86</sup> Members of Te Hunga Rōia Māori o Aotearoa described the conclusion that the current preventive regimes are inconsistent with tikanga as “inevitable”.
- 6.48 Several submitters identified the central failure as being related to whakapapa. Dr Jordan Anderson submitted that the indefinite and profound separation of individuals from their whānau and communities that results from the sentences and orders under review both undermines and disrupts whakapapa and whanaungatanga.<sup>87</sup> A member of Te Hunga Rōia Māori o Aotearoa likewise said putting people in prison for indeterminate sentences and preventing them from being with their whānau isolates them from their whakapapa. In relation to supervision conditions, The Law Association said the imposition of non-association conditions without regard to a prisoner's circumstances may ignore the importance of family connections and their cultural significance. Similarly, the Criminal Bar Association commented that restrictions on movement can impede a person's ability to

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<sup>82</sup> Dr Tony Ellis.

<sup>83</sup> Te Kāhui Tika Tangata | Human Rights Commission, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

<sup>84</sup> Criminal Bar Association.

<sup>85</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, Te Hunga Rōia Māori o Aotearoa.

<sup>86</sup> Dr Jordan Anderson, Chief Ombudsman, Criminal Bar Association, South Auckland Bar Association, Te Hunga Rōia Māori o Aotearoa, The Law Association.

<sup>87</sup> In response to our question 4.

connect with their whenua, whānau or iwi. It also said that, generally, a commitment to tikanga for all sentences is important.

- 6.49 The South Auckland Bar Association and the Chief Ombudsman expressed concern about the lack of culturally relevant measures for addressing risks of reoffending. The South Auckland Bar Association noted that culturally appropriate programmes are often not available to prisoners with lengthy sentences who simply sit in prison with their mana in a state of “rot” as nothing is done to address the hara. The Chief Ombudsman said the lack of access to cultural support and programmes for Māori in custody is concerning and exacerbates the disproportionate representation of Māori in prison.
- 6.50 Fourth, we asked whether the law relating to preventive detention, ESOs and PPOs fails to give effect to the Crown’s obligations under the Treaty. Most submitters addressing this question generally agreed the law fails to give meaningful effect to the Crown’s Treaty obligations.<sup>88</sup> The South Auckland Bar Association explained the failure in terms of the lack of culturally appropriate treatment being available to address the issue of Māori overrepresentation in the prison population. Expressing a similar concern, the Chief Ombudsman referred to recent OPCAT reports in which he recommended that prison management prioritise, implement and protect kaupapa Māori practices and programmes and strengthen partnership with iwi Māori. He said that, while he has found there is a “willingness” in Ara Poutama, there is also uncertainty in terms of what is expected and required of detention facilities in implementing the Crown’s Treaty obligations and incorporating tikanga.
- 6.51 On the other hand, while acknowledging the possibility of a Treaty issue, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service viewed the Crown’s obligation to protect the safety of all citizens and the disproportionate impact on Māori of the preventive regimes as raising competing interests. It added that the solution to this disproportionality is likely needed at a point much earlier than when resort is made to preventive measures.
- 6.52 Fifth, we proposed in the Issues Paper that the law could better enable Māori to live according to tikanga and could facilitate tino rangatiratanga through the promotion of Māori-designed and Māori-led initiatives. We explained that, if a person must be subject to a preventive measure, the court or New Zealand Parole Board (Parole Board) should consider whether and how the person can access a Māori-designed and Māori-led initiative. We proposed, too, that the law could promote opportunities for the person’s whānau, hapū or iwi or any person who has a shared sense of whānau identity to address the court or Parole Board. We asked submitters if they agreed with this proposal.

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<sup>88</sup> Dr Jordan Anderson (“clearly” fails), Criminal Bar Association (“likely” fails), South Auckland Bar Association (“fails”), Te Hunga Rōia Māori o Aotearoa (the Treaty inconsistency is “obvious”), The Law Association (when implemented in a certain way the law “would fail”).



- 6.53 Several submitters responded either directly<sup>89</sup> to the questions above<sup>90</sup> and/or by affirming more generally the importance of tikanga and the Treaty to this area of the law.<sup>91</sup> Some encouraged us to consult further with Māori.
- 6.54 The Chief Ombudsman, Criminal Bar Association, Te Kāhui Tika Tangata | Human Rights Commission, the NZLSA, the South Auckland Bar Association and The Law Association broadly supported the proposal. The Human Rights Commission said it endorsed a legislative shift towards a more rehabilitative approach, developed in active partnership with Māori, to align preventive measures more closely with Aotearoa New Zealand's te Tiriti and human rights obligations. It also endorsed the intent of our proposal to promote the development of Māori-designed and led initiatives. The NZLSA stressed that Māori are best placed to create and implement these initiatives and should be properly resourced to do so.
- 6.55 Members of Te Hunga Rōia Māori o Aotearoa urged us to consider how the law can support the establishment and development of Māori pathways. They noted the risks the proposal might be poorly implemented if the Government instigates initiatives itself. Instead, the Government needs to devolve resources and decision-making to Māori to build Māori capacity and enable Māori initiatives (whether iwi, hapū, whānau or urban-based Māori) to take the lead. Although this may be less than genuine tino rangatiratanga (in the sense that any new preventive regime will still be governed by state law), it would be an improvement.
- 6.56 Manaaki Tāngata | Victim Support did not disagree with our proposal but said applying an ao Māori lens to an offender who is at risk of reoffending must be balanced with the safety of victims. Victim Support also said an ao Māori lens must be applied to victims' safety and wellbeing too.
- 6.57 We received further feedback from participants at the wānanga we hosted in January 2024. That feedback is discussed under our proposals below.

## PREFERRED APPROACH

### The tikanga implications of a focus on rehabilitation and reintegration

- 6.58 Before setting out our preferred approach, we note there may be implications for both tikanga and the Crown's Treaty obligations of our suggested focus on rehabilitation and reintegration for preventive measures in a new Act. As a wānanga participant suggested to us, reforms to instil a more humane approach with a rehabilitative and reintegrative focus will be a direct benefit for Māori who are subject to preventive measures.
- 6.59 We anticipate this focus will also align the law closer with tikanga Māori. This is because (as explained earlier) tikanga is concerned with, among other things, working alongside a person who has committed a hara to reawaken their tapu and restore their relationship

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<sup>89</sup> Chief Ombudsman, Criminal Bar Association, Te Kāhui Tika Tangata | Human Rights Commission, Te Roopū Taura Ture o Aotearoa | New Zealand Law Students' Association, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, Te Hunga Rōia Māori o Aotearoa, The Law Association, Manaaki Tāngata | Victim Support.

<sup>90</sup> Criminal Bar Association.

<sup>91</sup> Bond Trust, Chief Ombudsman, Criminal Bar Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association, The Law Association.

with their community. As one participant at the wānanga explained, however, it is not difficult for reforms to *better* align with tikanga than the current law — the bar is low. Several submitters likewise commented on the basic incompatibility of current law with tikanga.

### The Crown's Treaty obligations

- 6.60 However, we do not think a greater focus on rehabilitation and reintegration will by itself resolve the issues explained in this chapter. Tino rangatiratanga, guaranteed under the Treaty, requires that Māori be substantively involved in the design and implementation of preventive measures. The principle of equality suggests responses to the risks of Māori reoffending should be tailored to those specific risks. The principle of options entails ensuring choices are available to live in te ao Māori. In the context of this review, we conclude the Crown's obligations under the Treaty mean the new Act should include specific measures that secure Māori involvement to counter the disproportionate effects of preventive regimes on Māori people.
- 6.61 We also see the exercise of tino rangatiratanga and enabling Māori to live in accordance with tikanga as being intertwined. This is because reconnecting a person with their whakapapa is work that ordinarily needs to be carried out through the authority of the people sharing that whakapapa. It cannot be achieved through a general alignment of the new law with tikanga or by embedding kaupapa Māori approaches within Ara Poutama practices.
- 6.62 The disproportionate rates of Māori subject to preventive detention and ESOs also engage the Treaty principles of equity and active protection. These principles reinforce the Crown's obligation to work with and support Māori groups to reduce Māori reoffending. The Tribunal has explained that this is even more important when Māori are actively seeking greater involvement.<sup>92</sup> This is the case here. As we have noted, during consultation, we discerned a clear desire among Māori to take greater responsibility for managing people at risk of reoffending. As Moana Jackson has also explained, changes within the justice system need to be drawn from “a commitment to accord Māori ideas and strategies equal value with the Pakeha”.<sup>93</sup> He said 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.

### The context of the wider criminal justice system

- 6.63 Participants at the wānanga in January 2024 noted that Māori often experience systemic detriment at the hands of the Crown, especially in state care and in the prison system. Participants said that the Crown could therefore be seen as responsible for the reoffending risks posed by some people. A similar concern was raised by a member of Te Hunga Rōia Māori o Aotearoa, who said it is important to acknowledge the Crown's role in terms of offenders who were abused in state care as children, not given any support and progressed to become offenders themselves. The wider systemic failings in

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<sup>92</sup> 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.

<sup>93</sup> Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) at 248.

the criminal justice system will often have had significant effects on those subject to preventive measures. A person on whom a post-sentence preventive measure is imposed will already have been exposed to the system for a long time.

- 6.64 Given the wider context, some participants at the wānanga were concerned by our proposal to promote Māori-designed and Māori-led initiatives, which we had published in the Issues Paper. These initiatives, like the rest of the preventive regime, would operate only late in a person's extensive journey through the criminal justice system. Wānanga participants explained to us that the proposal appeared to ignore the Crown's failures across the criminal justice process. The proposal seemed to suggest that these failures could, as an afterthought, be remedied by making a post-sentence regime more tikanga and Treaty-compliant.
- 6.65 We are firmly of the view that support for a person's rehabilitation needs to be provided during their prison sentence. Moreover, truly "preventive" initiatives need to target the systemic drivers of offending behaviour. We agree with wānanga participants that it is not enough to involve Māori participation and tikanga in post-sentence preventive measures, which are imposed at such a late stage in an otherwise damaging system.
- 6.66 We acknowledge that, due to its scope, this review can only address one part of the criminal justice system and that our proposals do not therefore address wider systemic failings. We do, however, wish to make proposals for reform that improve the law governing preventive measures as best they can.

### Administration of preventive measures by iwi, hapū, whānau and other groups

#### PROPOSAL

P12

When imposing a preventive measure, the new Act should require the court to consider whether the preventive measure should be administered by placing the person within the care of a Māori group or a member of a Māori group such as:

- a. an iwi, hapū or whānau;
- b. a marae; or
- c. a group with rangatiratanga responsibilities in relation to the person.

- 6.67 We think that the best way the law can enable Māori to live according to tikanga and facilitate tino rangatiratanga within the confines of a preventive measures regime is by requiring the court to consider whether to place a person into the care of a Māori group. That group would have primary responsibility for the person subject to the measure. They would ensure the core features and/or conditions of the preventive measure are observed. Specifically, a group could:
- (a) provide housing and programmes for people subject to community preventive supervision;
  - (b) manage residential facilities (for people subject to residential preventive supervision); and/or
  - (c) manage secure facilities (for people subject to secure preventive detention).

- 6.68 The text of the proposal refers to the placement of a person within the care of a Māori group or a member of a Māori group. We think it is important to recognise as much as is possible within the new law the group's collective responsibility for the person being cared for. As we explain above, reconnecting a person with their whakapapa is central to their rehabilitation and reintegration pursuant to tikanga. As we go on to explain in Chapters 13–16, our proposals also envisage there being a probation officer or facility manager to discharge specific responsibilities that should feature in the new law. For example, in Chapter 13, we propose that a probation officer or facility manager would be the individual responsible for devising and implementing a treatment and supervision plan in respect of each person who is subject to a preventive measure. Therefore, where a person is placed into the care of a group, a corresponding role will need to be filled. Where a person is placed into the care of a member of the group, it would be open for that person to fulfil that role.
- 6.69 In all cases, when considering whether a person should be placed in the care of a Māori group or a member of that group, the court would need to satisfy itself of the availability and suitability of such a placement in the circumstances. This includes the court being satisfied the relevant facilities and programmes have the capacity to ensure community safety by administering the fundamental conditions of a preventive measure. We also expect the court would take into account the views of any Māori group or groups with an interest in the application for the preventive measure and the person in respect of whom the preventive measure is proposed. As noted below and discussed further in Chapter 12, we consider that wider participation in proceedings should also be permitted.
- 6.70 The proposal is deliberately flexible to accommodate different ways the administration of preventive measures might be delivered, different levels of capability for undertaking this work and also therefore the different kinds of government resourcing and support that may be necessary to ensure successful delivery and development of capability.
- 6.71 For example, we envisage Māori groups might administer preventive measures pursuant to tikanga and mātauranga (Māori knowledge). But they might also draw on other approaches such as current clinical practice on rehabilitation and risk management. We envisage they would facilitate a person's rehabilitation by prioritising important aspects of tikanga. These might include supporting relationships with whānau, building the person's mana and respect for their tapu and working towards their restoration into the community. These are not matters the legislation should attempt to prescribe. Initiatives grounded in tikanga occur in an inherently Māori context. The proposal therefore recognises the role of Māori groups but does not specify whether any particular tikanga should be applied.
- 6.72 We acknowledge concerns of some submitters that the restoration of a person into the community should not come at the cost of victim and community safety. Our proposals recognise that a person may need to be separated from the community due to the level of risk they pose and that the court will consider the suitability of a proposed placement in terms of managing that person's risk. We do note, however, our understanding of the relevant tikanga is that a person's restoration into the community ultimately supports the restoration of the community itself. To this extent, the interests of the individuals involved and wider community align.
- 6.73 At the more institutional level, different approaches should also be possible depending on the capabilities and preferences of different Māori groups. We are mindful of the risk

explained to us during consultation that reform may be poorly implemented if Māori groups are not resourced and supported to take the lead. On the other hand, some groups will need time to build their capabilities. We think the proposal meets both concerns. We envisage a group could, for instance, undertake this work in partnership with Ara Poutama or within facilities operated by Ara Poutama (we discuss arrangements further in Chapter 13). It would also be for each group to decide which people would be eligible to participate, for example, whether it is for Māori of a particular iwi or hapū, all Māori or all people both Māori and non-Māori. Matters of design and implementation should be left to the leadership of each group, provided again they have the capacity to ensure community safety.

6.74 We have departed from the concept of “Māori-designed and Māori-led initiatives” used in the Issues Paper for two reasons. The first is that, on reflection, it does not sufficiently signal the intended potential for devolution and may instead perpetuate the current model for government-instigated procurement of rehabilitation services. We have heard through our consultation that the current model is both transactional and competitive and can deter Māori involvement. It does not represent the bold approach to partnership with Māori that is required to reduce Māori reoffending.

6.75 Second, it follows suggestions at the wānanga to recognise and respect Treaty relationships with the Crown, which is not adequately captured by generic references to “Māori” led and designed initiatives. Therefore, and while the text of the proposal still refers to a “Māori” group, we have drawn on the way the Sentencing Act 2002 and the Parole Act 2002 define “programmes” by listing iwi, hapū, whānau and marae as relevant types of Māori group. However, the proposed list also refers to groups “with rangatiratanga responsibilities”. This is because we think the new law should also be able to recognise and respect Treaty relationships involving non-tribal groups. In several reports, the Tribunal has explained that the Crown’s duty is to protect rangatiratanga wherever it is manifest.<sup>94</sup> In its *Te Whanau o Waipareira* report, it concluded that Te Whanau o Waipareira Trust, a non-kin-based urban Māori organisation, exercised rangatiratanga in fact and was therefore entitled to recognition in terms of the Treaty. The Tribunal emphasised that its conclusion was reached based on its overall assessment of the facts, including the Trust’s focus on meeting the needs of its beneficiaries in accordance with tikanga. It also said:<sup>95</sup>

It is neither desirable nor, we think, possible to create a checklist of the ingredients for the recognition of a Maori group in terms of the Treaty. Such an approach would do nothing to enhance rangatiratanga, which must be the Crown’s aim.

6.76 We recognise the proposed provision for Māori involvement will continue to sit within the framework of state law. It will require an order of the court and the group administering the preventive measure will require support and resourcing from the Government and satisfy the court they can provide adequate protection. We therefore do not claim that

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<sup>94</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at [8.2.3]; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013) at [3.2.4(1)]; 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, 2019) at 28; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at [2.5].

<sup>95</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at [3.4].

the proposal fully facilitates tino rangatiratanga. It does, however, go some way by better promoting Māori involvement.

- 6.77 We also recognise that legislative reform alone will not achieve the goals of the proposal. It will open the door to substantial Māori involvement in reducing reoffending, but the degree of involvement itself will depend on the Crown's willingness to work with Māori and support Māori groups to take the lead. It will also depend on the desire of Māori groups to take on responsibilities in this area. Practically, we think it will be important for Ara Poutama to build strong working relationships with Māori groups, recognising their status in terms of the Treaty, and implement best practices for commissioning their involvement to achieve the goals of the reformed regime.

### **Ability of kin groups to share views**

- 6.78 In Chapter 12, we discuss further proposals to enable family, whānau, hapū, iwi, and groups sharing a whānau sense of identity to share their views to the court in proceedings under the new law.
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## **PART THREE:**

# **ELIGIBILITY**

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## CHAPTER 7

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# Age of eligibility

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### IN THIS CHAPTER, WE CONSIDER:

- issues relating to the age at which a person is eligible for a preventive measure under current law; and
- the age of eligibility that should apply to preventive measures under the new Act.

## INTRODUCTION

- 7.1 This chapter considers issues relating to age of eligibility when imposing a sentence of preventive detention and feedback on our preliminary view in the Issues Paper that the sentence should apply only to people aged 25 and over. Given our proposal in Part 1 of this Preferred Approach Paper that preventive detention be abolished<sup>+</sup>, we outline our preferred approach to age of eligibility for preventive measures imposed as post-sentence orders.
- 7.2 In this chapter, we use the term “young adult” to include people aged between 18 and 25.<sup>1</sup> We use the term “young person” to include people aged between 14 and 18 and “children” to refer to people under the age of 14 years.<sup>2</sup>

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<sup>1</sup> Cognitive and emotional development varies between individuals, and there is not one age of maturity that will be appropriate for all people. We use the age range 18 up to a person’s 25th birthday because it appears to be one of the more common definitions of young adulthood in the criminal justice context. For example, the Young Adult List applies to people aged 18 to 25 and the Scottish Sentencing Council’s guideline for sentencing young people applies to people under the age of 25: Scottish Sentencing Council *Sentencing Young People: Sentencing Guide* (January 2022). It also reflects the scientific evidence indicating that the brain continues to develop into the mid to late 20s: 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; and Peter Gluckman and others *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Office of the Prime Minister’s Science Advisory Committee, May 2011) at 5.

<sup>2</sup> This reflects the usage of this term in Aotearoa New Zealand’s youth justice system, for example, the Oranga Tamariki Act 1989, s 2 definition of “child” and “young person”.



## CURRENT LAW

### Preventive detention

- 7.3 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.<sup>3</sup>
- 7.4 The minimum age of eligibility for preventive detention has decreased over time. 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. No explicit rationale for the age reduction was given but the Government justified overall reform as “deal[ing] with the immediate problem of violence” and addressing concerns about “particular types of offenders”.<sup>4</sup> The minimum age was again lowered to the current age of 18 years as part of sentencing reforms in 2002.<sup>5</sup> The Government justified a lower age, alongside other expansions to eligibility for preventive detention, by stating that:<sup>6</sup>

... 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.

### Extended supervision orders and public protection orders

- 7.5 There is no minimum age of eligibility for extended supervision orders (ESOs). However, to be eligible for a public protection order (PPO), a person must be aged 18 years or older at the time of the application.<sup>7</sup>
- 7.6 There is no minimum age at which the qualifying offending must have been committed for either ESOs or PPOs — both may be imposed even if the qualifying offending was committed when the person was under 18 years old. In practice, few eligible people will have committed the qualifying offending when they were under 18 years old. A person is eligible for an ESO or a PPO if they have been convicted and sentenced to imprisonment for qualifying offending, but the circumstances in which a young person can be sentenced to imprisonment are limited.<sup>8</sup> We are aware of two cases in which ESOs have been

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<sup>3</sup> Sentencing Act 2002, s 87(2)(b).

<sup>4</sup> (18 December 1986) 477 NZPD 6522–6523.

<sup>5</sup> Sentencing Act 2002, s 87(2)(b); and Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper). As we discuss in Chapter 1 of the Issues Paper, these reforms were a response to a 1999 law and order referendum.

<sup>6</sup> (17 April 2002) 599 NZPD (Sentencing and Parole Reform Bill — Instruction to Committee, Phil Goff).

<sup>7</sup> Public Safety (Public Protection Orders) Act 2014, s 7(1).

<sup>8</sup> Most young people (under 18) fall within the jurisdiction of te Kōti Taiohi | 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 | 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 1989 states that proceedings can be transferred out of te Kōti Taiohi | 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

imposed where the qualifying offending, conviction and sentencing occurred before the person turned 18.<sup>9</sup>

## ISSUES

7.7 In the Issues Paper, we focused on whether it is appropriate to sentence young adults to preventive detention. We suggested that how the law applies to young adults should be guided by both human rights discourse and scientific evidence related to young adults' brain development. Regarding the science, we noted the increasing recognition that behaviours associated with offending in young adults reflect immature brain development rather than long-term risk.<sup>10</sup> Regarding human rights, we outlined a developing norm that “young adults should have special consideration within the criminal justice system”.<sup>11</sup> We outlined that imposing preventive detention on people in this age group may be problematic due to:

- (a) difficulties accurately assessing risk with respect to young adults; and
- (b) the harmfulness of indeterminate sentences.

### Difficulties assessing risk with respect to young adults

7.8 As we discuss in Chapter 4, assessing a person's risk of reoffending when considering whether to impose preventive detention is problematic because it requires the court to determine the risks a person will reoffend when they are released from prison, likely many years in the future. Research shows that important functions of the brain relating to judgement and impulsivity continue to develop throughout adolescence well into a person's 20s.<sup>12</sup> Predicting the risk of reoffending in the long term for young adults presents additional difficulty because their risk profile may change significantly across this period.<sup>13</sup>

7.9 Risk assessment tools have “limited temporal validity and moderate predictive accuracy” during adolescence.<sup>14</sup> While it is possible to estimate risk over the short term with some

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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.

<sup>9</sup> See *Chief Executive of the Department of Corrections v SRA* [2018] NZHC 1088; and *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 2366. There are also circumstances where an individual committed offending during the time they were a young person but were not charged for this offending until they were older than 18 and subsequently had an ESO imposed: for example *Nepia v Chief Executive of Department of Corrections* [2019] NZHC 2485.

<sup>10</sup> Issues Paper at [5.14]–[5.20].

<sup>11</sup> *Nessa Lynch Young Adults in the Criminal Justice System in Aotearoa New Zealand — a principled framework for reform* (Michael and Suzanne Borrin Foundation, Wellington, 2022) at 27. Issues Paper at [5.21]–[5.25].

<sup>12</sup> See generally, Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, June 2018) at 13.

<sup>13</sup> Jodi L Viljoen, Kaitlyn McLachlan and Gina M Vincent “Assessing Violence Risk and Psychopathy in Juvenile and Adult Offenders: A Survey of Clinical Practices” (2010) 17 *Assessment* 377 at 389.

<sup>14</sup> Anneke T H 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.

degree of accuracy, “estimates of long-term risk are more problematic”.<sup>15</sup> This “might be a result of the unstable nature of attitudes, behaviour, and relationships in this versatile age period”.<sup>16</sup> Risk assessment tools used on young people for the purposes of preventive measures can identify risk but fail to distinguish between those with “minor behavioural problems over a fairly short period of time” and those whose “life trajectory [is] oriented toward more serious and chronic crimes”.<sup>17</sup>

- 7.10 Courts appear aware of this issue and have taken the limitations of risk assessment and the person’s developmental context into account when determining whether to impose preventive measures on young adults.<sup>18</sup> In *Grant v R*, te Kōti Pīra | 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.<sup>19</sup> The Court considered that Mr Grant’s age 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 initial health assessor reports concluding that Mr Grant posed a significant or very high risk of violent reoffending. On appeal, an independent report before the Court affirmed that Mr Grant’s risk of reoffending was very high but also took his age and developmental context into account. The Court accepted the report’s explanation regarding adolescent brain development.<sup>20</sup> In granting the appeal, the Court reasoned that, as Mr Grant matured, his behaviour may become more stable, and he would likely become more receptive to participating in treatment and rehabilitation.<sup>21</sup>

### Harmfulness of indeterminate sentences on young people

- 7.11 As we explain in Chapters 4 and 5, there is evidence that indeterminate sentences of imprisonment generally are harmful for those subject to them. There is limited direct research on the experiences of young adults subject to preventive detention or indeterminate sentences. However, there is reason to suggest that indeterminate sentences may be particularly harmful when imposed on young people and young adults.
- 7.12 Interviewees we spoke with who received an indeterminate sentence at a young age stated that they struggled with the sense of loss and the lack of incentive to take steps

<sup>15</sup> Roy J O’Shaughnessy and Holly T Andrade “Forensic Psychiatry and Violent Adolescents” (2008) 8 *Brief Treatment and Crisis Intervention* 27 at 35.

<sup>16</sup> Anneke T H 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.

<sup>17</sup> Julie Savignac *Tools to Identify and Assess the Risk of Offending Among Youth* (National Crime Prevention Centre – Public Safety Canada, 2010) at 9.

<sup>18</sup> For example *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. Similar caution is also evident with respect to post-sentence orders. For example, in *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 2366, te Kōti Matua | 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.

<sup>19</sup> *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.

<sup>20</sup> *Grant v R* [2017] NZCA 614 at [32].

<sup>21</sup> *Grant v R* [2017] NZCA 614 at [48]–[49] and [55]–[57].

towards rehabilitation and reintegration.<sup>22</sup> In a recent judgment concerning sentences of life imprisonment, the Court of Appeal recognised the detrimental impact of indeterminate sentences on younger people.<sup>23</sup> The Court concluded that a life sentence may have a disproportionate effect on young adults and young people for these reasons:<sup>24</sup>

- (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) If granted release, 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.

7.13 Although a long term of imprisonment as an alternative to a life sentence would not avoid all these effects, the Court considered that it would mitigate them.<sup>25</sup>

7.14 The United Nations Committee on the Rights of the Child recommends 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”.<sup>26</sup> It based its recommendation on the opinion of the Special Rapporteur that life sentences “have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment”.<sup>27</sup> This call for abolition has been echoed in Aotearoa New Zealand by the Office of the Children’s Commissioner, which recommended that the Government prohibit the use of life sentences — a form of indeterminate sentence — for young people convicted of serious offences.<sup>28</sup> While these recommendations relate to young people under the age of 18, there is sufficient similarity regarding the issues to raise questions whether young adults up to age 25 should be exempt from indeterminate sentences as well.

7.15 Finally, as we discuss in Chapter 6, the criminal justice system overall disproportionately impacts Māori. The Māori population is also proportionately younger, meaning that the system as a whole will also therefore even impact young adult Māori. As such, the

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<sup>22</sup> These comments mirror similar ones in interviews conducted in England of young adults serving sentences of imprisonment for public protection: see Melanie Merola “Young offenders’ experiences of an indeterminate sentence” (2015) 17 *Journal of Forensic Practice* 55.

<sup>23</sup> *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.

<sup>24</sup> *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [181]–[190].

<sup>25</sup> *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [180].

<sup>26</sup> 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].

<sup>27</sup> 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].

<sup>28</sup> *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, August 2022) at 75.

negative impacts of indeterminate sentences also fall disproportionately on young adult Māori.<sup>29</sup>

### Preliminary view

- 7.16 In the Issues Paper, we expressed the preliminary view that preventive detention is unlikely to be demonstrably justified as a necessary and proportionate response when imposed on young adults. We stated that post-sentence orders could satisfactorily respond 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. We noted that preventive measures imposed after sentencing may have specific advantages for young adults, including:
- (a) they provide an opportunity for the person to mature neurologically and to engage in rehabilitation prior to being considered;
  - (b) they avoid the adverse impacts of indeterminate imprisonment and parole for life; and
  - (c) risk assessment is more accurate because it addresses current risk rather than risk at the end of a hypothetical sentence of imprisonment.

## RESULTS OF CONSULTATION

- 7.17 Most submitters agreed with the view presented in the Issues Paper that preventive detention is unlikely to be demonstrably justified when imposed on young adults.<sup>30</sup> Dr Jordan Anderson submitted that young adults under 25 years have “greater neuroplasticity than older adults” and “demonstrate greater amenability to rehabilitation”. She noted that including 18-year-olds in the preventive detention regime was not evidence based and should be perceived instead as part of an inclination “to demonstrate political ‘toughness’ on crime”.
- 7.18 Lara Caris submitted that, if post-sentence measures continue, individuals who committed qualifying offending when they were under the age of 18 should not be eligible. Regarding young adults convicted of sexual offending in particular, she said that their risk may be assessed based on factors such as their “attitude towards women” alongside other factors that may be influenced or “damaged” due to their experiences in a “male prison environment”. She submitted that the behaviour and actions of a young person in this context “may warrant a different interpretation” in terms of risk than if those actions were committed by a mature male adult.
- 7.19 Some submitters disagreed with our preliminary view. Te Kāhui Ture o Aotearoa | New Zealand Law Society submitted that, despite the general undesirability of imposing preventive detention on young adults, there still may be “exceptional cases where there are no less restrictive options that can adequately address the safety risks present”. Manaaki Tāngata | Victim Support submitted that young adults are a high-offending age

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<sup>29</sup> See Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand – a principled framework for reform* (Michael and Suzanne Borrin Foundation, Wellington, 2022) at 25.

<sup>30</sup> Dr Jordan Anderson, Bond Trust, Lara Caris, Criminal Bar Association, Dr Tony Ellis, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

group, with many committing sexual or violent offending. Despite their developmental stage, they still present a risk to the community and therefore the option to impose preventive detention should remain. Te Tari Ture o te Karauna | Crown Law Office submitted that, although young people have “excellent prospects of rehabilitation”, preventive detention remains an appropriate sentence for a small number.

- 7.20 We conducted interviews with three people subject to an indeterminate sentence who were aged 20 or younger at the time the sentence was imposed. Two described how their offending was the result of difficult childhood experiences. They said that a better approach would have been to provide them supervision and support as a response to their offending rather than an indeterminate sentence. One interviewee said that indeterminate sentences make it hard for young people who want to change because they are still subject to a long and potentially ongoing sentence. Another said he felt he had missed opportunities to experience his youth.

## PREFERRED APPROACH

- 7.21 As we outline in Chapter 4, our preferred approach includes the repeal of preventive detention and the enactment of preventive measures that are imposed as a post-sentence order. Consequently, the preliminary view we reached in the Issues Paper — that young adults should not be subject to preventive detention — falls away. Instead, our preferred approach addresses whether the new preventive measures should include a minimum age requirement.

### Age of eligibility for preventive measures

#### PROPOSAL

P13

The new Act should require that a person is aged 18 years or older to be eligible for a preventive measure.

- 7.22 In considering the appropriate age of eligibility, we recognise that a small group of young people present a high risk of reoffending.<sup>31</sup> Preventive measures may therefore be necessary and justified to address concerns for community safety. Also, people in young adulthood generally respond well to rehabilitative and reintegrative treatment in comparison to their older counterparts.<sup>32</sup> Potentially, a young person might benefit from the imposition of a preventive measure given our proposals to focus them on treatment. Nonetheless, we accept that the severity of restrictions available under the new Act are unsuitable for imposition on young people. Therefore, we conclude that preventive measures should only apply once a person is aged 18 or over. We note that this is

<sup>31</sup> Stefan Luebbers, Grant Hunter and James RP Ogloff “Understanding and intervening with young offenders: a literature review” in Penny Armytage and James Ogloff *Meeting needs and reducing offending: Youth justice review and strategy — Appendices* (Government of Victoria, July 2017) at 29.

<sup>32</sup> Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand — a principled framework for reform* (Michael and Suzanne Borrin Foundation, Wellington, 2022) at 20; and Beatriz Luna “The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation” (2012) 63 *Hastings Law J* 1469 at 1485.

consistent with the current age of eligibility for a PPO.<sup>33</sup> It also reflects practice and norms that exclude those under 18 from criminal justice approaches that apply to adults.<sup>34</sup>

- 7.23 The age of eligibility we propose applies at the time of imposition, not at the time an offence is committed. It does not eliminate eligibility for a person who committed a qualifying offence before they reach the age of 18. We acknowledge feedback from some submitters that a person should be ineligible if they committed the qualifying offence when they were under 18 years old. In our view, however, this approach would be insufficient to deal with the real risk to community safety posed by some individuals who commit serious offences when under the age of 18. Judging by the case law regarding ESOs and PPOs, we consider that the number of eligible people in this category is quite small. Furthermore, while qualifying offending means a person is eligible for a preventive measure, ultimately our proposed legislative test determines whether a measure is imposed. As a result, imposition of a preventive measure is justified based on the immediate risk posed rather than the prior offending itself.
- 7.24 Our preferred approach would allow for young adults to be subject to a form of indeterminate detention (see our discussion of residential preventive supervision and secure preventive detention in Chapters 15 and 16). We recognise that our proposals may engage similar concerns to applying preventive detention on young adults, particularly the potential to cause feelings of hopelessness and lack of incentive to engage in rehabilitation. However, as we outline above, a small group of young adults present a high risk of reoffending and therefore preventive measures may be necessary and justified to address concerns for community safety. Imposing a higher age of eligibility means there will be a lack of options to protect the community and address the risk they will commit further serious sexual or violent offences. In addition, we consider that the problems with imposing indeterminate detention on this age group are alleviated by other aspects of our preferred approach, in particular:
- (a) Risk assessment should be conducted shortly before the person would otherwise be released into the community. The assessment will therefore be of the immediate risks they present to the community rather than what risks they may present many years into the future.
  - (b) The legislative tests we propose in Chapter 10 require that the court impose restrictions that are proportionate to nature of the person’s risk of reoffending. Contrarily, preventive detention entails prolonged imprisonment as a matter of course.
  - (c) In Chapter 18, we propose that a preventive measure be subject to annual reviews by a review panel as well as reviews by a court every three years. This will ensure

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<sup>33</sup> In comparison, four of the post-sentence regimes that operate in Australia (Victoria, South Australia, New South Wales and Tasmania) set a statutory age of eligibility at 18 years old. The three remaining regimes (Western Australia, Northern Territory and Queensland) however permit the state to apply for orders against those under the age of 18 if they are in custody pursuant to relevant youth justice legislation.

<sup>34</sup> In general, the youth justice system focuses on informal, diversionary and reintegrative responses to offending as well as prioritising the wellbeing and understanding of the individual concerned. In contrast, the adult criminal justice system focuses more on formal responses involving individual accountability, retribution and deterrence: see Nessa Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand – a principled framework for reform* (Michael and Suzanne Borrin Foundation, Wellington, 2022) at 13–14.

restrictions will be in place no longer than necessary and enable a more responsive approach to changes in a person's risk profile.

- (d) As we discuss in Chapter 13, our preferred approach is designed to ensure the better availability of rehabilitative treatment and reintegration support. We suggest that a treatment and supervision plan be prepared to map for the person a path towards restoration to safe and unrestricted life in the community. Legislative guiding principles should require that people subject to a preventive measure are provided with as much autonomy and quality of life as possible while ensuring orderly functioning and safety within a facility.
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**CHAPTER 8**

# Qualifying offences

**IN THIS CHAPTER, WE CONSIDER:**

- what prior offending should make a person eligible for a preventive measure to be sought against them;
- what future offending a person should be at risk of committing for a preventive measure to be imposed on them; and
- proposals for which offences should be qualifying offences under the new Act.

**INTRODUCTION**

- 8.1 Under the current law, a person must have been convicted of a particular offence in order to be eligible for a preventive measure. We refer to these past offences as “qualifying offences”. To impose a preventive measure, a court must be satisfied that the person poses a risk of committing similar offences in the future. We refer to this potential future offending as “further qualifying offences”.
- 8.2 What offences are considered qualifying offences or further qualifying offences are important questions for this review. The qualifying offences define the scope of the preventive regime by helping to define eligibility. The further qualifying offences focus on the type of harm to the community the regimes are designed to protect against.
- 8.3 In this chapter, we consider what offences a person must be convicted of to be eligible for a preventive measure under the new Act. We also consider what should be a further qualifying offence for the purposes of the legislative test to impose a preventive measure.
- 8.4 We explore issues with the current law in relation to qualifying offences, including inconsistencies across the regimes governing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs). We also discuss whether the current set of qualifying offences is appropriately targeted and whether there are some offences that should not be included or other offences, currently omitted, that should be included.
- 8.5 We conclude that eligibility for preventive measures should continue to be based on convictions for qualifying offences and that the new Act should have one set of qualifying offences that make a person eligible for all preventive measures. We propose that these

qualifying offences should, in general, be the same offences as under the current regimes, with the following changes:

- (a) the inclusion of strangulation and suffocation, and imprisonable offences under the Films, Videos, and Publications Classification Act 1993 (FVPC Act); and
- (b) the removal of incest, bestiality and accessory after the fact to murder.

8.6 We do not consider, however, that qualifying offences for the purpose of eligibility should necessarily be the same as further qualifying offences for the purpose of the legislative test for imposition. We explain our reasoning for this and the practical implications of such an approach at the end of this chapter.

## CURRENT LAW

8.7 Currently, a person must have been convicted of a serious sexual or violent offence to be eligible for preventive detention, an ESO or a PPO.<sup>1</sup> Qualifying offences for each of these measures are defined in the relevant legislation.<sup>2</sup> 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.<sup>3</sup> The same set of offences are qualifying offences and further qualifying offences.

8.8 Table 1 in Appendix 1 of this Preferred Approach Paper sets out the relevant qualifying offences for preventive detention, ESOs and PPOs. Qualifying offences are, in general, the same across the three regimes, although there are some differences:

- (a) Three offences relating to indecent acts are qualifying offences for an ESO but not for preventive detention or a PPO:
  - (i) Indecent act with consent induced by threat where the victim is under 16 years old at the time of the offence.
  - (ii) Indecent act on a dependent family member where the victim is under 16 years old at the time of the offence.
  - (iii) Exploitatively doing an indecent act on a person with a significant impairment.
- (b) Murder is a qualifying offence for an ESO and PPO but not preventive detention.
- (c) Abduction of a young person under 16 is a qualifying offence for preventive detention and a PPO but not an ESO.
- (d) Attempts or conspiracies to commit a qualifying offence are qualifying offences for ESOs and PPOs but only for preventive detention if they are separate offences.<sup>4</sup>

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<sup>1</sup> 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 9.

<sup>2</sup> Sentencing Act 2002, s 87(5); Parole Act 2002, s 107B; and Public Safety (Public Protection Orders) Act 2014, s 3 (definition of “serious sexual or violent offending”).

<sup>3</sup> Sentencing Act 2002, s 87(2)(c); Parole Act 2002, s107(2)(b)(i)–(ii); and Public Safety (Public Protection Orders) Act 2014, s 13(1)(b).

<sup>4</sup> 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 112 (s 132(2)), attempted

- (e) Offences under the FVPC Act are qualifying offences for ESOs only.

## ISSUES

### Inconsistencies across the regimes

- 8.9 As highlighted above, there are some differences in qualifying offences across the three regimes. In the Issues Paper, we expressed the view that many of these differences were without any apparent rationale.<sup>5</sup>
- 8.10 We also expressed a preliminary view that it was desirable for preventive measures to fit together as a single, coherent regime.<sup>6</sup> We said using the same list of qualifying offences for all preventive measures would promote clarity and consistency and better enable people to be managed in the least restrictive manner possible. We noted an alternative view that the more restrictive regimes should require a higher threshold of eligibility and so target more serious offending. We considered, however, that the legislative test for imposition should bear the primary responsibility for determining which measure is necessary and appropriate.<sup>7</sup>

### *Inclusion of imprisonable offences in the Films, Videos, and Publications Classification Act 1993*

- 8.11 In discussing inconsistencies in qualifying offences across the three regimes, we drew particular attention to certain imprisonable offences in the FVPC Act, which are qualifying offences for an ESO but not for preventive detention or a PPO.<sup>8</sup> Importantly, these offences will make a person eligible for an ESO, but an ESO will not be imposed on the basis that someone poses a risk of committing another FVPC Act offence in the future — they must pose a risk of committing a further serious sexual or violent offence.
- 8.12 The FVPC Act offences that are qualifying offences all relate to the possession of child sexual abuse material (CSAM).<sup>9</sup> This includes the making,<sup>10</sup> possession<sup>11</sup> or live-streaming

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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).

<sup>5</sup> Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, 2023) (Issues Paper) at [6.18].

<sup>6</sup> Issues Paper at [6.19]–[6.20].

<sup>7</sup> Issues Paper at [6.21]–[6.22].

<sup>8</sup> Issues Paper at [6.24].

<sup>9</sup> We use the terminology of child sexual abuse material (CSAM) throughout this chapter to refer to any objectionable depictions of children. This appears to be the most widely accepted term for this type of material in Aotearoa New Zealand — see for example the definition adopted by Te Tari Taiwhenua | Department of Internal Affairs “What is child sexual abuse material?” (2021) <[www.dia.govt.nz](http://www.dia.govt.nz)>. It can also be referred to as child sexual exploitation material. The term “child pornography” is also widely used in the literature, although this has been criticised in recent years for failing to capture the harmfulness and illegality of these types of materials. See Glossary of Terms in *Literature Review: A Review of the Risk Posed by Internet Offenders* (Risk Management Authority, December 2018) at 5.

<sup>10</sup> Films, Videos, and Publications Classification Act 1993, ss 123–124 (maximum penalty 14 years’ imprisonment).

<sup>11</sup> Films, Videos, and Publications Classification Act 1993, s 131A (maximum penalty 10 years’ imprisonment).

of an objectionable publication,<sup>12</sup> knowing, or having reasonable cause to believe, that the publication is objectionable. Content is “objectionable” if it does any or all of the following:<sup>13</sup>

- (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.

8.13 These offences are all non-contact offences. Any sexual offending involving actual contact with a child or young person would be captured by a Crimes Act 1961 offence.

8.14 In the Issues Paper, we observed that the commission of non-contact FVPC offences does not inevitably indicate a risk of escalation and progression of committing qualifying contact sexual offences in the future.<sup>14</sup> We noted this was “highly dependent” on the individual circumstances of an offender. We sought particular feedback from submitters on the inclusion of FVPC Act offences as qualifying offences.

### Inclusion of insufficiently serious offences

8.15 During preliminary engagement, we heard a concern that indecent assault is not serious enough to justify making a person eligible for a preventive measure. Indecent assault can cover a range of behaviours that can vary significantly in terms of seriousness.<sup>15</sup> Our analysis of the case law suggested that, in cases of indecent assault, the courts apply the legislative tests and only impose ESOs where the circumstances of the offending are serious enough to justify them. In one case, the court declined an application for an ESO, finding that the defendant’s sexually indecent acts were not sufficiently serious to justify its imposition.<sup>16</sup> In contrast, in another case, the indecent assault was found to be severe enough (in addition to a number of other factors) to make a person eligible for preventive detention.<sup>17</sup>

8.16 We sought feedback generally on whether the current qualifying offences are serious enough to justify making someone eligible for a preventive measure.

### Omission of offences similar to qualifying offences

8.17 In the Issues Paper, we identified offences that are similar in nature and seriousness to current qualifying offences but that are not currently included in the legislation:<sup>18</sup>

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<sup>12</sup> Films, Videos, and Publications Classification Act 1993, ss 132C (maximum penalty 14 years’ imprisonment).

<sup>13</sup> Parole Act 2002, s 107B(3). See also Films, Videos, and Publications Classification Act 1993, s 3.

<sup>14</sup> Issues Paper at [6.28].

<sup>15</sup> Issues Paper at [6.15].

<sup>16</sup> *Chief Executive, Department of Corrections v Maindonald* [2018] NZHC 946 at [17].

<sup>17</sup> *Hofmann v Department of Corrections* [2021] NZCA 256.

<sup>18</sup> Issues Paper at [6.30].

- (a) **Dealing in people under 18 for sexual exploitation, removal of body parts or engagement in forced labour.**<sup>19</sup> We noted that this offence frequently involves sexual exploitation and so aligns with existing qualifying offences.<sup>20</sup> We identified two cases where preventive detention was imposed for sexual offending and where this offence was also charged and formed part of their offending behaviour.<sup>21</sup>
- (b) **Wilfully infecting with disease.**<sup>22</sup> We considered that, like acid throwing, which is a qualifying offence, this offence can cause serious physical harm.<sup>23</sup>
- (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.**<sup>24</sup>
- (d) **Female genital mutilation.**<sup>25</sup>
- (e) **Inciting, counselling or procuring suicide, where the victim then commits or attempts to commit suicide.**<sup>26</sup>
- (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.**<sup>27</sup>
- (g) **Ill-treatment or neglect of a child or vulnerable adult in a manner likely to cause suffering, injury or adverse effects.**<sup>28</sup>
- (h) **Failure to protect a child or vulnerable adult from a risk of death, grievous bodily harm or sexual assault.**<sup>29</sup>
- (i) **Other FVPC Act offences punishable by imprisonment.**<sup>30</sup> This would include other offences not already captured by the ESO regime (discussed above), including situations where material is objectionable because it promotes or supports the use of violence or coercion to submit to sexual conduct, bestiality or acts of torture and the infliction of extreme violence or cruelty.<sup>31</sup>
- (j) **Contracting a person under the age of 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.**<sup>32</sup> These offences are not qualifying offences for any of the preventive

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<sup>19</sup> Crimes Act 1961, s 98AA (maximum penalty 14 years' imprisonment).

<sup>20</sup> Issues Paper at [6.34(a)].

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

<sup>22</sup> Crimes Act 1961, s 201 (maximum penalty 14 years' imprisonment).

<sup>23</sup> Issues Paper at [6.34(b)].

<sup>24</sup> Crimes Act 1961, s 204 (maximum penalty 10 years' imprisonment).

<sup>25</sup> Crimes Act 1961, s 204A(2) (maximum penalty seven years' imprisonment).

<sup>26</sup> Crimes Act 1961, s 179(1) (maximum penalty 14 years' imprisonment).

<sup>27</sup> Crimes Act 1961, s 182 (maximum penalty 14 years' imprisonment).

<sup>28</sup> Crimes Act 1961, s 195 (maximum penalty 10 years' imprisonment).

<sup>29</sup> Crimes Act 1961, s 195A(1) (maximum penalty 10 years' imprisonment).

<sup>30</sup> Films, Videos, and Publications Classification Act 1993, ss 3, 124, 127, 129, 131A and 132C (maximum penalties from 1–14 years' imprisonment).

<sup>31</sup> Issues Paper at [6.34(i)].

<sup>32</sup> Prostitution Reform Act 2003, s 23(1) (maximum penalty seven years' imprisonment).

regimes if committed in Aotearoa New Zealand but are qualifying offences if committed overseas. We said this was inconsistent.<sup>33</sup>

### **Strangulation and suffocation**

- 8.18 We drew particular attention to the omission of strangulation or suffocation as a qualifying offence for any of the preventive regimes<sup>34</sup> and expressed a preliminary view that it should be included.<sup>35</sup>
- 8.19 We considered its omission was related to the timing of the creation of the offence. The offence of strangulation or suffocation was enacted in 2018. Prior to this, strangulation or suffocation was charged using the assault provisions of the Crimes Act. Preventive detention was therefore imposed on the basis of offending that amounted to strangulation or suffocation but was charged as a different qualifying offence such as wounding with intent to cause grievous bodily harm.<sup>36</sup> We noted that, if the same behaviour was now charged under the new offence, the person would not be eligible for preventive detention.

### **Inclusion of offences not targeted at community safety**

- 8.20 The aim of the preventive regimes is to protect the community from serious reoffending. In the Issues Paper, we noted that some current qualifying offences may not be necessary or effective to achieve that aim.<sup>37</sup> We sought feedback on two offences, which to our knowledge have never on their own formed the basis for the imposition of a preventive measure: incest<sup>38</sup> and bestiality.<sup>39</sup> We expressed a preliminary view that neither incest nor bestiality should be qualifying offences for preventive measures.<sup>40</sup>
- 8.21 We considered incest could be distinguished from other qualifying sexual offences on the basis that a lack of consent is not an element of the offence. Any cases of incest involving non-consensual activity or sexual offending against a child or vulnerable adult would fall under other qualifying offences. Additionally, there is some evidence that incest offending has lower rates of recidivism than other kinds of sexual offending.<sup>41</sup>
- 8.22 Similarly, we queried whether the inclusion of bestiality as a qualifying offence addresses the policy aim of protecting the community from serious reoffending because it does not involve direct harm or threat of harm to another person.<sup>42</sup> Furthermore, although there is

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<sup>33</sup> Issues Paper at [6.34(j)].

<sup>34</sup> Crimes Act 1961, s 189A (maximum penalty seven years' imprisonment).

<sup>35</sup> Issues Paper at [6.35].

<sup>36</sup> See for example *Greathead v R* [2014] NZCA 49.

<sup>37</sup> Issues Paper at [6.37].

<sup>38</sup> Crimes Act 1961, s 130 (maximum penalty 10 years' imprisonment).

<sup>39</sup> Crimes Act 1961, s 143 (maximum penalty seven years' imprisonment).

<sup>40</sup> Issues Paper at [6.46] and [6.51].

<sup>41</sup> See for example the health assessor's remarks in *R v J* HC Auckland CRI-2006-092-16336, CRI-2006-092-1337, 1 April 2008 at [59].

<sup>42</sup> Issues Paper at [6.48].

a lack of scientific research on the topic, there is no established link between bestiality and the risk of sexual or violent offending against humans.<sup>43</sup>

### Scope of further qualifying offences

8.23 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. In a separate chapter of the Issues Paper, we outlined concerns we heard through preliminary engagement that some of the current qualifying offences may not be serious enough to justify the imposition of a preventive measure when a person is at risk of committing them in the future. In particular:<sup>44</sup>

- (a) indecent assault, as noted above, spans a spectrum of behaviour, some of which may be very serious and some less so;
- (b) incest and bestiality, again as noted above, may not represent serious enough harm; and
- (c) attempts or conspiracies to commit qualifying offences do not entail the same level of harm to the community as if the offence is in fact committed.

## RESULTS OF CONSULTATION

### Inconsistencies across the regimes

8.24 We asked submitters whether qualifying offences should be the same for all preventive measures. The majority of submitters supported using the same qualifying offences.<sup>45</sup> This was largely due to a preference for consistency across the regimes and to better allow for consideration of the imposition of the least restrictive option possible. Te Tari Ture o te Karauna | Crown Law Office did not have a “strong view” on the issue but agreed with our view in the Issues Paper that some of the inconsistencies across the current regimes lacked an obvious explanation. In contrast, some other submitters considered there may be good reasons for some of the differences. In particular, murder is excluded from preventive detention as it already attracts an indeterminate sentence.<sup>46</sup>

8.25 Some submitters disagreed that the same offences should be qualifying offences for all preventive regimes.<sup>47</sup> The South Auckland Bar Association “strongly disagreed” with the suggestion and commented that different behaviour underlies types of offending, which should be addressed in alternative ways. It supported having separate offences for different measures to allow for specific considerations and criteria to inform the assessment of risk.

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<sup>43</sup> Brian Holoyda, Ravipreet Gosal and K Michelle Welch “Bestiality Among Sexually Violent Predators” (2020) 48(3) American Academy of Psychiatry and the Law 358.

<sup>44</sup> Issues Paper at [8.21].

<sup>45</sup> Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service. Additionally, Dr Tony Ellis noted his decision to not engage with the question on the basis of his view that the sentence of preventive detention should be abolished.

<sup>46</sup> Te Tari Ture o te Karauna | Crown Law Office, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>47</sup> South Auckland Bar Association, The Law Association.

- 8.26 The New Zealand Council for Civil Liberties (NZCCL) and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) both specifically mentioned that qualifying offences should be the same for offences committed domestically as for offences committed overseas. We address overseas offending further in Chapter 9.

### ***Inclusion of imprisonable offences under the Films, Videos, and Publications Classification Act 1993***

- 8.27 We did not receive many submissions on the inclusion of imprisonable offences under the FVPC Act.<sup>48</sup> One submitter, the Crown Law Office, considered that they should be qualifying offences under the new regime. It commented that these offences are already deemed sufficiently serious to attract an ESO and that, although there are a range of maximum penalties, the most serious offence attracts a maximum penalty of 14 years' imprisonment, which is in fact higher than the maximum penalty for indecently assaulting a child under 12 in section 132(3) of the Crimes Act.<sup>49</sup> It further noted that some offenders convicted of CSAM offences will present a risk of actual offending against children and that the underlying tendencies involved in CSAM offending warrant the availability of more intensive and lengthier supervision and treatment than is available under standard parole release conditions.
- 8.28 The NZCCL opposed the inclusion of FVPC Act offences as qualifying offences on the basis that none of them were serious enough to warrant inclusion.
- 8.29 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service said the issue warranted further consideration, particularly on the links between non-contact and future contact offending.

### ***Inclusion of insufficiently serious offences***

- 8.30 We asked submitters whether each of the current qualifying offences are sufficiently serious to justify making a person eligible for a preventive regime. Three submitters agreed that the current qualifying offences were generally appropriate.<sup>50</sup>
- 8.31 The majority of submitters commented on specific qualifying offences.<sup>51</sup> In particular, submitters shared their views on the appropriateness of including indecent assault as a qualifying offence. The Crown Law Office and the NZLS supported its inclusion on the basis that it can cover serious offending. The Crown Law Office noted that its inclusion would not automatically result in the imposition of a preventive measure as a judge will consider the facts of each case, including the seriousness of offending, before imposing a measure.

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<sup>48</sup> Te Tari Ture o te Karauna | Crown Law Office, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>49</sup> Crimes Act 1961, s 132(3): "Everyone who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years".

<sup>50</sup> Criminal Bar Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

<sup>51</sup> Te Tari Ture o te Karauna | Crown Law Office, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association. Additionally, Dr Tony Ellis noted his decision to not engage with the question on the basis of his view that the sentence of preventive detention should be abolished.



- 8.32 Other submitters opposed the inclusion of indecent assault as a qualifying offence.<sup>52</sup> These submitters were concerned about less serious offending being captured by the inclusion of indecent assault as a qualifying offence and did not consider this could be justified. The Law Association and the Public Defence Service commented that concerns about the lack of seriousness of indecent assault were a factor in the repeal of the previous Three Strikes legislation. The Bond Trust supported an approach that would see generic offences like indecent assault subdivided into categories based on the severity of the actual behaviour.
- 8.33 The remainder of responses to this question focused on the appropriateness of some other offences as qualifying offences.<sup>53</sup> The Law Association, the NZLS and the South Auckland Bar Association commented on the offence of accessory after the fact to murder. They all said this offence covered a wide range of behaviour – from providing food to a family member who is a suspect to disposing of evidence relevant to the investigation – and that behaviour on the lower end of the scale might not be sufficiently serious to justify the imposition of a preventive measure. The NZLS commented that, as the assistance is provided after the fact, no actual violence is involved and so it is questionable whether the behaviour poses an ongoing risk to the safety of the community.
- 8.34 The Public Defence Service queried the inclusion of two offences as qualifying offences: organising or promoting child sex tours and meeting a young person following grooming. It considered that organising or promoting child sex tours was serious enough to be included but that it did not fit logically with the rehabilitation and reintegration focus of preventive regimes as, unlike other types of child sex offending, it was likely to be driven by financial gain. In relation to meeting a young person following grooming, it noted that it was analogous to an attempt to commit a sexual offence, which, on its own, was not a qualifying offence for preventive detention or a PPO.
- 8.35 Finally, The Law Association drew attention to robbery as another offence where the seriousness of the behaviour could vary greatly. It gave the example of an unarmed offender making a threat under the pretence of having a weapon.

### Omission of offences similar to qualifying offences

- 8.36 In the Issues Paper, we specified a number of offences that we considered analogous to existing qualifying offences but that are not included in current legislation. We asked submitters for their views on whether these should be included as qualifying offences.
- 8.37 The majority of submitters who responded to this question were opposed to the inclusion of these specified offences as qualifying offences.<sup>54</sup> These submitters cautioned generally against extending qualifying offences given the highly restrictive nature of preventive measures. Some submitters considered that the offences identified in the Issues Paper

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<sup>52</sup> New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>53</sup> Te Tari Ture o te Karauna | Crown Law Office, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>54</sup> Criminal Bar Association, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

were extremely rare and that repeat offending was unlikely.<sup>55</sup> The South Auckland Bar Association commented that the “addition of extra charges must be reserved for the serious offending that is frequently featuring in our courts”. It also underlined the undesirability of adding qualifying offences and exposing an increasing number of offenders (a disproportionate number of whom may be Māori) to harsh preventive measures.

- 8.38 Only one submitter, the NZLS, considered that the offences identified in the Issues Paper should be qualifying offences — with the possible exception of offences under the Prostitution Reform Act 2003 (suggestion (j) in the Issues Paper) involving the contracting of commercial sexual services from a person under the age of 18. It was concerned that some of these offences are strict liability (for example, it could cover situations where the person committing the offence was unaware that the person they were contracting with for sexual services was in fact under the age of 18) and that this was inappropriate to qualify a person for “the most serious penalties available in our criminal justice system”.
- 8.39 Submitters made comments on a number of specific offences:
- (a) **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 (suggestion (c) in the Issues Paper).** The Public Defence Service did not consider this offence fits with the purpose of the regime, noting that offending was “unlikely to be repeated, will typically arise in a very specific set of circumstances and likely do not involve a general public safety risk”.
  - (b) **Female genital mutilation (suggestion (d) in the Issues Paper).** The South Auckland Bar Association felt there were gradations of behaviour within the offence of female genital mutilation and that there should be more culturally sensitive ways of addressing this offending than imposing preventive measures.
  - (c) **Inciting, counselling or procuring suicide, where the victim then commits or attempts to commit suicide (suggestion (e) in the Issues Paper).** The Public Defence Service considered this did not fit with the purpose of the regime on the basis that it was “unlikely to be repeated, will typically arise in a very specific set of circumstances and likely do not involve a general public safety risk”. The South Auckland Bar Association expressed concern about the large number of young adults engaging in behaviour on social media that would be caught by this offence. It considered the imposition of preventive measures on young adults with diminished brain maturity to be particularly inappropriate.
  - (d) **Ill-treatment or neglect of a child or vulnerable adult in a manner likely to cause suffering injury or adverse effects (suggestion (g) in the Issues Paper) and failure to protect a child or vulnerable adult from a risk of death, grievous bodily harm or sexual assault (suggestion (h) in the Issues Paper).** The Public Defence Service suggested that these offences did not fit with the purposes of the preventive regimes. It said these offences are likely to occur in relation to a small and easily identifiable pool of victims (usually family members) and so there is no general public safety risk. Additionally, these offences are unlikely to be repeated as the child or vulnerable adult involved will be removed from the person’s care. The Public Defence

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<sup>55</sup> Criminal Bar Association, South Auckland Bar Association, The Law Association.

Service also commented that these offences are largely due to social issues such as addiction or socio-economic status, which seem to be outside the ambit of what preventive regimes are aimed at.

- (e) **Other FVPC Act offences punishable by imprisonment (suggestion (i) in the Issues Paper).** The Public Defence Service referred to its response to an earlier question addressing FVPC offending and urged further consideration of the inclusion of FVPC Act offences. It noted that the suggestion to include images of bestiality was at odds with the proposal to remove bestiality as a qualifying offence (discussed further below).

### *Strangulation and suffocation*

- 8.40 In the Issues Paper, we expressed a preliminary view that strangulation should be a qualifying offence and asked submitters whether they agreed. Submitters in favour of its inclusion pointed to the level of risk a conviction for strangulation or suffocation carries.<sup>56</sup> The Bond Trust considered it represents a “clear and apparent escalation of the seriousness of offending and as such the breadth of risk and imbalance needing to be managed”. Similarly, the NZLS referred to evidence that strangulation forms part of “an ongoing pattern of violence in family relationships”. The NZCCL regarded its omission to be inconsistent with the handling of other qualifying offences of similar severity and suggested it was the result of administrative oversight rather than intention.
- 8.41 Neither the Public Defence Service nor the South Auckland Bar Association supported the inclusion of strangulation and suffocation as a qualifying offence. They did not agree that its omission was an administrative oversight and thought Parliament had made a conscious decision not to amend the relevant legislation to include it as a qualifying offence. Both submitters expressed concern that it is a very commonly charged offence and therefore could substantially increase the number of orders being sought.
- 8.42 The South Auckland Bar Association commented further on the practical implications of including strangulation as an offence. It noted that a charge of strangulation is often laid as part of a negotiation with an accused and “almost always” withdrawn in exchange for a guilty plea on a lesser charge. It suggested it would be inappropriate to expose defendants facing such a charge to a preventive measure. Finally, it commented that studies linking strangulation and homicide in the context of family violence predominantly come from overseas. As this behaviour is frequently dictated by socio-economic and cultural variances, it suggested that research should be carried out in Aotearoa New Zealand before drawing conclusions.
- 8.43 Two submitters expressed more mixed views. The Criminal Bar Association agreed that strangulation is a serious offence and an identified precursor to murder. However, it also noted that it only attracts a seven-year maximum penalty, significantly lower than many of the other maximum penalties attached to qualifying offending. It suggested that it should perhaps be included as a qualifying offence only if there is a persistent and repeated pattern of strangulation or serious violence in a family relationship.
- 8.44 The Law Association noted the mixed views of its members. On the one hand, strangulation can present as serious and repeated offending and may be justified as a

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<sup>56</sup> Bond Trust, Dr Tony Ellis, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

qualifying offence if it demonstrates a pattern of serious domestic violence. On the other hand, and similarly to the South Auckland Bar Association, it noted that strangulation was frequently charged but often later withdrawn or dismissed. Although some studies from overseas have shown a correlation between strangulation and future homicide, The Law Association did not see this as determinative. Other studies show a number of other factors that indicate a higher risk of homicide in the context of family violence than strangulation but that are not qualifying offences, for example, use or threatened use of a weapon or threats to kill.

### Inclusion of offences not targeted at community safety

- 8.45 We asked submitters for their views on whether incest and bestiality should be removed as qualifying offences. The majority of submitters agreed incest should be removed.<sup>57</sup> Submitters agreed with the reasoning outlined in the Issues Paper that it could be distinguished from other sexual offending as it was generally consensual and rates of recidivism were low. Most submitters recognised that, if the behaviour was not consensual, it would likely be charged in the form of other offences that are qualifying offences.
- 8.46 Two submitters expressed caution. The NZLS commented that it is difficult to accept that there can be genuine consent in cases of incest and that “arguments can be made in support of its retention”. The Crown Law Office, while not expressing a clear view either way, referred to one case as an example of where a preventive measure for incest may have prevented further offending.<sup>58</sup> We have also received feedback from other stakeholders that supports its retention.
- 8.47 The responses to the question of removing bestiality as a qualifying offence were more finely balanced. Some submitters supported its removal on the basis that it does not address the policy aim of keeping the public safe because there is no established link between bestiality and sexual offending against humans and harm to animals is not sufficiently serious to warrant preventive measures.<sup>59</sup> However, one of these submitters, the South Auckland Bar Association, considered its removal should be “parked” until sufficient research is available in Aotearoa New Zealand on the link between bestiality and sexual offending against humans.
- 8.48 Other submitters supported retaining bestiality as a qualifying offence. The Law Association, the Bond Trust and the Criminal Bar Association all considered bestiality to be deeply disturbing behaviour that could be an indicator of a person’s risk of future offending.

### Scope of further qualifying offences

- 8.49 We asked submitters whether they thought there were any issues with further qualifying offences (the offences a person must pose a risk of committing in order for the court to

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<sup>57</sup> Bond Trust, Criminal Bar Association, Dr Tony Ellis, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>58</sup> *T v R* [2016] NZCA 148.

<sup>59</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

impose a preventive measure). The majority of submitters did not address this question in detail and referred to their earlier answers on what should be a qualifying offence for the purpose of eligibility.<sup>60</sup>

- 8.50 Some submitters commented specifically on the inclusion of attempts and conspiracies as further qualifying offences.<sup>61</sup> The Public Defence Service and South Auckland Bar Association both considered it was inappropriate that attempts and conspiracies to commit a qualifying offence could justify the imposition of a preventive measure. The Public Defence Service observed that an inchoate offence does not entail the same level of harm as the actual offence. It expressed particular concern that the inclusion of attempts and conspiracies may capture some people who themselves chose not to go through with an offence.
- 8.51 The Crown Law Office and the NZLS said they supported the continued inclusion of inchoate offences as qualifying offences. Although these offences do not result in the same level of actual harm in the community, they can serve as a strong indicator of risk, and the fact that somebody was stopped before they could follow through does not alter that.

## PREFERRED APPROACH

- 8.52 We propose that the new Act should continue to require that a person be convicted of a particular offence in order to be eligible for a preventive measure. We make various proposals as to what offences should be included as a “qualifying offence”.
- 8.53 We also consider that, to impose a preventive measure, the court must be satisfied that a person poses a risk of committing similar offending in the future – a “further qualifying offence”. For reasons we expand on below, we consider some “further qualifying offences” should differ from “qualifying offences”.

### Qualifying offences for the purposes of eligibility

#### PROPOSAL

P14

The new Act should continue to require that a person has been convicted of a qualifying offence in order to be eligible for a preventive measure.

### *The role of qualifying offences*

- 8.54 We consider that the use of qualifying offences as a trigger for eligibility for a preventive measure should continue. We acknowledged in the Issues Paper that a list of qualifying offences is a “blunt tool” for identifying eligibility.<sup>62</sup> A conviction for a previous offence is

<sup>60</sup> Bond Trust, Criminal Bar Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association.

<sup>61</sup> Te Tari Ture o te Karauna | Crown Law Office, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

<sup>62</sup> Issues Paper at [6.13].

not necessarily an accurate indicator of the seriousness of a person's offending due to the way offences are framed and charged. Prosecutorial decisions about charging or plea arrangements may result in someone being convicted on a lesser charge. There may be other equally or more serious offenders in the community who simply have not been detected.

- 8.55 Nevertheless, we favour this approach for the following reasons. First, it is the only principled and practical way to administer eligibility for a preventive measure. If a previous conviction was not required for eligibility, the public at large would be eligible for preventive measures. The state would be required to use some sort of monitoring and surveillance to identify risk and therefore eligibility. It would be unworkable and unethical to monitor the riskiness of all members of the public. Of the comparable jurisdictions we examined, all require conviction for specific (sexual or violent) offences in order to impose a preventive measure.<sup>63</sup>
- 8.56 Second, the imposition of a preventive measure represents a severe limitation of people's rights and freedoms. For this reason, as we observed in the Issues Paper, it is important that the legislation clearly defines when someone may be eligible for such a measure.<sup>64</sup> An approach based on qualifying offences, plainly set out in statute, provides that clarity and certainty and clearly conveys to someone whether they may be considered for a preventive measure.<sup>65</sup>
- 8.57 Third, although risk factors for future offending are complex and individualised, it is clear that one of the most stable and significant predictors of future offending is previous offending.<sup>66</sup> This is what rationally connects this approach to the aim of the preventive regime — to protect the community from the harm caused by serious reoffending. We emphasise here that it is not the past conviction itself that triggers consideration of a preventive measure but the person's risk of reoffending assessed on the basis of their previous conduct.
- 8.58 Finally, there has been little serious criticism in the case law or literature of the use of qualifying offences as a criterion for eligibility. Additionally, no submitters in consultation questioned this approach. We also consider that the bluntness of this approach can be addressed through the application of the legislative tests (outlined in Chapter 10). Qualifying offences do not, on their own, justify the imposition of a preventive measure. It is for the court, in applying the legislative tests for imposition, to ensure that a preventive measure is appropriately imposed, taking into account the individual's

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<sup>63</sup> See for example Australia (Crimes (High Risk Offenders) Act 2006 (NSW), s 4A; Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 5; Penalties and Sentences Act 1992 (Qld), s 162; Serious Offenders Act 2018 (Vic), s 8; High Risk Serious Offenders Act 2020 (WA), s 5; Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 7; Sentencing Act 2017 (SA), s 57); Canada (Criminal Code RSC 1985 c C-46, s 752.01 "Dangerous Offenders and Long-term Offenders"); and Germany (German Criminal Code (Strafgesetzbuch — StGB), s 66).

<sup>64</sup> Issues Paper at [6.10]. The Legislations Design and Advisory Committee's *Legislation Guidelines* also state that "legislation that overrides fundamental rights and values must use clear and unambiguous wording". Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [4.10].

<sup>65</sup> This aligns with one of the fundamental objectives, as set out in the Legislation Design and Advisory Committee's *Legislation Guidelines*, that "legislation should be accessible for users — legislation should be able to be easily found by citizens, easy to navigate, and understand". Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 9.

<sup>66</sup> Lucy Moore *Literature Review — Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 14. See also *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [10] and [45].

previous offending and the level of risk they pose. Qualifying offences are, however, also relevant to the imposition of those legislative tests as they require the court to be satisfied that a person is at high risk of committing a *further* qualifying offence if a preventive measure is not imposed. We return to this point below.

- 8.59 Subject to our proposals on the addition and removal of a small number of offences discussed below, we consider qualifying offences for the current regimes should continue as qualifying offences in the new Act. As we conclude above, a conviction for a serious offence is the most reliable indicator of a risk that a person will seriously offend again in future. The question then is whether these offences target sufficiently serious offending.

### **A focus on serious sexual and violent offending**

- 8.60 We consider the law governing preventive measures should continue to focus on the prevention of sexual and violent offending. This is because of the seriousness of this type of offending.

- 8.61 There is no single agreed definition in the literature on what is meant by “serious” offending. Whether an offence is deemed to be “serious” will depend on the audience or purpose for which the determination of seriousness is being sought.<sup>67</sup> There are various ways in which seriousness can be assessed, including:

- (a) common-sense or intuitive judgements about what is serious (surveys of public opinion tend to rely on these more intuitive judgements);<sup>68</sup>
- (b) quantitative assessment and classification of offences by assigning a harm value to each offence;<sup>69</sup>
- (c) consideration of the philosophy and psychology of harm, which can draw on ideas of harm, culpability and assessment of the values society wishes to protect;<sup>70</sup> or
- (d) by reference to maximum penalties on the basis that these should reflect the relative seriousness of an offence.<sup>71</sup>

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<sup>67</sup> For example, the idea of what constitutes serious offending from the perspective of victims or the broader community may be different to the perspective of those working in the criminal justice system. It may also vary depending on the jurisdiction, the setting, the specifics of the topic being researched or the research author themselves. Lucy Moore *Literature Review – Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023)

<sup>68</sup> See for example Te Tāhū o te Ture | Ministry of Justice *Te Rangahau o Aotearoa mō te Taihara me te Haumarutanga 2014 | 2014 New Zealand Crime and Safety Survey* (2015).

<sup>69</sup> See for example Sophie Curtis-Ham and Darren Walton “The New Zealand Crime Harm Index: Quantifying Harm Using Sentencing Data” (2017) 12 *Policing* 455, based on work by Lawrence Sherman and others “The Cambridge Crime Harm Index: Measuring Total Harm from Crime Based on Sentencing Guidelines” (2016) 10 *Policing* 171 at 171. Te Aka Matua o te Ture | Law Commission also developed a quantitative tool for measuring the harm caused or risked by particular offences in its report *Maximum Penalties for Criminal Offences* (NLZC SP21, 2013) at [3.9].

<sup>70</sup> See for example Joel Feinberg *Harm to Others: The Moral Limits of the Criminal Law Volume One* (Oxford University Press, Oxford, 1984); and Andrew Von Hirsch and Nils Jareborg “Gauging Criminal Harm: A Living Standard Analysis (1991) 11 *Oxford J Legal Stud* 1.

<sup>71</sup> Te Aka Matua o te Ture | Law Commission *Maximum Penalties for Criminal Offences* (NZLC SP21, 2013). See discussion at [2.3]–[2.10].

- 8.62 One commonality in these different approaches to assessing seriousness is that sexual or violent offending always tends to be considered “serious”.<sup>72</sup> This is due to sexual or violent offending causing direct interpersonal harm both through immediate physical harm and often longer-term emotional harm.<sup>73</sup> This is reflected in legislative and policy responses to sexual and violent offending, for example, in these offences attracting longer maximum penalties and in approaches to sentencing. This suggests some general coalescence in policy and legislative spheres around the idea that sexual and violent offending is “serious”.
- 8.63 This approach is also reflected in the current approach to qualifying offences under the preventive detention, ESO and PPO statutes, which all target sexual and violent offending. We do not propose departing from this approach. We consider it reflects generally accepted ideas of “seriousness” based on whichever metric. Furthermore, with the exception of some specific offences discussed further below, submitters to our consultation did not raise concerns about the broad scheme of qualifying offences. This suggests a tacit acceptance of the seriousness of most of the offences currently targeted by the regimes. Accordingly, we stand by our preliminary view expressed in the Issues Paper that the current regimes target a small number of appropriately serious sexual and violent offences.
- 8.64 As noted above, inconsistencies across the existing regimes mean there are some offences that are not qualifying offences for all three measures of preventive detention, ESOs and PPOs. Our proposal for the continued inclusion of qualifying offences listed at Table 1 in Appendix 1 would mean that any offence that is currently a qualifying offence for the purposes of only one or two measures would be a qualifying offence for all preventive measures under the new Act.

## PROPOSAL

P15

Qualifying offences should be the same for all preventive measures under the new Act.

- 8.65 We consider that the qualifying offences should be the same for all preventive measures under the new Act. As we discuss in Chapter 4, our preferred approach is for a single, post-sentence regime to govern all preventive measures. This approach responds to the fragmentation of the law across the three current regimes, which hinders and sometimes prevents the imposition of the most appropriate measure. Our proposals for a new Act are aimed at creating a comprehensive source of law to link and govern all preventive measures and facilitate the imposition of the least restrictive measures appropriate in the circumstances. Using the same list of qualifying offences for all measures aligns with that approach. There was near unanimity among submitters on this point. They agreed that it would best promote clarity and consistency of application.

<sup>72</sup> Lucy Moore *Literature Review — Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 3.

<sup>73</sup> Lucy Moore *Literature Review — Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 4.



- 8.66 We note the views of some submitters, however, that there should be a gradation of offences so that only the most serious offending gives rise to eligibility for the most restrictive preventive measures. We do not agree with this approach. We consider our proposed legislative tests for the imposition of preventive measures (outlined in Chapter 10) will ensure that the necessary and appropriate measure is imposed in the circumstances, taking into account a number of different factors.
- 8.67 Additionally, the legislative test and, therefore, the justification for imposing a preventive measure is centred on the risk of future offending. Risk is not necessarily determined by the seriousness of previous offending. For example, someone may have committed a very serious offence but pose less of a risk of reoffending than someone who has committed a less serious offence. It would be inaccurate, therefore, to base eligibility for a particular measure solely on the type of qualifying offending.

## PROPOSAL

### P16

To be eligible for a preventive measure under the new Act, a person must have been convicted of an offence set out in Table 1 in Appendix 1 with the following amendments:

- a. The offence of strangulation and suffocation (section 189A of the Crimes Act 1961) should be added as a qualifying offence.
- b. The following offences should be removed as qualifying offences:
  - i. Incest (section 130 of the Crimes Act 1961).
  - ii. Bestiality (section 143 of the Crimes Act 1961).
  - iii. Accessory after the fact to murder (section 176 of the Crimes Act 1961).

- 8.68 In the Issues Paper, we observed that qualifying offences have two primary functions in the determination of eligibility under the current regimes:<sup>74</sup>
- (a) To identify potential candidates for a preventive measure — the aim of the preventive regimes is to protect the community from the harm caused by serious reoffending. Therefore, qualifying offences must be rationally connected to the risk of committing a similar offence in the future.
  - (b) To contribute to ensuring the regimes target sufficiently serious offending — the harm to the community posed by the risk of reoffending must be of such a degree that it can justify making a person eligible for an order. This is because the imposition of a preventive measure involves a serious restriction on a person's rights and freedoms.
- 8.69 We take these two functions as our rationale for deciding whether an offence should be included as a qualifying offence. We consider that, for inclusion, an offence must both be rationally connected to the aim protecting the community from serious reoffending and represent a serious enough harm to justify making someone eligible for a preventive measure.

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<sup>74</sup> Issues Paper at [6.8].

### Continued inclusion of existing offences

- 8.70 Subject to our proposals on the addition and removal of a small number of offences discussed below, we consider qualifying offences for the current regimes should continue as qualifying offences in the new Act. As we conclude above, a conviction for a serious offence is the most reliable indicator of a risk that a person will seriously offend again in future. We have also explained our conclusion that, in general, the regimes are appropriately targeted at serious sexual and violent offending.
- 8.71 As noted above, inconsistencies across the existing regimes mean that there are some offences that are not qualifying offences for all three measures of preventive detention, ESOs and PPOs. Our proposal for the continued inclusion of qualifying offences listed at Table 1 in Appendix 1 would mean that any offence that is currently a qualifying offence for the purposes of only one or two measures would be a qualifying offence for all preventive measures under the new Act.

### Indecent assault

- 8.72 We propose that indecent assault should continue to be a qualifying offence under the new Act. Some submitters were concerned about the inclusion of indecent assault on the basis that it would capture low-level offending that was not serious enough to justify the imposition of a preventive measure.<sup>75</sup> Many of these submitters noted that this concern was, in part, a reason for the repeal of the previous Three Strikes legislation.
- 8.73 As we reasoned in the Issues Paper and as noted by other submitters,<sup>76</sup> indecent assault can involve behaviour that is very serious.<sup>77</sup> It is our view that offending at this more serious end can result in harm the community should be protected from and, therefore, that a preventive measure may be an appropriate response. We consider the application of the legislative tests for imposition will ensure that preventive measures will not be imposed when the risk of reoffending relates to less serious behaviour.

### Attempts and conspiracies

- 8.74 For the avoidance of doubt, our proposal would mean that an attempt or conspiracy to commit a qualifying offence would also be a qualifying offence. Currently, attempts and conspiracies are only qualifying offences for some offences and some preventive measures. We have proposed above that qualifying offences should be the same for all preventive measures.
- 8.75 In the Issues Paper, we questioned whether the inclusion of attempts and conspiracies was rationally connected to the purposes of the regime as they do not themselves entail the same level of actual harm to the community.<sup>78</sup> We consider that attempts or conspiracies are an indicator of the seriousness of an offence even though no actual harm was caused. As the Crown Law Office noted, the fact that somebody was thwarted —

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<sup>75</sup> New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>76</sup> Te Tari Ture o te Karauna | Crown Law Office, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>77</sup> In the Issues Paper at [6.16], we referred to *Hofmann v Department of Corrections* [2021] NZCA 256 where the charges of indecent assault included following and grabbing the victim, forcefully removing her clothing and underwear, sucking on her breast and placing her hand on his penis.

<sup>78</sup> Issues Paper at [8.21(c)].

often through “sheer luck” — before they could follow through does not change the fact that an attempt or conspiracy can pre-empt extremely serious offending. Attempts or conspiracies can therefore be an indicator of risk of future offending in the same way as any other serious offending. For this reason, we consider attempts and conspiracies should remain as qualifying offences for the purpose of eligibility.

- 8.76 We take a different view, however, on their inclusion as a further qualifying offence, which we discuss in more detail below.

#### Prostitution Reform Act 2003 offences

- 8.77 Currently, the offences under the Prostitution Reform Act of contracting or causing or encouraging a person under 18 to provide sexual services or receiving payment derived from commercial sexual services provided by someone under 18 are qualifying offences only if committed by a New Zealand citizen or resident overseas but not if committed domestically.<sup>79</sup> This set of offences seems to have deliberately targeted overseas offending as an attempt to address child sex tourism.<sup>80</sup>

- 8.78 We conclude that these offences should remain as qualifying offences and should be so regardless of whether they are committed domestically or overseas.<sup>81</sup> These offences may cover behaviour that is part of the commission of other (qualifying) offences such as indecent acts or sexual connection with a child or young person. They may also cover behaviour that is only preparatory and does not involve any actual physical contact with the person under 18 such as making arrangements for the provision of commercial sexual services without following through. Both sets of behaviour are an indicator of the risk of further serious offending regardless of whether it takes place in Aotearoa New Zealand or overseas. For reasons we elaborate on below, however, we propose that this offence should be a qualifying offence for eligibility only and not a further qualifying offence.

#### Imprisonable offences under the Films, Videos, and Publications Classification Act 1993

- 8.79 We propose that the imprisonable offences under the FVPC Act that are currently qualifying offences for an ESO should be qualifying offences for all preventive measures under the new Act.<sup>82</sup> Our conclusion on this point is finely balanced. Additionally, we did not receive detailed feedback from submitters on the inclusion of FVPC Act offences in

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<sup>79</sup> Prostitution Reform Act 2003, s 23(1); and Crimes Act 1961, s 144A(1).

<sup>80</sup> (30 March 1995) 547 NZPD (Crimes Amendment Bill No 2, Report of the Justice and Law Reform Committee — Alec Neill).

<sup>81</sup> This approach aligns with the continued inclusion of the offence of organising or promoting child sex tours (Crimes Act 1961, s 144C) as a qualifying offence. Similarly to the Prostitution Reform Act 2003 offences discussed here, this offence can be capable of facilitating or causing serious offending. See also *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [48].

<sup>82</sup> As set out in Parole Act 2002, s 107B(3), this includes any offence under the Films, Videos, and Publications Classification Act 1993 “if the offence is punishable by imprisonment and any publication that is the subject of the offence is objectionable because it does any or all of the following: (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”.

the new regime.<sup>83</sup> For these reasons, we would particularly welcome views on this proposal.

- 8.80 The relevant FVPC Act offences are non-contact offences. They do not involve any physical contact with a child or young person and typically involve the possession and viewing of CSAM. Any contact offending involved in the commission of an FVPC Act offence would be covered by a number of other qualifying offences.
- 8.81 We propose that this type of non-contact offending be qualifying offending because it can be relevant to the assessment of risk of someone committing a future contact child sexual offence. This reason informs our conclusion, discussed further below, that the relevant FVPC Act offences should be qualifying offences but not further qualifying offences. In applying the legislative tests for the imposition of a preventive measure, the court should be concerned with whether a person presents a high risk of going on to commit a contact sexual offence against a child or young person and not with whether they present a high risk of committing further FVPC Act offending. We expand on this point in our discussion of further qualifying offending below.
- 8.82 An approach focused on FVPC Act offending as an indicator of risk of contact offending reflects the original objective of bringing FVPC Act offences within the scope of the ESO regime. The select committee that recommended the inclusion of these offences as qualifying offences for ESOs did so with the intention of ensuring that:<sup>84</sup>

... those offenders convicted of child pornography offences and sentenced to prison will be assessed to determine whether they are likely in the future to commit a sexual offence under Part VII of the Crimes Act 1961 involving a child under 16. Those offenders in this category who are assessed as medium-high or high risk of offending against children would be the subject of an application for an extended supervision order.

- 8.83 The available literature cautions against viewing any move between non-contact and contact child sex offending as a straightforward or linear progression.<sup>85</sup> Child sexual offending has been described as a “complex phenomenon which is best explained by considering various factors” rather than something that can be explained by a direct causal relationship with the possession and viewing of CSAM.<sup>86</sup> This is reflected in internationally recorded rates of “progression” from non-contact to contact offending, which range from 0 to 2.7 per cent.<sup>87</sup> This is misaligned with general public perceptions of

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<sup>83</sup> Three submitters commented on this issue: Te Tari Ture o te Karauna | Crown Law Office supported the inclusion of FVPC Act offending under the new regime, New Zealand Council for Civil Liberties opposed it and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service considered the issues warranted “further consideration”.

<sup>84</sup> Parole (Extended Supervision) and Sentencing Amendment Bill 2004 (88-2) (select committee report) at 10.

<sup>85</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 70, 75 and 106.

<sup>86</sup> Jennifer A McCarthy “Internet sexual activity: A comparison between contact and non-contact child pornography offenders” (2010) 16 *Journal of Sexual Aggression* 181 at 183.

<sup>87</sup> See Thomas H Cohen “Building a Risk Tool for Persons Placed on Federal Post-Conviction Supervision for Child Sexual Exploitation Material Offenses: Documenting the Federal System’s Past, Current, and Future Efforts” (2023) 87 *Federal Probation Journal* 19 at 23; Philip Howard and others *Escalation in the severity of offending behaviour* (UK Ministry of Justice, 2023) at 18 and 56–57; Ian A Elliott and others “Reoffending rates in a U.K. community sample of individuals with convictions for indecent images of children” (2019) 43 *Law and Human Behaviour* 369; Kelly M Babchishin and others “Child sexual exploitation materials offenders: A review” (2018) 23 *European Psychologist* 130; and Jennifer A

risk that someone who has committed non-contact child sexual offences is more likely to commit contact sexual offences in the future.<sup>88</sup>

- 8.84 The literature does, however, point to a possible relationship or interaction between non-contact child sexual offending and contact child sexual offending. The scientific literature on this issue has coalesced around two typologies for non-contact offenders: those who use the internet to engage in online sexual behaviours and facilitate sexual fantasy (fantasy-driven offenders) and those who are driven by a desire to shift their engagement towards contact sexual offending (contact-driven offenders).<sup>89</sup> There are also some people who will engage in both non-contact and contact offending – referred to as “dual offenders” in the literature.<sup>90</sup> In these cases, it is not always clear what type of offence came first and whether there is a linear pathway that goes from non-contact offending to contact offending.<sup>91</sup> Some offenders may commit parallel offences of viewing CSAM and sexually assaulting children and young people.<sup>92</sup> There is also the possibility of “undetected offending” – either that a contact offender may have also committed undetected non-contact offending or that a non-contact offender may have committed contact offences that have not been reported – meaning that the number of dual offenders may be higher than officially recorded.<sup>93</sup>
- 8.85 The literature suggests it is possible to distinguish between fantasy-driven and contact-driven offenders and so identify when someone may be at risk of being a dual offender. The general consensus is that there are more differences than similarities between fantasy-driven and contact-driven offenders.<sup>94</sup> These two groups present with distinct offending profiles and motivations as well as different criminogenic and treatment

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McCarthy “Internet sexual activity: A comparison between contact and non-contact child pornography offenders” (2010) 16 *Journal of Sexual Aggression* 181. See also Christopher Dowling and others *Patterns and predictors of reoffending among child sexual offenders: A rapid evidence assessment* (Australian Institute of Criminology, August 2021) at 11 and 13.

<sup>88</sup> See for example Chad Steel and others “Public Perceptions of Child Pornography and Child Pornography Consumers” (2022) 51 *Archives of Sexual Behavior* 1173; Carissa Byrne Hessick “Disentangling Child Pornography from Child Sex Abuse” (2011) 88 *Wash U L Rev* 853; and Anita Lam, Jennifer Mitchell and Michael C Seto “Lay Perceptions of Child Pornography Offenders” (2010) 52 *Canadian Journal of Criminology and Criminal Justice* 173.

<sup>89</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 9 and 25–32. See also Kelly M Babchishin and others “Child Sexual Exploitation Materials Offenders” (2018) 23 *European Psychologist* 130 at 133; Hannah L Merdian and others “Fantasy-Driven Versus Contact-Driven Users of Child Sexual Exploitation Material: Offender Classification and Implications for Their Risk Assessment” (2018) 30 *Sexual Abuse* 230 at 246 and 248–249; and Sarah J Brown “Assessing the risk of users of child sexual exploitation material committing further offences: a scoping review” (2024) 30 *Journal of Sexual Aggression* 1 at 2. See also Kelly M Babchishin, R Karl Hanson and Heather VanZuylen “Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children” (2015) 44 *Arch Sex Behav* 45 at 58. See generally the discussion about motivation of offenders in Jennifer A McCarthy “Internet sexual activity: A comparison between contact and non-contact child pornography offenders” (2010) 16 *Journal of Sexual Aggression* 181 at 184–185.

<sup>90</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 43.

<sup>91</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 75–76.

<sup>92</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 70.

<sup>93</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 75.

<sup>94</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 46.

needs.<sup>95</sup> The literature distinguishes between particular characteristics of each group of offenders and identifies disparities relating to:<sup>96</sup>

- (a) individual factors such as socio-demographic characteristics, violent and criminal histories, emotional and sexual problems, personality traits and other related issues;
- (b) cognitive distortions pertaining to justification for their behaviour and the sexual agency of children;
- (c) victim factors, including differences in victim characteristics and empathy for victims; and
- (d) how offenders engage with CSAM, including how they collect and use these materials and their reasons for doing so.

8.86 Additionally, research suggests there are a number of factors that may increase the risk of a non-contact offender progressing to a contact offence.<sup>97</sup> These can include:

- (a) access to children in an offline context, which may enable contact offending;<sup>98</sup>
- (b) criminal histories, with contact offenders and dual offenders being more likely to have a greater history of prior offending — in particular, violent offending;<sup>99</sup>
- (c) an increased presence of antisociality such as “acting out and over-assertiveness”,<sup>100</sup> which has been described as “the key risk factor” in making the transition from non-contact internet offending to contact offending;<sup>101</sup> and
- (d) possession and viewing of increased amounts of, and more extreme, CSAM.<sup>102</sup>

8.87 On this basis, our view is that the evidence suggests it is possible — on the basis of particular characteristics and risk factors — to distinguish between those offenders who pose particular risks of committing both non-contact and contact child sexual offences and those who will not. This would be assessed using a combination of risk assessment tools and clinical judgement. We recognise it may not always be possible to make this distinction with absolute certainty. We consider, however, that missing offenders who can be identified as posing particular risks of committing contact child sexual offences outweighs the detriment of identifying a large cohort of offenders, many of whom will not pose a risk of committing future contact offending.

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<sup>95</sup> Hannah L Merdian and others “Fantasy-Driven Versus Contact-Driven Users of Child Sexual Exploitation Material: Offender Classification and Implications for Their Risk Assessment” (2018) 30 *Sexual Abuse* 230 at 232–233.

<sup>96</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 44.

<sup>97</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 11.

<sup>98</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 11, 47, 61, 64, 75, 79–80 and 91.

<sup>99</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 10–11, 54, 71–72 and 75.

<sup>100</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 55, 65, 73, 75 and 83.

<sup>101</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 75.

<sup>102</sup> Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 11, 62, 75 and 82.

- 8.88 We view the risk of someone reoffending in future with a contact child sexual offence as a more compelling reason to include the relevant FVPC Act offences as qualifying offences than these offences being sufficiently serious in and of themselves to warrant inclusion. This is not to say that these offences are not harmful or are victimless offences. The predominant harm is to those depicted in the materials – not just the sexual violation at the time the content was created but the long-term psychological and emotional trauma that can be exacerbated by the repeated and perpetual exposure of the content online.<sup>103</sup> It is possible that the viewing of CSAM and the ease of access in the internet age creates a demand that drives supply.<sup>104</sup> However, it would be at odds with the approach to qualifying offences – which focuses on direct interpersonal harm – to treat this as the harm that the community should be protected against through the imposition of a preventive measure.
- 8.89 The inclusion of these FVPC Act offences may have a widening effect on the preventive regime. The viewing of CSAM is not uncommon behaviour.<sup>105</sup> The behaviour may be increasing with advances in technology and internet access meaning it is easier to access and share CSAM.<sup>106</sup> The inclusion of FVPC Act offences as qualifying offences will expose a large number of offenders to the possibility of a preventive measure, with a knock-on effect for resourcing at the health assessor and court level. We consider that this can be justified.
- 8.90 Materially, we do not anticipate the inclusion of FVPC Act offending as qualifying offences across the whole regime would lead to an increase in the numbers of preventive measures imposed. As we have noted above, recorded rates of progression from non-contact to contact child sexual offending are very low. Current practice also reflects a cautious approach to imposition of ESOs. Te Kōti Pīra | Court of Appeal has said that not every relevant FVPC Act offence will be regarded as serious offending for the purposes of imposing an ESO.<sup>107</sup> In practice, it appears that, where ESOs are imposed on the basis on FVPC Act offending, the person also has a history of contact offending.<sup>108</sup> We also note

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<sup>103</sup> Ateret Gewirtz-Meydan and others “The complex experience of child pornography survivors” (2018) 80 *Child Abuse & Neglect* 238–248 at 249; and Te Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Addressing Child Pornography and Related Offending* (August 2012) at [17]. See also the comments of Walker J in *R v Christian* [2023] NZHC 3509 that “the filming and distribution of images of this abuse perpetuates the horror and victimises the children each and every time it is viewed” (at [20]).

<sup>104</sup> Richard Wortley “Situational Prevention of Child Abuse in the New Technologies” in Ethel Quayle and Kurt Ribisl (eds) *Understanding and Preventing Online Exploitation of Children* (Routledge, London, 2012).

<sup>105</sup> In 2023, there were 611 finalised charges for objectionable publication offences involving child exploitation materials, 61 per cent (376) of which resulted in a conviction: Te Tāhū o te Ture | Ministry of Justice *Justice data tables – sexual offences* (March 2024).

<sup>106</sup> Compare, for example, the 611 finalised charges for objectionable publication offences involving child exploitation materials in 2023 to 154 finalised charges in 2014: *Justice data tables – sexual offences* (Te Tāhū o te Ture | Ministry of Justice, March 2024). We note that there may be other reasons for the increase, including better detection or increased reporting of CSAM offending. See also Te Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Addressing Child Pornography and Related Offending* (August 2012) at [16]; and United Nations Office on Drugs and Crime *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children* (May 2015) at 15–19.

<sup>107</sup> *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [48].

<sup>108</sup> See for example *Sloss v Chief Executive of the Department of Corrections* [2024] NZCA 226 (where possession of objectionable images was seen as relevant to the conclusion that the offender had a “pervasive pattern of serious sexual offending”) at [45]; *Clark v Chief Executive of the Department of Corrections* [2016] NZCA 119; and *Williamson v Department of Corrections* [2014] NZHC 98.

a recent case where a judge declined to impose preventive detention as it was not a proportionate response and the least restrictive outcome “when all but one of the offences relates to the possession of child sexual exploitation material and given the circumstances of that offending”.<sup>109</sup>

### **Addition of qualifying offences**

- 8.91 With the exception of the offence of strangulation and suffocation, we do not propose the addition of any other new offences as qualifying offences under the new Act.
- 8.92 In the Issues Paper, we consulted on 10 new offences that we considered were similar in nature and seriousness to existing qualifying offences.<sup>110</sup> We observed that, on one hand, the inclusion of some offences but the exclusion of other similarly serious offences could be seen as arbitrary. On the other hand, we recognised that caution should be exercised in expanding the scope of the preventive regimes without sufficient justification.
- 8.93 On reflection, we favour a more cautious approach to the development of qualifying offences under the new Act. This recognises the severity of preventive measures and the restrictions they place on a person’s rights and freedoms. As we have expressed elsewhere in this Preferred Approach Paper, there needs to be a strong justification for the imposition of a preventive measure. We consider, similarly, that there must be a strong justification for widening the scope of eligibility for preventive measures and thus exposing a greater number of individuals to the possibility of imposition. We have found little such justification in the case law, the literature or submissions to our review. Among submitters, there was little or no support for classifying these proposed offences as qualifying offences. Indeed, the vast majority of submitters were opposed to these proposed offences being qualifying offences for a preventive measure.<sup>111</sup>
- 8.94 Commenting more specifically on the inclusion of strangulation as a qualifying offence, the South Auckland Bar Association remarked more generally that the addition of qualifying offences has the “undesirable effect of exposing increasing numbers of offenders (most likely those from Māori backgrounds)” to be subject to harsh preventive measures. Although systemic issues such as the overrepresentation of Māori within the prison and criminal justice system are beyond the scope of this review, we are conscious of not exacerbating existing inequities without good reason.
- 8.95 We do not consider that the exclusion of these new offences as qualifying offences means that the current set of qualifying offences, which we propose taking forward, is arbitrary. In contrast, there are good reasons for distinguishing between them. Although the new offences on which we consulted are serious — indeed, sometimes similarly serious to existing qualifying offences — we do not consider that they are rationally connected to the aim of the preventive regime. By that we mean that they may not be necessary or effective to protect the community from the risk of serious reoffending.

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<sup>109</sup> *R v Christian* [2023] NZHC 3509 at [103].

<sup>110</sup> Issues Paper at [6.34].

<sup>111</sup> Criminal Bar Association, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.



8.96 We make the following observations on the specific offences:

- (a) **Dealing in people under 18 for sexual exploitation, removal of body parts or engagement in forced labour.** We did not receive any feedback on this specific offence from submitters. We observed in the Issues Paper that at least two people who were sentenced for this offence were also sentenced to preventive detention for other offences relating to the same behaviour.<sup>112</sup> Our conclusion from this is that the behaviour in this offence will often either involve the commission of another qualifying offence (for example, sexual offending against a young person or the causing of grievous bodily harm, injuring with intent or aggravated wounding or injury) or be carried out in conjunction with other qualifying offences. As such, we do not consider it necessary to manage the risk of serious reoffending to include this as a stand-alone qualifying offence. Furthermore, the component of “engagement in forced labour” (which covers behaviours such as people trafficking and modern slavery) does not, on its own, encompass the type of sexual and violent interpersonal harm targeted by other qualifying offences.
- (b) **Wilfully infecting with disease.** Again, we did not receive any specific feedback on this offence from submitters. This offence has typically been charged in cases involving the intentional transmission of human immunodeficiency virus (HIV). Even then, it has been charged only rarely and, to our knowledge, not successfully prosecuted as it is often charged alongside other offences (many of which would be qualifying offences, for example, wounding with intent or causing grievous bodily harm).<sup>113</sup> In this context, we again question the necessity of including it as a stand-alone qualifying offence.
- (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.** We agree with the view of the Public Defence Service that this offence is “unlikely to be repeated, will typically arise in a very specific set of circumstances and likely do[es] not involve a general public safety risk”. We agree that the offence is typically committed in specific circumstances that are unlikely to be repeated. For this reason, we do not consider the inclusion of this as a qualifying offence would be necessary or effective to keep the community safe from serious reoffending.
- (d) **Female genital mutilation.** In contrast to other qualifying offences, female genital mutilation takes place within a very specific cultural and social context.<sup>114</sup> The motivations for a person committing this offence are likely to be very different from other types of offenders.<sup>115</sup> Potential future victims of female genital mutilation within particular communities are more easily identifiable than potential future victims of

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<sup>112</sup> *Nelson v R* [2017] NZCA 407; and *Ellmers v R* [2013] NZCA 676.

<sup>113</sup> A search of Westlaw and Lexis Nexis databases in May 2024 for cases returned, for example, two reported cases involving a charge of infecting with disease under s 201 of the Crimes Act 1961. In *R v Mwai* [1995] 3 NZLR 149, (1995) 13 CRNZ 273, for example, Mr Mwai was later convicted of causing grievous bodily harm and criminal nuisance as the judge concluded this case involved recklessness rather than wilful harm, making the charge of causing grievous bodily harm with intent or reckless disregard for safety the more appropriate one (at 3).

<sup>114</sup> Crimes (Definition of Female Genital Mutilation) Amendment Bill 2019 (194-2) (select committee report) at 2.

<sup>115</sup> The World Health Organization states that “the reasons why FGM is performed vary from one region to another as well as over time and include a mix of sociocultural factors within families and communities”: World Health Organization *Female Genital Mutilation* (5 February 2024) <[www.who.int/news-room](http://www.who.int/news-room)>.

other types of sexual and violent offending. As such, there may be other more culturally and socially targeted preventive interventions that are more appropriate and effective than a blanket approach using a preventive measure (for example, addressing the practice through education and “community-based empowerment programmes”).<sup>116</sup>

- (e) **Inciting, counselling or procuring suicide, where the victim then commits or attempts to commit suicide.** As with the offence of preventing or impeding a person to save his or her own life or the life of another (discussed at (c) above), it is most likely that this offence will arise in a very specific set of circumstances that are unlikely to be repeated. Again, for this reason, we do not consider the inclusion of this as a qualifying offence would be necessary or effective to keep the community safe from serious reoffending.
- (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.** Again, we did not receive submitter feedback on this specific offence. This offence has been used to prosecute people who have assaulted pregnant women in a manner that causes the death of a foetus.<sup>117</sup> In reported cases where this offence has been charged and successfully prosecuted, the perpetrator has also been convicted of other qualifying offences, including causing grievous bodily harm. For this reason, we do not consider that the inclusion of this offence as a stand-alone qualifying offence is necessary to address the potential harms caused by reoffending.
- (g) **Ill-treatment or neglect of a vulnerable adult in a manner likely to cause suffering, injury or adverse effects, and failure to protect a child or vulnerable adult from a risk of death, grievous bodily harm or sexual assault.** Some submitters drew an analogy with the offence of incest, which we proposed removing in the Issues Paper, in that these offences are likely to occur in relation to a very small and identifiable pool of victims (usually a family member) and as such do not present a general public safety risk. We agree that the circumstances of this offence are unlikely to be replicated in future. Where there is a risk of further offending (for example, someone being released from prison and returning to their family situation), this risk can be managed in other ways (for example, by identifying and removing the victim or other potential victims from the person’s care).
- (h) **Other imprisonable FVPC Act offences.** These offences include the viewing of objectionable material that promotes or supports (a) the use of violence or coercion to compel a person to participate in sexual conduct, (b) bestiality or (c) acts of torture or the infliction of extreme violence or cruelty. We discuss in detail above the inclusion of imprisonable FVPC Act offences relating to CSAM as qualifying offences. Our conclusion on this point is finely balanced. At this stage, we do not consider it appropriate to widen the scope of FVPC Act offences included as qualifying offences more broadly. Additionally, our conclusion on including FVPC Act offences relating to CSAM as qualifying offences rests on the relevance of non-contact child sexual

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<sup>116</sup> Ayan Said and Peter Simunovich “Female Genital Mutilation: Challenges in practice and policy within New Zealand” (2014) *Pacific Health*. See also Crimes (Definition of Female Genital Mutilation) Amendment Bill (194-2) (select committee report), which concluded that other non-legislative measures such as national Police guidelines and educational programmes were also needed to reduce the incidence of female genital mutilation in Aotearoa New Zealand (at 5).

<sup>117</sup> Te Aka Matua o te Ture | Law Commission *Alternative approaches to abortion law* (NZLC MB4, 2018) at [11.14]–[11.17].

offending to the assessment of risk of future contact child sexual offending. As we explore above, there is a volume of psychological research that has examined the relationship between viewing CSAM and committing contact child sexual offences. We have not been able to identify the same level of research on any relationship between these other specific FVPC Act offences and sexual or violent offending.

- (i) **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.** We have addressed above the extension of this offence from being a qualifying offence only when committed overseas to being a qualifying offence regardless of where it is committed.

8.97 Finally, we note that most of these offences are rarely charged.<sup>118</sup> Furthermore, there was no widespread concern among submitters about the current exclusion of these offences from qualifying offences under the current regimes. This suggests to us that there is not a concern or problem in practice that there are a large number of serious offenders, posing a risk to the public, who are not being captured by the current regime.

### Strangulation and suffocation

8.98 We propose that the offence of strangulation and suffocation be included as a qualifying offence under the new Act.<sup>119</sup>

8.99 The harm caused by strangulation or suffocation is serious. In its report recommending the creation of a new offence of strangulation, Te Aka Matua o te Ture | Law Commission described the act of strangulation as “very serious criminal behaviour”.<sup>120</sup> This was described both in terms of the serious physical harm caused to a victim<sup>121</sup> and the psychological effects of strangulation in the context of family violence. In this context, it is a “unique” tool of coercion that is used by abusers to traumatise and control: “abusers do not strangle to kill, but to show that they *can* kill”.<sup>122</sup>

8.100 The harm posed to the community by this offence is not just the physical and psychological effects of strangulation itself<sup>123</sup> but the risk that it poses of an escalation in behaviour. This is particularly relevant in the context of family violence where it is most

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<sup>118</sup> Detailed charging statistics for these offences are not available in publicly available justice statistics. However, there are very few reported cases available on many of these offences. A search of Westlaw and Lexis Nexis databases in May 2024 for cases returned, for example, two reported cases involving a charge of infecting with disease under s 201 of the Crimes Act 1961, no reported cases involving charges of female genital mutilation under s 204A of the Crimes Act 1961, no reported cases involving charges of impeding rescue under s 204 of the Crimes Act 1961, two reported cases involving charges of killing an unborn child under s 182 of the Crimes Act 1961 and nine reported cases involving charges of aiding and abetting suicide under s 179 of the Crimes Act 1961.

<sup>119</sup> Crimes Act 1961, s 189A.

<sup>120</sup> Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [1.14].

<sup>121</sup> Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.7]–[2.10].

<sup>122</sup> Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NLZC R138, 2016) at [2.16].

<sup>123</sup> See Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.7]–[2.11].

prevalent.<sup>124</sup> Strangulation in family violence circumstances is linked to higher risk of a future fatal attack by the perpetrator on the victim.<sup>125</sup> The most widely cited statistic, from a 2004 American study, is that women who were murdered by their partners were 9.9 times more likely to have been strangled than women who were abused but not strangled.<sup>126</sup> The underrecognition of this risk was a significant factor in the Commission's decision to recommend the creation of a specific offence in 2016.<sup>127</sup>

8.101 Not all submitters were convinced by this assessment of risk. The South Auckland Bar Association was critical of the evidence base for the links between strangulation and homicide, pointing out that these studies have not been carried out in Aotearoa New Zealand and that, given socio-economic and cultural variances can often dictate behaviours, local analysis is needed before drawing conclusions. However, we do not consider the existing evidence can easily be dismissed. This is because of the (likely underreported)<sup>128</sup> prevalence of strangulation in the family violence context<sup>129</sup> and the prevalence of family violence<sup>130</sup> and family violence homicide<sup>131</sup> in Aotearoa New Zealand more generally. As the Commission observed in 2016, an increased risk does not mean that a fatal attack will occur, merely that there is a greater chance it will occur:<sup>132</sup>

However, the consequences are for the victim to die, so it is important that this increased risk is understood and taken into account by any person who is making decisions about the victim or the perpetrator of strangulation.

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<sup>124</sup> The Commission commented that strangulation is not confined to this context and that it can feature in “stranger” assaults. However, strangulation was “strongly correlated” with intimate partner violence, and this was the focus of its review: Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.17]. In our discussion in this Preferred Approach Paper, we proceed on the basis that it is most common in the context of family violence. In line with the approach of the New Zealand Family Violence Clearinghouse, we use “family violence” as an umbrella term covering both intimate partner violence (violence caused by a current or former intimate partner, regardless of whether they are or were living together) and violence in other types of close interpersonal relationships within families or groups fulfilling the function of family. See New Zealand Family Violence Clearinghouse “Frequently Asked Questions” <[www.nzfvc.org.nz](http://www.nzfvc.org.nz)>.

<sup>125</sup> Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [8.2].

<sup>126</sup> Jacquelyn Campbell and others “Research Results From a National Study of Intimate Partner Homicide: The Danger Assessment Instrument” (2004).

<sup>127</sup> Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [8.2]–[8.5].

<sup>128</sup> “Research indicates that over 67 per cent of family harm events are not reported”: Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2020/21* (November 2021) at 6.

<sup>129</sup> See Te Tāhū o te Ture | Ministry of Justice *Justice data tables – sexual offences* (March 2024).

<sup>130</sup> It is estimated that 30 per cent of New Zealand women have experienced at least one incident of physical violence by a partner: Janet Fanslow and others “Change in prevalence rates of physical and sexual intimate partner violence against women: data from two cross-sectional studies in New Zealand, 2003 and 2019” (2021) *BMJ Open* at 5. This compares with 22 per cent of women in other OECD countries: OECD *Society at a Glance 2019: OECD Social Indicators* (2019) at 126. See also Te Tāhū o te Ture | Ministry of Justice *Justice data tables – sexual offences* (March 2024). In 2023, there were 30,532 finalised charges for family violence offences, representing 15 per cent of all charges finalised in court. See also Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2022/23* (December 2023) at 8. In 2022/23, Police carried out 177,452 family harm investigations, a 49 per cent increase since 2017.

<sup>131</sup> Ngā Pirihimana o Aotearoa | New Zealand Police statistics suggest that between 2007 and 2021, approximately 15 per cent of homicide victims were killed by a partner: Ngā Pirihimana o Aotearoa | New Zealand Police *Police Statistics on Homicide Victims in New Zealand 2007–2021* (June 2024) at 9.

<sup>132</sup> Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.31].

- 8.102 The Law Association cited the 9.9 figure in its submission but noted that this was in fact lower than a number of other factors that indicate an increased risk of homicide in family violence, for example, the use or threatened use of a weapon in an assault (20.2 times the risk of being murdered) or threatening to kill (14.9 times the risk). They queried the logic of including strangulation as a qualifying offence but not these behaviours. We do not agree there is inconsistency. Threats (whether to kill or to use a weapon), while severely distressing to the recipient, do not fall into the same category of causing serious interpersonal harm that is represented in qualifying offences. The actual use of a weapon in an assault would likely be captured by existing qualifying offences such as aggravated assault or, in some cases, specific offences regarding the use of firearms.
- 8.103 The Public Defence Service queried whether the inclusion of strangulation as a qualifying offence was rationally connected to the policy aims of preventive measures to protect the community from the risk of reoffending. It suggested that, as strangulation normally arises in the context of family violence, it could not be said to be an offence that posed a risk to the community at large. We disagree. Strangulation in the context of family violence can pose a wider public safety risk. In contrast to incest (discussed below) and abuse or neglect of a child or vulnerable adult (discussed above), where victims are limited and easily identifiable, family violence behaviours can persist and repeat across multiple relationships.<sup>133</sup> Additionally, at a policy level, we consider that the prevalence of family violence in Aotearoa New Zealand (disproportionate to other developed countries) makes this an issue of public concern.<sup>134</sup>
- 8.104 The Public Defence Service also doubted whether a preventive measure would appropriately address the underlying causes of strangulation in the context of family violence. Similar concerns have been noted by the courts. In *Department of Corrections v Gray*, which involved various counts of male assaults female between Mr Gray and his partner, the Court declined to impose an ESO.<sup>135</sup> This was partly on the basis that it would not “prevent, let alone seriously mitigate against the risk” of Mr Gray forming an intimate partner relationship that would develop the kind of violence contemplated.<sup>136</sup> The Court did not consider the standard conditions of an ESO to be well directed to the situation, giving the example of the requirement for Mr Gray to remain at a particular address — something that may in fact increase the risk of violence by restricting his ability to leave. Other conditions such as requiring a probation officer’s consent to a change of employment were not relevant to the risk at all. Additionally, in the event that any risk

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<sup>133</sup> Matthew P Bland and Barak Ariel “Serial Domestic Abuse” in *Targeting Domestic Abuse with Police Data* (Springer, Cham, 2020) at 115; Amanda L Robinson “Serial Domestic Abuse in Wales: An Exploratory Study Into its Definition, Prevalence, Correlates, and Management” (2017) 12 *Victims & Offenders* 643 at 645–646 and 652–653; and Anthony Morgan, Hayley Boxall and Rick Brown *Targeting repeat domestic violence: Assessing short-term risk of reoffending* (Australian Institute of Criminology, No. 552, June 2018) at 8.

<sup>134</sup> It is estimated that one in three women will experience family violence in the course of their life, meaning that Aotearoa New Zealand has the highest rates of family violence among OECD countries: Anna Leask “Family violence study: ‘Startling’ number of women at risk of death by abuser” *New Zealand Herald* (online ed, 14 May 2024).

<sup>135</sup> *Department of Corrections v Gray* [2021] NZHC 3558.

<sup>136</sup> *Department of Corrections v Gray* [2021] NZHC 3558 at [56].

began to manifest, there were other mechanisms that could be used to respond to that such as a current or future partner seeking a protection order.<sup>137</sup>

- 8.105 We do not take this case as authority that an ESO (or other preventive measure) will always be ineffective in responding to the risk of family violence. There may be other cases where the standard or special conditions of an order will be more relevant and effective. This was acknowledged by the Court in *Gray*, where it was held that conditions relating to drug and alcohol consumption and prohibitions on residing at a particular address may have practical value.<sup>138</sup> We agree, however, that a preventive measure will not always be appropriate. This underlines the importance of the application of the legislative tests in determining when a preventive measure will be appropriate and justified.
- 8.106 Some submitters queried whether strangulation is always a serious offence. Both South Auckland Bar Association and The Law Association said that it can cover a range of behaviours and that many people are charged with strangulation simply because a minor assault may have occurred around the neck and chest area. In our view, however, the fact strangulation or suffocation can be extremely serious means that it should be a qualifying offence. Where a charge of strangulation involves less serious behaviour, the imposition of a preventive measure can be excluded through the application of the legislative tests.
- 8.107 We note too that various policy responses to strangulation have coalesced around it being a serious offence. The decision to create a stand-alone offence for strangulation and suffocation — with a maximum seven-year penalty — was in recognition of the seriousness of the offence and the desire to prevent it from being “downplayed”, “minimised” or charged as a less serious offence.<sup>139</sup>
- 8.108 In the Issues Paper, we considered that strangulation would have been included as a qualifying offence had it existed at the time of the enactment of the preventive regimes. We note that, prior to 2018, offending that amounted to strangulation would have been charged as a qualifying offence (for example, wounding with intent to cause grievous bodily harm).<sup>140</sup>
- 8.109 The South Auckland Bar Association disagreed that it was Parliament’s intention for strangulation to be a qualifying offence. It said Parliament had the option of imposing a 10 or 14-year maximum penalty but chose to limit it to seven years, suggesting it did not intend for it to bear the same level of culpability as other serious offending. Additionally, it said that Parliament had the option of amending the legislation concerning preventive measures to include it as a qualifying offence but chose not to. We disagree. There are a number of seven-year maximum penalty offences included as qualifying offences that are equally serious, for example, indecent assault, wounding with intent and aggravated wounding or injury. We consider it plausible that the failure to amend the preventive statutes upon the introduction of strangulation as a specific offence to include it as a

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<sup>137</sup> *Department of Corrections v Gray* [2021] NZHC 3558 at [59].

<sup>138</sup> *Department of Corrections v Gray* [2021] NZHC 3558 at [59].

<sup>139</sup> New Zealand Government “Strong evidence for a new strangling offence” (press release, 8 March 2016).

<sup>140</sup> See for example *Greathead v R* [2014] NZCA 49.

qualifying offence was an oversight rather than a deliberate policy decision to exclude it.<sup>141</sup>

- 8.110 Finally, we acknowledge that the inclusion of strangulation and suffocation as a qualifying offence will have a widening effect on the regime by increasing the number of people eligible for preventive measures under the new Act. Strangulation is a frequently charged offence: 4,936 individuals have faced finalised charges for strangulation or suffocation since 2018, with 2,313 of these individuals subsequently being convicted.<sup>142</sup> It is clear that strangulation could significantly widen the scope of the preventive regime and the number of people exposed to it. For the reasons set out above, we consider this can be justified. Additionally, we do not consider liberal charging of this offence will be a problem in practice as eligibility for a preventive measure will depend on a conviction. The legislative tests for imposition will operate to ensure that preventive measures are only imposed when appropriate and justified.
- 8.111 Including strangulation or suffocation as a qualifying offence may increase the number of cases considered by the court. It may also have an impact on resourcing needs and cause delays to determining applications due to the increased demand for health assessor reports. However, we do not consider that additional demands on resources is an appropriate reason, on its own, to exclude strangulation as a qualifying offence. In this case, the clear reasons that justify inclusion outweigh concerns about resourcing. As we discuss in Chapter 11, resourcing implications with regard to court time and the availability of health assessors will need to be addressed and adequately accommodated.

### Removal of qualifying offences

- 8.112 There are some offences we consider should be removed as qualifying offences because they are neither necessary nor effective in protecting the community from serious reoffending or because they are not sufficiently serious to justify making someone eligible for a preventive regime.

### Incest

- 8.113 We propose that incest should not be a qualifying offence. Submitters almost unanimously agreed with the reasoning set out in the Issues Paper.<sup>143</sup> We observed that incest can be distinguished from other qualifying sexual offences because the lack of consent tends not to be an element of the offence. Where incest is charged, it usually involves consenting adults, leading the Court of Appeal to state that, in the cases charged as incest, the court must proceed on the basis that the offending involved “true consent, freely given by a person who was in a position to make a rational decision”.<sup>144</sup> Where the incestuous behaviour is non-consensual or involves a particularly vulnerable victim or a

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<sup>141</sup> There is no mention of preventive detention, ESOs or PPOs in the parliamentary debates on the second and third reading of the Family Violence (Amendments) Act 2018 (which enacted the offence of strangulation) — see (6 November 2018) 734 NZPD 8065 (third reading) and (11 September 2018) 732 NZPD 6430 (second reading). Preventive detention, ESOs or PPOs for strangulation offences were also not considered by the Justice and Electoral Committee in its report (Family and Whānau Violence Legislation Bill (247-2) (select committee report)).

<sup>142</sup> Te Tāhū o te Ture | Ministry of Justice *Justice data tables – sexual offences* (March 2024).

<sup>143</sup> Issues Paper at [6.38]–[6.46].

<sup>144</sup> *B (CA 817/2011) v R* [2012] NZCA 260 at [13].

child or young person, the perpetrator will invariably be charged with other sexual offences that are qualifying offences.

- 8.114 We also noted in the Issues Paper that incest offending has, by its nature, low rates of recidivism. Given the narrow and finite pool of potential victims (incest is only an offence within particular degrees of familiar relationships),<sup>145</sup> opportunities to reoffend are extremely limited and there is little risk to the community at large. For this reason, we expressed a preliminary view that categorising incest as a qualifying offence is not rationally connected with the aims of preventive measures.
- 8.115 In its submission, the Crown Law Office referred to one case where it considered a preventive measure for incest could have averted further offending.<sup>146</sup> We note that such cases will be extremely rare and, where they arise, other mechanisms (such as non-contact orders or other welfare-driven approaches) will be available to the court that may more appropriately manage risk in the specific context and nature of incest offending.

### Bestiality

- 8.116 We propose that bestiality should not be a qualifying offence under the new Act. Our conclusion on this is more finely balanced. There was no clear consensus on this issue among submitters. While most agreed with the reasoning set out in the Issues Paper, where we expressed a preliminary view for its exclusion, a number of submitters were concerned that bestiality was a sign of deeply disturbed behaviour that may provide an indication of risk.<sup>147</sup>
- 8.117 We reiterate that there is a lack of scientific research on bestiality.<sup>148</sup> As far as we can determine, there is no clear evidence of an established link between bestiality and the risk of sexual or violent offending against humans. Submitters did not point to any evidence beyond a general concern that bestiality is disturbing behaviour. Offences that make a person eligible for preventive measures must be sufficiently serious and align with the policy aim of keeping the community safe from harm. In this respect, bestiality is an anomaly as a qualifying offence. It is the only qualifying offence to involve harm to animals rather than humans.<sup>149</sup> Harm to animals is generally not seen as being of comparable seriousness to harm to humans. On this basis, we do not consider bestiality to be sufficiently serious or to demonstrate a risk of harm to the community more broadly to justify its inclusion as a qualifying offence.

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<sup>145</sup> Crimes Act 1961, s 130(1)(a). “Sexual connection is incest if it is between 2 people whose relationship is that of parent and child, siblings, half siblings, or grandparent and grandchild”.

<sup>146</sup> *T (CA438/2015) v R* [2016] NZCA 148.

<sup>147</sup> Bond Trust, Criminal Bar Association and The Law Association.

<sup>148</sup> Issues Paper at [6.50] citing Brian Holoyda, Ravipreet Gosal and K Michelle Welch “Bestiality Among Sexually Violent Predators” (2020) 48(3) *American Academy of Psychiatry and the Law* 358 at 358.

<sup>149</sup> We distinguish this from the existing qualifying offence of compelling an indecent act with an animal, which very much causes harm to the person being compelled to act. Crimes Act 1961, s 142A.



### Accessory after the fact to murder

- 8.118 We propose removing accessory after the fact to murder as a qualifying offence under the new Act. Although we did not specifically consult on this matter, three submitters spontaneously raised the issue with us.<sup>150</sup> We do not consider it meets our criteria for inclusion as a qualifying offence under the new regime.
- 8.119 Submitters said that “accessory after the fact to murder” covers a wide range of behaviours, some of which are less serious (for example, providing food to a suspect) and some of which are more active and serious (for example, disposing of evidence). On this basis, the offending conduct may not be sufficiently serious to justify the imposition of a preventive measure. The same is true of the other offences we have discussed and proposed including in the new Act, for example, indecent assault and strangulation. More compelling, in our view, is that the offence takes place after the fact and — in contrast to the other qualifying offences — does not cause actual harm. Although such behaviour may be harmful to justice in the sense of assisting an offender to evade authorities or impeding or actively blocking a criminal investigation, it does not involve acts of serious sexual or physical interpersonal violence. For this reason, we do not consider it to be sufficiently serious to justify making someone eligible for a preventive measure.
- 8.120 Additionally, and as submitters noted, this offence tends to be highly situational, often based on familiar or personal relationships with an offender. This suggests that the risk of reoffending is low.
- 8.121 However, as we have not previously consulted on this issue, we would welcome specific feedback on this point.

### Further qualifying offences

#### PROPOSAL

P17

All qualifying offences listed above should also be “further qualifying offences” for the purpose of the application of the legislative tests under the new Act with the exception of:

- a. imprisonable Films, Videos, and Publications Classification Act 1993 offences;
- b. attempts and conspiracies to commit qualifying offences; and
- c. Prostitution Reform Act 2003 offences.

- 8.122 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 Issues Paper, we identified a concern that some qualifying offences may not be serious enough to justify imposing a preventive measure.<sup>151</sup>
- 8.123 As we have discussed above, we consider that the qualifying offences we have identified are sufficiently serious to justify making someone eligible for a preventive measure under

<sup>150</sup> The Law Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society and South Auckland Bar Association.

<sup>151</sup> Issues Paper at [8.20]–[8.21].

the new Act. We consider, for the same reasons, they can also be serious enough to justify the imposition of preventive measures.

- 8.124 There are three exceptions to this view. The first is the set of imprisonable FVPC Act offences we have identified as qualifying offences above. We have concluded that the harm the community should be protected from is not the risk of repeated possession and viewing of CSAM but the risk that someone who has previously offended by viewing CSAM will go on to carry out a more serious contact offence. In these situations, the court should only consider the risk of someone going on to commit a further qualifying offence when considering whether to impose a preventive measure.
- 8.125 Second, we do not consider attempts and conspiracies to commit a qualifying offence should be further qualifying offences. As we explain above, we consider attempts or conspiracies should remain as qualifying offences for the purpose of eligibility because they can indicate a risk of future offending in the same way as any other serious offending. In recognition of the fact, however, that they are less serious than actual offences, we do not propose including them as a further qualifying offence. In these cases, the relevance of the risk is not that they might go on to again attempt or conspire to commit a serious offence but that they may go on to succeed in committing a serious offence.
- 8.126 In the Issues Paper, we noted that meeting a young person following grooming is currently a qualifying offence for all three preventive measures.<sup>152</sup> Similar to attempts and conspiracies, this offence is an attempted offence as the person must intend to commit a sexual offence against the young person upon meeting. We queried whether this offence was necessary as a qualifying offence when the intended offences are themselves qualifying. We propose retaining this offence as both a qualifying offence and a further qualifying offence on the basis it can be distinguished from other attempts and conspiracies. We consider the act of meeting someone following a period of grooming goes beyond a merely preparatory act to follow through on serious offending.
- 8.127 Third, we do not consider that qualifying Prostitution Reform Act offences should be further qualifying offences. Similar to attempts and conspiracies, this offending is often preparatory and indicative of a risk of future, more serious offending rather than being sufficiently serious in and of itself. Where the offending has also involved the commission of a serious sexual offence, this will be both a separate qualifying offence for the purposes of eligibility and a further qualifying offence. The NZLS expressed concern about Prostitution Reform Act offences being qualifying offences for preventive detention as they are strict liability offences. We consider that the retention of these offences as qualifying offences but not further qualifying offences will allow consideration of offending as an indicator of risk but that preventive measures themselves will only be imposed in appropriate circumstances that indicate a risk of further, more serious offending.
- 8.128 We make two final observations on indecent assault, incest and bestiality, which we specifically identified for feedback in the Issues Paper. As a result of our conclusion above that incest and bestiality be removed as qualifying offences, we do not consider whether they should be further qualifying offences. On indecent assault, we reiterate our conclusion that indecent assault can be extremely serious and is something the

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<sup>152</sup> Crimes Act 1961, s 131B. See also discussion in Issues Paper at [8.21(c)].

community should expect to be protected from. For this reason, it should also remain as a further qualifying offence. The application of the legislative tests in considering previous offending and the risk this might indicate should ensure that a preventive measure is only imposed in sufficiently serious cases.

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## CHAPTER 9

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# Overseas offending

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### IN THIS CHAPTER, WE CONSIDER:

- issues related to eligibility for an ESO or a PPO due to offending committed overseas; and
- proposals for reform addressing the eligibility criteria that should apply to overseas offenders.

## INTRODUCTION

9.1 In this chapter, we consider when a person should be eligible for a preventive measure if their offending occurred overseas rather than in Aotearoa New Zealand. We examine the current law regarding overseas offending and eligibility for extended supervision orders (ESOs) and public protection orders (PPOs) and issues with that law. We conclude by proposing what provision should be made in the new Act regarding overseas offending.

## CURRENT LAW

9.2 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.<sup>1</sup> An ESO or a PPO can, on the other hand, be imposed on someone as a result of offending overseas if certain criteria are met. Consequently, this discussion of the current law focuses on eligibility for ESOs and PPOs.

9.3 A person who commits offending overseas and returns to Aotearoa New Zealand is eligible to have an ESO or PPO imposed on them if:

- (a) under the Returning Offenders (Management and Information) Act 2015 (Returning Offenders Act), they:

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<sup>1</sup> 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.

- (i) fit within the description of a “returning prisoner”; or
  - (ii) have returned to Aotearoa New Zealand more than six months after their release from custody overseas and Subpart 3 of Part 2 of the Returning Offenders Act applies; or
- (b) they fit within other eligibility criteria relating to overseas offending set out in the Parole Act 2002 or the Public Safety (Public Protection Orders) Act 2014 (PPO Act).

9.4 We discuss each category in further detail below.

### Returning Offenders Act

9.5 The main purpose 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 released from New Zealand prisons.<sup>2</sup> It 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 development led to the number of New Zealand citizens deported or removed from Australia to Aotearoa New Zealand increasing five-fold from about five to about 25 per month.<sup>3</sup>

9.6 As of January 2023, 265 returning offenders were subject to management by Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) under the Returning Offenders Act, with 21 of these considered “high risk due to their likelihood of reoffending, harming others, or both”.<sup>4</sup>

9.7 In this review, we focus on the Returning Offenders Act only to the extent it relates to the preventive regimes.

### Returning prisoners

9.8 The Returning Offenders Act imposes mandatory standard release conditions and provides for special conditions to be imposed on any person who is determined to be a “returning prisoner”.

9.9 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:

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<sup>2</sup> Returning Offenders (Management and Information) Bill (98-1) (explanatory note) at 1. Te Kōti Pira | Court of Appeal has considered how the Returning Offenders Act should be interpreted in light of protections under the New Zealand Bill of Rights Act 1990’s protections (NZ Bill of Rights) against retrospective and double penalties: *Commissioner of Police v G* [2023] NZCA 93. Subsequently, Parliament passed amendments clarifying that the Returning Offenders Act applies retrospectively even in cases where that may be inconsistent with the rights in the NZ Bill of Rights prohibiting double punishment and retrospective increases of penalties: Returning Offenders (Management and Information) Act 2015, ss 3A–3B; Ministry of Justice *Departmental Disclosure Statement: Returning Offenders (Management and Information) Amendment Bill 2023* (February 2023) at 3 and 7; and Returning Offenders (Management and Information) Amendment Bill (232-1) (explanatory note) at 1–2. The amended Act also alters how determinations regarding a person’s status as a returning prisoner are made. The Commissioner of Police is no longer required to provide notice to the offender prior to that determination: Returning Offenders (Management and Information) Act 2015, ss 18A and 22.

<sup>3</sup> Justice Committee *Review of the Operation of the Returning Offenders (Management and Information) Act 2015* (September 2019).

<sup>4</sup> Ministry of Justice *Departmental Disclosure Statement: Returning Offenders (Management and Information) Amendment Bill 2023* (February 2023) at 3.

has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand; and

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

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.

- 9.10 A determination that a person is a returning prisoner must be made within six months of the person's arrival in Aotearoa New Zealand.<sup>5</sup> 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.<sup>6</sup> The standard release conditions are those that apply to parole under the Parole Act.<sup>7</sup> A returning prisoner may also be subject to special conditions imposed by the court upon application by the chief executive of Ara Poutama Aotearoa | Department of Corrections.<sup>8</sup> The special conditions that may be imposed are the same as those that may be imposed on a person subject to parole and must not last longer than the standard release conditions.<sup>9</sup>

### ***People who return to Aotearoa New Zealand more than six months after release from custody***

- 9.11 Under section 32 of the Returning Offenders Act, if a person meets the 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 in prison, the court can impose release conditions on the returning offender if, immediately before their return to Aotearoa New Zealand, they were subject to:<sup>10</sup>
- (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.
- 9.12 In these circumstances, the standard release conditions do not apply automatically. The court may, however, impose release conditions if satisfied that they are necessary to facilitate the person's rehabilitation and reintegration or to reduce the risk of reoffending.<sup>11</sup>

<sup>5</sup> Returning Offenders (Management and Information) Act 2015, s 18.

<sup>6</sup> Returning Offenders (Management and Information) Act 2015, s 24(2).

<sup>7</sup> 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.

<sup>8</sup> Returning Offenders (Management and Information) Act 2015, s 26.

<sup>9</sup> Returning Offenders (Management and Information) Act 2015, s 26(2). The same test as in the Parole Act applies to the imposition of special conditions — a special condition must not be imposed unless it is designed to reduce the risk of reoffending, facilitate or promote the person's rehabilitation and reintegration or provide for the reasonable concerns of victims: Returning Offenders (Management and Information) Act 2015, s 26(3).

<sup>10</sup> Returning Offenders (Management and Information) Act 2015, s 32(1)(b).

<sup>11</sup> Returning Offenders (Management and Information) Act 2015, s 33(2).

### **Eligibility for extended supervision orders and public protection orders under the Act**

- 9.13 A person will be eligible for an ESO or a PPO if they are determined to be a returning prisoner under section 17 in respect of a qualifying offence committed overseas and they are subject to standard release conditions or special conditions imposed under the Returning Offenders Act.<sup>12</sup>
- 9.14 If a person returns more than six months after their release from custody, they will be eligible for an ESO if:
- (a) they meet the criteria under section 32 of the Returning Offenders Act (discussed above);
  - (b) the offending committed overseas would constitute an imprisonable offence if committed in Aotearoa New Zealand; and
  - (c) they are subject to conditions imposed under the Returning Offenders Act.
- 9.15 Notably, a person is eligible for an ESO whether or not the offending would be qualifying offending under the ESO legislation.<sup>13</sup> A person is eligible for a PPO on a similar basis. However, the offending committed overseas must be a qualifying offence under the PPO regime.

### **Other eligibility on the basis of overseas offending**

- 9.16 Separate to the Returning Offenders Act, both the ESO and PPO legislation provide that a person will be eligible to have an ESO or a PPO imposed on them if they committed a qualifying offence<sup>14</sup> overseas and they:<sup>15</sup>
- (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.
- 9.17 These provisions overlap with eligibility that is determined by the Returning Offenders Act. It is likely that, if a person meets these criteria, they would also meet the criteria to be a returning prisoner. This category of eligibility was in place before the Returning Offenders Act was enacted.

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<sup>12</sup> Parole Act 2002, ss 107C(1)(c) and 107F(1)(d); and Public Safety (Public Protection Orders) Act 2014, s 7(1)(e).

<sup>13</sup> Parole Act 2002, ss 107C(1)(d) and 107F(1)(d).

<sup>14</sup> 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.

<sup>15</sup> Parole Act 2002 s 107C(1)(b); and Public Safety (Public Protection Orders) Act 2014, s 7(1)(d).

## ISSUES

### Availability of an ESO for non-qualifying offending

- 9.18 Most 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 be within the description of a qualifying offence for that preventive measure.
- 9.19 However, as we note above and in the Issues Paper, the Parole Act provides that an ESO may also be imposed where overseas offending is not a qualifying offence if:<sup>16</sup>
- (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.
- 9.20 We have not found any policy or legislative materials that explain why the Parole Act does not require the overseas offending to fit the description of qualifying offending in Aotearoa New Zealand.
- 9.21 In the Issues Paper, we suggested that, where a person was subject to monitoring or supervision for an offence overseas, broader eligibility might be justified on the basis that the overseas jurisdiction had determined that the person presented a risk of serious offending. However, we also noted this reasoning may be problematic because overseas jurisdictions may impose monitoring, supervision or post-detention measures in circumstances that would not be justified under New Zealand law. For example, they may be imposed on offending that is less serious or apply a lower risk threshold. On the other hand, even if a person is eligible for an ESO because of overseas offending that would not be considered qualifying offending if committed in Aotearoa New Zealand, the court still needs to be satisfied that the legislative tests for the imposition of the ESO are met.<sup>17</sup>
- 9.22 We also observed that the status quo creates an inconsistency. A person who meets the 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.
- 9.23 Although we are not aware of any problems arising with this provision in practice, we sought feedback on this matter because it is a departure from the other eligibility criteria.

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<sup>16</sup> Parole Act 2002, s 107C(1)(c); and Returning Offenders (Management and Information) Act 2015, s 32.

<sup>17</sup> Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper) at [7.22]–[7.24].



## Procedural problems with timing and difficulty obtaining information

- 9.24 An application for an ESO for a returning offender must be made within six months of the person arriving in Aotearoa New Zealand. In the Issues Paper, we stated that, in our preliminary engagement, we heard that it can be difficult to access the information needed from overseas jurisdictions, particularly within this timeframe.<sup>18</sup>
- 9.25 Extending the timeframe could make it easier for Ara Poutama 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 measure.
- 9.26 We understand that the vast majority of returning offenders under the Returning Offenders Act arrive from Australia.<sup>19</sup> Processes and formal information-sharing agreements are in place so that New Zealand government departments and agencies can coordinate with Australian authorities.<sup>20</sup>
- 9.27 In the Issues Paper, we stated an initial view that it is appropriate that coordination and information sharing continue through bilateral arrangements rather than legislation and asked for feedback on this point.

## RESULTS OF CONSULTATION

- 9.28 All submitters who responded agreed that eligibility for preventive measures without conviction for a qualifying offence is inappropriate.<sup>21</sup> They expressed concern about the fairness of overseas offenders being subject to a wider application of the ESO regime than those who have offended in Aotearoa New Zealand. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) also commented more generally that caution is required when extending eligibility to returnees due to potential lack of safeguards in overseas justice systems and because overseas sentencing regimes may impose harsher penalties for similar offending.
- 9.29 Most submitters who touched upon the timeframe for an ESO application for a person convicted overseas said reform was unnecessary.<sup>22</sup> These submitters thought that the current law strikes the right balance between allowing information to be gathered and not exposing a person returning to Aotearoa New Zealand to an extended period of uncertainty. Several acknowledged the timeframe could create specific problems. The Criminal Bar Association and The Law Association emphasised that early provision of legal advice was important for the system to operate but did not recommend extending the

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<sup>18</sup> Issues Paper at [7.27]–[7.30].

<sup>19</sup> Between 18 November 2015 and 18 May 2017, 98 per cent of offenders who returned to Aotearoa New Zealand were returned from Australia: Ministry of Justice “Submission to the Justice Committee on the Statutory Review of the Returning Offenders (Management and Information) Act 2015” at [28].

<sup>20</sup> Ministry of Justice “Submission to the Justice Committee on the Statutory Review of the Returning Offenders (Management and Information) Act 2015” at [32]–[40].

<sup>21</sup> Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>22</sup> Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association.

timeframe. Te Tari Ture o te Karauna | Crown Law Office acknowledged the difficulties involved with accessing information from overseas but concluded that it is in the interests of all parties to make applications quickly. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service said that it could be helpful for Ara Poutama to indicate early on that it intends to seek an ESO.

- 9.30 In contrast to these views about the timeframe, the New Zealand Council for Civil Liberties suggested that it should be shortened significantly to 30 days. It expressed concern that a longer timeframe may cause a person to be “imprisoned” for lack of sufficient evidence for a significant period.

## PREFERRED APPROACH

### PROPOSAL

P18

The new Act should provide that a person convicted of an offence overseas is eligible for a preventive measure if the offence would come within the meaning of a qualifying offence as defined under the new Act had it been committed in Aotearoa New Zealand and the person:

- a. has arrived in Aotearoa New Zealand within six months of ceasing to be subject to any sentence, supervision conditions, or order imposed on the person for that offence by an overseas court; and
  - i. since that arrival, has been in Aotearoa New Zealand for less than six months; and
  - ii. resides or intends to reside in Aotearoa New Zealand; or
- b. has been determined to be a returning prisoner and is subject to release conditions under the Returning Offenders (Management and Information) Act 2015; or
- c. is a returning offender to whom subpart 3 of Part 2 of the Returning Offenders (Management and Information) Act 2015 applies and who is subject to release conditions under that Act.

- 9.31 Current eligibility for people returning to Aotearoa New Zealand who have committed offences overseas is in place to address the risk posed by a small number of returnees for whom an ESO or PPO may be justified.<sup>23</sup> We consider that this group could present a high risk to community safety for which imposition of one of our proposed preventive measures may be justified. Therefore, we propose that returnees should remain eligible on the same basis as the current law.

- 9.32 The new Act should, however, require that the person’s offending overseas come within the description of a qualifying offence under the new Act if it had been committed in Aotearoa New Zealand. Submitters agreed with our initial view that it is problematic if eligibility for a preventive measure relies on commission of offending that would not be

<sup>23</sup> Ministry of Justice *Regulatory Impact Statement: Management of offenders returning to New Zealand* (October 2015) at 3.

qualifying in Aotearoa New Zealand. Therefore, our preferred approach adopts that of the PPO Act and alters the status quo with respect to ESOs. Minor consequential amendments to the Returning Offenders Act would be required to ensure consistency with the language of the new Act.<sup>24</sup>

- 9.33 Feedback from submitters has also confirmed that issues of timing or difficulty obtaining information are best addressed as practical matters rather than through requirements under the new Act. The current six-month time limit strikes an appropriate balance between administrative efficiency and providing certainty for returnees.
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<sup>24</sup> Section 32 of the Returning Offenders Act provides for eligibility for those who returned to Aotearoa New Zealand more than six months after release from custody in prison and immediately before their return were subject to “conditions imposed under an order in the nature of an extended supervision order or public protection order”. Since our preferred approach would repeal those measures, an amended provision would refer to preventive measures under the new Act instead.

## **PART FOUR:**

# **IMPOSING PREVENTIVE MEASURES**

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**CHAPTER 10**

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# Legislative tests for imposing preventive measures

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**IN THIS CHAPTER, WE CONSIDER:**

- the legislative tests the courts apply when determining whether to impose preventive detention, an extended supervision order or a public protection order;
- issues with those tests; and
- proposals for revised tests the court should apply to determine whether to impose any preventive measure.

**INTRODUCTION**

- 10.1 Central to this review is the question of how to ensure 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 through which the courts determine whether to impose preventive measures are crucial to achieving this balance.
- 10.2 This chapter examines issues with the current legislative tests, particularly in light of this overall balancing exercise. We propose a single set of revised tests that should govern the imposition of all preventive measures.

**CURRENT LAW****Preventive detention**

- 10.3 A court determines whether to impose a sentence of preventive detention based on the tests in section 87 of the Sentencing Act 2002.

- 10.4 Section 87(2)(c) 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.
- 10.5 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.
- 10.6 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 extended supervision order (ESO) and whether it would provide adequate protection for the public.<sup>1</sup> Te Kōti Pira | Court of Appeal has recently explained that those seeking preventive detention must demonstrate why less restrictive options are insufficient.<sup>2</sup> 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.<sup>3</sup>
- 10.7 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). When released on parole, they will be subject to the standard release conditions set out in section 14 of the Parole Act 2002. Under section 15, the Parole Board can also impose on the person any special condition that is designed to:<sup>4</sup>
- (a) reduce the risk of reoffending by the offender;
  - (b) facilitate or promote the rehabilitation and reintegration of the offender; or
  - (c) provide for the reasonable concerns of victims of the offender.
- 10.8 The guiding principles set out in section 7(2)(a) of the Parole Act relate to the setting of special conditions. It provides that the Parole Board must be guided by the principle that offenders must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community.

### Extended supervision orders

- 10.9 ESOs are imposed as post-sentence orders. The test for imposing an ESO is different to the test for imposing preventive detention.

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

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

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

<sup>4</sup> Parole Act 2002, s 15(2). Section 15 then provides a non-exhaustive list of the kinds of special conditions the Parole Board may impose.

- 10.10 Section 107I(2) of the Parole Act provides that 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.
- 10.11 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:<sup>5</sup>
- (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.
- 10.12 The characteristics in respect of violent offending are that the person:<sup>6</sup>
- (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.
- 10.13 The courts have revisited how they apply the legislative test for deciding whether to impose an ESO in light of the Court of Appeal’s judgment in *Chisnall v Attorney-General* (we discuss this further in Chapters 3 and 4).<sup>7</sup> 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* held that, when the statutory criteria for an ESO are met, the court must balance the right not to be subject to second punishment against the statutory purpose of protecting the public from the risk the person will commit a relevant offence.<sup>8</sup> The Court said, put more simply, a “strong justification” is needed for an ESO.

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<sup>5</sup> Parole Act 2002, s 107IAA(1).

<sup>6</sup> Parole Act 2002, s 107IAA(2).

<sup>7</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484; and *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107.

<sup>8</sup> *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53]; and *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

- 10.14 Once a court has imposed an ESO on a person, they become subject to the standard extended supervision conditions set out in section 107JA of the Parole Act. In addition, the Parole Board may impose any special conditions it is entitled to impose under section 15 of the Parole Act.

### Public protection orders

- 10.15 Section 13(1) of the Public Safety (Public Protection Orders) Act 2014 (PPO Act) provides the court may make a public protection order (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.<sup>9</sup>
- 10.16 Like an ESO, a PPO can only be imposed if the person displays certain traits and behavioural characteristics. The PPO 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”:<sup>10</sup>
- (a) an intense drive or urge to commit a particular form of offending;
  - (b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties;
  - (c) absence of understanding or concern for the impact of the respondent’s offending on actual or potential victims;
  - (d) poor interpersonal relationships or social isolation or both.
- 10.17 As with 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.<sup>11</sup> As with ESOs, the courts require orders under the PPO Act to be “strongly justified” in light of the way the orders limit the protection against second penalties.<sup>12</sup>

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<sup>9</sup> Public Safety (Public Protection Orders) Act 2014, s 3.

<sup>10</sup> Public Safety (Public Protection Orders) Act 2014, s 13(2).

<sup>11</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [40] per Elias CJ; and *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [42].

<sup>12</sup> *Chief Executive, Department of Corrections v Waiti* [2024] NZHC 1682 at [63]; *Chief Executive of the Department of Corrections v Waiti* [2023] NZHC 2310 concerning an interim detention order under s 107 of the Public Safety (Public Protection Orders) Act 2014; *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 concerning a review of a PPO under s 18 of the Public Safety (Public Protection Orders) Act 2014; and *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 concerning a prison detention order under s 85 of the Public Safety (Public Protection Orders) Act 2014.



## ISSUES

10.18 In the Issues Paper, we identified various issues with the current legislative tests. We suggested that the current legislative tests may not achieve community safety without unduly restricting a person’s rights and freedoms.<sup>13</sup>

### The legislative tests may not target the appropriate level of risk

10.19 We questioned whether the tests were focused on the appropriate likelihood of serious reoffending.<sup>14</sup> The tests for preventive detention, ESOs and PPOs take different approaches. The tests for ESOs and PPOs require the risk that the person will reoffend to be “high” or “very high”. The courts have explained that ESOs and PPOs are a serious intrusion on the protection against second penalties. In the context of PPOs, the *Kōti Matua* | High Court has held that the likelihood of reoffending must almost border on the inevitability of imminent serious reoffending for a PPO to be justified under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).<sup>15</sup> The test for preventive detention, on the other hand, requires the court to be satisfied that the person is simply “likely” to commit a further qualifying offence.

10.20 We observed that the tests for imposing an ESO 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 commit a relevant sexual offence, whereas for violent offending, the risk must be “very high”.<sup>16</sup> The different thresholds within the legislative tests may explain, in part, why a high proportion of ESOs are imposed in relation to sexual offending.<sup>17</sup> As set out in Chapter 2, of the 197 people subject to an ESO as at 30 June 2023, the qualifying offending for 190 individuals (96 per cent) was sexual offending.<sup>18</sup>

10.21 We also identified a lack of coherence across the tests. The different levels of likelihood expressed in the tests do not correlate with the relative severity of the preventive measures. For example, preventive detention has the lowest threshold for likelihood of reoffending but is the most restrictive measure. The tests for ESOs and PPOs focus on certain traits and behavioural characteristics that do not align, meaning the courts will possibly make assessments of reoffending risks based on different factors.

### Scope of further qualifying offences too broad

10.22 The legislative tests rely on the person being at risk of committing a further qualifying offence. We noted in the Issues Paper that some further qualifying offences may not be

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<sup>13</sup> Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper) at ch 8.

<sup>14</sup> Issues Paper at [8.12]–[8.18].

<sup>15</sup> *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [150].

<sup>16</sup> Parole Act 2002, s 107(2)(b).

<sup>17</sup> The other key reason is that, prior to 2014, violent offending did not qualify for an ESO.

<sup>18</sup> Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama | Department of Corrections) to Samuel Mellor (Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (15 February 2024).

serious enough to justify imposing a preventive measure.<sup>19</sup> We identified indecent assault, incest, bestiality, and attempts and conspiracies. We discuss this issue in Chapter 8 and make proposals to exclude certain offences from being further qualifying offences.

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

- 10.23 We observed in the Issues Paper that the courts and international bodies have created several additional features of the tests that reflect human rights law and are not expressed in the primary legislative tests.<sup>20</sup>
- 10.24 In particular, 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. 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.<sup>21</sup> Although the domestic courts have said in the past that preventive detention is not a sentence of last resort,<sup>22</sup> they will not impose preventive detention when they consider the risks can be adequately managed through less restrictive means, principally through a determinate sentence and an ESO.<sup>23</sup> 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.<sup>24</sup>
- 10.25 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 PPO 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.<sup>25</sup> 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 PPO Act.<sup>26</sup>
- 10.26 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

<sup>19</sup> Issues Paper at [8.20]–[8.21].

<sup>20</sup> Issues Paper at [8.22]–[8.32].

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

<sup>22</sup> *R v C* [2003] 1 NZLR 30 (CA) at [6].

<sup>23</sup> *Tawhai v R* [2023] NZCA 444 at [21]; *T (CA502/2018) v R* [2022] NZCA 83 at [30]; and *R v Mist* [2005] 2 NZLR 791 (CA) at [100]–[101].

<sup>24</sup> Sentencing Act 2002, s 87(4)(e).

<sup>25</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 at [37] and [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].

<sup>26</sup> During the passage of the Public Safety (Public Protection Orders) Bill, Te Kāhui Ture o Aotearoa | New Zealand 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 Aotearoa | Department of Corrections (Ara Poutama) 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 Aotearoa | Department of Corrections *Public Safety (Public Protection Orders) Bill — Departmental Report* (25 February 2014) at [35] and [40].

ESO or a PPO should only be imposed if it is a justified limit on the right in each case. As discussed above, 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 of protecting the community from reoffending.<sup>27</sup> This additional proportionality test is not referred to in the Parole Act or the PPO Act.

- 10.27 As a general principle, the law should be comprehensive, clear and accessible, particularly if it involves coercive power that can limit human rights.<sup>28</sup> We expressed concern in the Issues Paper that the legislation governing the preventive regimes is not 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.

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

- 10.28 We identified in the Issues Paper several issues relating to the traits and behavioural characteristics a person is required to display under the tests for ESOs and PPOs.<sup>29</sup> We have struggled to find any authoritative material in the policy and legislative history as to why the characteristics stated in the legislative tests were thought to identify the highest-risk people. It is not apparent from our research that these terms have a recognised clinical meaning.<sup>30</sup>

- 10.29 In the absence of any authoritative explanation for their inclusion, we commented that requiring a person to display these traits and behavioural characteristics may exclude people who pose significant risks to community safety. We identified the following characteristics as potentially problematic:

- (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”. Similarly, section 13(2)(c) of the PPO 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

<sup>27</sup> 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; and *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [30]. For PPOs see *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [24]; and *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [40] (a prison detention order case).

<sup>28</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 8. This principle is exemplified in ss 5 and 6 of the New Zealand Bill of Rights Act 1990 itself.

<sup>29</sup> Issues Paper at [8.33]–[8.46].

<sup>30</sup> 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 antisocial 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 the 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.

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.<sup>31</sup> 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.<sup>32</sup> 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 he was 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.<sup>33</sup>

10.30 Beyond concerns with the particular characteristics, we expressed doubt about whether, as a matter of legislative design, the court should be directed to specific characteristics as being demonstrative of reoffending risk. We gave two reasons for this concern:

- (a) 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. 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.<sup>34</sup> Consequently, the predominant focus of the legislative tests on the existence or non-existence of traits and behavioural characteristics may preclude a broader inquiry into whether a preventive measure is necessary to address the situational factors and the triggers for reoffending.
- (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.

10.31 We also noted difficulties with the language used in the legislative tests to describe the traits and behavioural characteristics. The legislation uses phrases like “pervasive pattern of serious sexual or violent offending”, “a predilection or proclivity for serious sexual

<sup>31</sup> *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.

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

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

<sup>34</sup> Lucy Moore *Literature Review — Risk Assessment of Serious Offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 9.

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. In addition, the Parole Act and the PPO 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 PPO Act. The intended meaning is obscure.

- 10.32 Lastly, we noted that the traits and behavioural characteristics listed in the legislation may be more likely to describe people who have a disability. As we discuss in Chapter 5, preventive measures are often imposed on people who present with both diagnosed and undiagnosed brain, behavioural or mental health issues. Common presentations include autism 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 from regulating their behaviour or appreciating the consequences of their actions. They closely resemble the traits and behavioural characteristics listed in the legislation.<sup>35</sup> For example, the legislation directs the court to inquire whether the person has “limited self-regulatory capacity”,<sup>36</sup> a “lack of acceptance of responsibility or remorse for past offending”,<sup>37</sup> an “absence of understanding or concern for the impact of ... offending”<sup>38</sup> and “poor interpersonal relationships or social isolation or both”.<sup>39</sup>
- 10.33 A particular concern is that section 107IAA of the Parole Act and section 13(2) of the PPO 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 with 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 PPO Act, but because they do not exhibit the traits and behavioural characteristics, the court cannot make an ESO or a PPO.<sup>40</sup> 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.
- 10.34 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

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<sup>35</sup> In the Cabinet Social Policy Committee Paper “Public Protection Orders: Establishing a Civil Detention Regime” (23 March 2012) SOC (12) 16 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.

<sup>36</sup> Parole Act 2002, ss 107IAA(1)(c) and 107IAA(2)(b)(ii); and Public Safety (Public Protection Orders) Act 2014, s 13(2)(b).

<sup>37</sup> Parole Act 2002, s 107IAA(1)(d)(i).

<sup>38</sup> Public Safety (Public Protection Orders) Act 2014, s 13(2)(c).

<sup>39</sup> Public Safety (Public Protection Orders) Act 2014, s 13(2)(d).

<sup>40</sup> As, for example, was the case in *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507.

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.<sup>41</sup> Disabled people may pose risks to community safety because they may have difficulty adhering to criminal prohibitions.<sup>42</sup> Human rights law, however, requires that the existence of a disability should not, of itself, be a determining factor.

- 10.35 We expressed a preliminary view in the Issues Paper that the primary determinant whether the court should impose preventive measures should be the risks 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.

### Issues relating to the temporal elements of the legislative tests

- 10.36 We discussed in the Issues Paper the different and potentially problematic time periods to which the risk of reoffending must relate in order for a court to impose a preventive measure. 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.<sup>43</sup>
- 10.37 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 for sexual offending and two to five years for violent offending are the periods in which the majority of people who will reoffend following release from prison would have done so.<sup>44</sup> Risk assessments and tools devised for this purpose are based on these periods. They are not suited to assess risk beyond the relevant periods.
- 10.38 In addition, the PPO 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". It may be unclear what "suitable opportunity" means in practice. 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.
- 10.39 We gave a preliminary view that it may be preferable for the legislative tests to require an assessment of a person's risk during a period that better reflects risk assessment practice.

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<sup>41</sup> 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).

<sup>42</sup> 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.

<sup>43</sup> *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [26].

<sup>44</sup> Lucy Moore *Literature Review — Risk Assessment of Serious Offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 17.

## Issues relating to the imposition of special conditions

### *The jurisdictions for making orders and for imposing special conditions are divided between the courts and the Parole Board*

- 10.40 The sentencing court is currently responsible for making an ESO and for setting its duration, whereas the Parole Board is responsible for imposing special conditions.
- 10.41 In the Issues Paper, we explained that this division of jurisdiction could lead to two issues.<sup>45</sup> First, in some situations, the split jurisdictions for imposing orders and conditions can necessitate multiple hearings concerning similar issues and the same evidence.<sup>46</sup>
- 10.42 Second, there are different processes for challenging a court’s decision in relation to an ESO and a Parole Board’s decision in relation to special conditions. If a person wishes to challenge a court decision concerning an ESO, they must appeal to the Court of Appeal. These appeals are conducted as if they were appeals against a sentence in the criminal jurisdiction.<sup>47</sup> If a person wishes to challenge a Parole Board decision in relation to ESO conditions, however, they must apply for a review by the chairperson of the Parole Board or a panel convener and, failing that, for judicial review. 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 disadvantage the client. 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.

### *The relationship between the Parole Act’s guiding principles, its tests for imposing special conditions and the New Zealand Bill of Rights Act 1990 is unclear*

- 10.43 There is some uncertainty as to what tests the Parole Board should apply when imposing special conditions on a person subject to preventive detention or an ESO.
- 10.44 First, the test for special conditions in respect of people subject to preventive detention has been the subject of recent proceedings in which the courts have taken differing approaches. In *Grinder v Attorney-General*, the Court of Appeal overturned the High Court’s decision that a special condition should only be imposed and maintained if without it a person will pose an “undue risk” to the community.<sup>48</sup> The Court of Appeal held that the Parole Act requires the Parole Board to apply an undue risk test only when making decisions about the release or recall of an offender.<sup>49</sup> In contrast, the Parole Board may impose special conditions when an offender is considered to pose a low risk of reoffending. The Court explained that special conditions can assist with stabilising the

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<sup>45</sup> Issues Paper at [10.80]–[10.93].

<sup>46</sup> For example, in *Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32, te Kōti Matua | High Court, in order to decide whether an ESO should be imposed in lieu of a PPO, needed to hear 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.

<sup>47</sup> Parole Act 2002, s 107R(2).

<sup>48</sup> *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760.

<sup>49</sup> *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [39]–[40] referring to ss 7(1), 28 and 61 of the Parole Act 2002.

offender’s risk level or reducing the risk to negligible levels through the offender’s rehabilitation and reintegration.<sup>50</sup> The Court also considered that an NZ Bill of Rights-consistent interpretation of the Parole Act does not require that the necessity of special conditions be tested against the undue risk threshold.<sup>51</sup> Rather, the proportionality requirements in section 7(2)(a) of the Parole Act that release conditions must not be “more onerous, or last longer, than is consistent with the safety of the community” ensures that the limits special conditions place on rights are reasonable. The Court considered this is an NZ Bill of Rights-consistent approach to conditions inbuilt into the Parole Act.<sup>52</sup>

- 10.45 Te Kōti Mana Nui | Supreme Court has granted leave to appeal the Court of Appeal’s decision in *Grinder*.<sup>53</sup>
- 10.46 Second, it is not clear whether or how section 7 of the Parole Act applies to ESOs. Section 7(2)(a) refers only to “release conditions” and not the conditions of extended supervision.<sup>54</sup> While the requirements of the NZ Bill of Rights still apply when the Parole Board sets special conditions under an ESO,<sup>55</sup> it is odd that the mechanisms under the Parole Act for ensuring release conditions are reasonable and proportionate do not also apply to ESOs. This issue exposes a broader concern that we raise elsewhere in this Preferred Approach Paper that it is awkward to superimpose preventive measures onto the parole regime.
- 10.47 In our view, it would be helpful to clarify how a reformed legislative test for imposing special conditions would sit in relation to any guiding principles and how it would ensure consistency with the NZ Bill of Rights.

## RESULTS OF CONSULTATION

### Appropriate level of risk

- 10.48 Several submitters addressed the question of whether the legislative tests for preventive detention, ESOs and PPOs focus on the right level of likelihood of possible future reoffending.<sup>56</sup> Some commented on the differing approaches taken in these regimes and, in particular, the anomaly of preventive detention having the lowest threshold despite

<sup>50</sup> *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [44].

<sup>51</sup> *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [51].

<sup>52</sup> *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [51].

<sup>53</sup> *Grinder v Attorney-General* [2024] NZSC 50.

<sup>54</sup> Issues Paper at [10.75]–[10.79]. Section 107O(2) of the Parole Act 2002 states that certain sections of the Parole Act apply “as if the conditions of the extended supervision order were release conditions”, which reinforces the notion that they are two different concepts. See too the recent decision in *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [74], where te Kōti Matua | High Court said that the decision to impose special conditions on an ESO will be “guided” by sections 107K and 15 of the Parole Act 2002. The Court did not refer to the guiding principles in section 7.

<sup>55</sup> For example, te Kōti Pira | 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].

<sup>56</sup> Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Tari Ture o te Karauna | Crown Law Office, Dr Tony Ellis and Douglas Ewen.



being the most severe measure. Submitters generally favoured a consistent threshold for all measures. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) said:

We consider the tests should be better aligned with one another and use the same terminology. In our view, the use of terms ‘high/very high risk’ are likely to be more transparent and better reflect the standard that should be applied, compared with the ‘likely to commit another qualifying offence’ phrase used as part of the preventive detention test. ‘Likely’ has the potential to be interpreted as ‘a risk that could happen’, which we consider is too low of a threshold to justify such a significant punishment.

10.49 Several submitters commented on the different thresholds used for ESOs in connection with risks of further sexual or violent offending.<sup>57</sup> These submitters generally thought the different thresholds were difficult to rationalise given that both sexual and violent offending could be highly serious.

10.50 Some submitters noted how determining likelihood is difficult. Te Tari Ture o te Karauna | Crown Law Office noted that psychologists frequently explain they cannot test for whether a person presents a “very high” risk of reoffending. This is because not all actuarial assessments contain a “very high” risk category, meaning a person can only be said to meet this requirement on the basis of subjective clinical assessment.

### Requirements of human rights law

10.51 Several submitters addressed the issue that the human rights considerations the courts apply when imposing a preventive measure are not referred to in the primary legislative tests.<sup>58</sup> Most submitters, including the Criminal Bar Association, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and other criminal barristers, submitted that human rights considerations should be expressed within the tests. On the other hand, the NZLS and the Crown Law Office did not think the current approach causes significant issues in practice. The NZLS, however, thought referring to human rights considerations could make the legislation more understandable to non-lawyers and that this is a “desirable goal”. On that basis, the NZLS said it would not have an issue with human rights considerations being included in the legislative tests.

10.52 In the Issues Paper, we put forward two preliminary proposals for revisions to the legislative tests to state the human rights considerations the court should weigh when deciding whether to impose a preventive measure:<sup>59</sup>

- (a) The first option was for the legislation to require the court to be satisfied that:
- (i) the measure is the least restrictive necessary to address the risks the person will commit a further qualifying offence; and
  - (ii) 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 NZ Bill of Rights.

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<sup>57</sup> Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>58</sup> Bond Trust, Lara Caris, Criminal Bar Association, Dr Tony Ellis, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, Te Tari Ture o te Karauna | Crown Law Office, The Law Association.

<sup>59</sup> Issues Paper, P12A and P12B and [12.57]–[12.60].

- (b) The second option was for the legislation to 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 NZ Bill of Rights are justified.

10.53 Four submitters gave feedback on these proposals. Two submitters supported the first proposal, and one supported the second.<sup>60</sup> Te Kāhui Tika Tangata | Human Rights Commission did not express a preference. The Commission emphasised, however, that the NZ Bill of Rights applies to the state as a whole, including the courts, and the utility of any proposed approach depends on its ability to secure a rights-consistent outcome.

### Traits and behavioural characteristics

10.54 Several submitters addressed the issues we raised with the focus on traits and behavioural characteristics.<sup>61</sup> Most submitters agreed with the issues we raised. The NZLS and the Crown Law Office agreed that the elements are difficult to interpret and may not indicate people at risk of reoffending. Several submitters commented that the traits and behavioural characteristics are potentially more likely to describe people with a disability and that this is a serious issue.

10.55 The Law Association and the Criminal Bar Association, however, supported a focus on traits and characteristics, although they thought the actual elements should be reviewed. The Criminal Bar Association said that the requirement to display certain characteristics “ensures that the orders are not made except in the most clear cases”.

10.56 Some submitters commented specifically on the preliminary proposal we put forward in the Issues Paper to remove traits and behavioural characteristics from the tests. The NZLS, Human Rights Commission and the New Zealand Council for Civil Liberties (NZCCL) supported the proposal. The Public Defence Service, however, was concerned that omitting traits and behavioural characteristics from the legislative tests would make the tests vague and, without a defined set of requirements, it might be difficult to argue against the making of an order. The Public Defence Service acknowledged the current traits and characteristics should, at the very least, be updated based on the latest research, rewritten in plain English and regularly reviewed.

### Temporal elements

10.57 Some submitters addressed the issue relating to the temporal elements of the tests.<sup>62</sup> They generally agreed that predictions of risk well into the future are problematic. The NZLS said:

The more remote a risk is, the less it justifies limitation of the person’s rights. From this perspective, it is questionable whether predictions of future behaviour 10 years from now should be sufficient for making an order such as an ESO.

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<sup>60</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and South Auckland Bar Association supported the first preliminary proposal. New Zealand Council for Civil Liberties supported the second proposal.

<sup>61</sup> Bond Trust, Lara Caris, Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, Dr Tony Ellis, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Te Kāhui Ture o Aotearoa | New Zealand Law Society, The Law Association.

<sup>62</sup> Bond Trust, Te Tari Ture o te Karauna | Crown Law Office, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

10.58 The Crown Law Office submitted that there is confusion about the concept of “imminence” for PPOs.

### Imposition of special conditions

10.59 In the Issues Paper, we asked submitters whether there are any issues arising from the division between the order-making and condition-setting jurisdictions for ESOs that require legislative reform. We also asked for feedback on our proposal that a court could be responsible for setting special ESO conditions.

10.60 All submitters who responded to this question identified issues arising from the division between the order-making and the condition-setting jurisdiction for ESOs.<sup>63</sup> The Public Defence Service said it was problematic to have a court consider under what conditions an ESO might be appropriate without it being able to impose those conditions. The Law Association, the Criminal Bar Association and Lara Caris noted shortcomings regarding the process for challenging decisions by the Parole Board compared to appeals against court decisions. The NZCCL suggested that the Parole Board should be improved.

10.61 Although the NZLS also identified issues with the division, it ultimately considered the current system of splitting decision-making authority between the court and the Parole Board may be necessary, if inconvenient.

10.62 We also asked submitters whether 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.

10.63 All submitters who addressed this question agreed that they should.<sup>64</sup> The NZLS added that the wording “no more onerous, restrictive or of greater duration than is reasonably necessary to provide for the safety of the community” may be preferable. The Criminal Bar Association added that annual reviews were necessary.

### PREFERRED APPROACH

10.64 We conclude that significant revisions to the legislative tests are needed to address the issues with the current law discussed above. In light of our proposals in Part 1 of this Preferred Approach Paper for a single, post-sentence regime to govern preventive measures, we propose here a single set of tests to apply to the imposition of all preventive measures under the new Act.

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<sup>63</sup> Lara Caris, Criminal Bar Association, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association.

<sup>64</sup> Bond Trust, Criminal Bar Association, Dr Tony Ellis, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association.

## An application to te Kōti Matua | High Court or te Kōti-ā-Rohe | District Court should be required

### PROPOSALS

P19

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the court for an order imposing a preventive measure on an eligible person.

P20

Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for secure preventive detention and residential preventive supervision under the new Act. Te Kōti-ā-Rohe | District Court should have first instance jurisdiction to determine applications for community preventive supervision. Where the chief executive of Ara Poutama Aotearoa | Department of Corrections applies for preventive measures in the alternative, they should apply to the court having first instance jurisdiction to determine the most restrictive preventive measure sought.

10.65 We consider the High Court should have first instance jurisdiction to determine applications for secure preventive detention and residential preventive supervision. Te Kōti-ā-Rohe | District Court, on the other hand, should have first instance jurisdiction over applications for community preventive supervision.

10.66 This allocation of first instance jurisdiction broadly resembles the jurisdictional configuration under the current law. The High Court has exclusive jurisdiction to impose preventive detention and PPOs. In our view, it is appropriate that the High Court continues to exercise jurisdiction in respect of forms of secure detention. As we discuss in Chapters 3 and 15, residential preventive supervision can be understood as replacing the current practice of detaining people on ESOs pursuant to residential restrictions and programme conditions. Jurisdiction for imposing ESOs currently lies with the “sentencing court”, which can either be the High Court or District Court depending on which court sentenced the person to imprisonment in respect of the person’s qualifying offending.<sup>65</sup> Over the period 2004–2024, 32 per cent of ESO applications were heard and determined by the High Court and 68 per cent of ESO applications were heard and determined in the District Court. Reflecting a similar breakdown, we propose that applications for residential preventive supervision be determined by the High Court and applications for community preventive supervision be determined by the District Court.<sup>66</sup>

<sup>65</sup> Section 107D of the Parole Act 2002 defines the “sentencing court” as te Kōti Matua | High Court unless every relevant offence for which the person against whom the ESO is sought was most recently subject to a sentence of imprisonment imposed by te Kōti ā Rohe | District Court, in which case the sentencing court is the District Court.

<sup>66</sup> In respect of ESOs that are subject to residential restrictions and programme conditions, which we propose should be replaced by residential preventive supervision, it is likely te Kōti Matua | High Court will have imposed those ESOs. That is because we understand that many of those ESOs will have also involved an intensive monitoring condition. Applications for ESOs with intensive monitoring conditions must be made to the High Court: Parole Act 2002, s 107IAB(2).

- 10.67 Where an application seeks preventive measures in the alternative (for example, residential preventive supervision or, if the court declines that application, community preventive supervision), the court with jurisdiction over the more restrictive measure should determine the application.
- 10.68 We propose that the procedure for imposing a preventive measure should commence by an application made by the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive). Again, this continues the current law in respect of ESO and PPO applications. We address various matters relating to proceedings under the new Act in Chapter 12.

## The revised legislative tests

### PROPOSALS

#### P21

The new Act should provide that the court may impose a preventive measure on an eligible person if it is satisfied that:

- a. the person is at high risk of committing a further qualifying offence in the next three years if the preventive measure is not imposed on them;
- b. having regard to the nature and extent of that risk, the preventive measure is the least restrictive measure adequate to address that risk; and
- c. the nature and extent of any limits the preventive measure would place on the person's rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 are justified by the nature and extent of the risk the person poses to the community.

#### P22

When the court hears and determines an application for residential preventive supervision or community preventive supervision:

- a. any reference to a preventive measure in the tests in P21 should include any special conditions to form part of that preventive measure sought against the eligible person; and
- b. the court should impose the preventive measure together with any special conditions that satisfy the tests.

## PROPOSAL

P23

In deciding whether the tests in P21 are met, the new Act should provide that the court:

- a. must take into account:
  - i. the health assessor reports provided in support of the application;
  - ii. offences disclosed in the person's criminal record;
  - iii. any efforts made by the person to address the cause or causes of all or any of those offences;
  - iv. whether and, if so, how a preventive measure imposed can be administered by Ara Poutama Aotearoa | Department of Corrections (or on its behalf); and
  - v. any other possible preventive measure that the court could impose that would comply with those tests; and
- b. may take into account any other information relevant to whether the tests in P21 are met.

10.69 As discussed in Part 1, we propose that the new Act should provide for a gradation of three preventive measures – community preventive supervision, residential preventive supervision and secure preventive detention. The measures should be coherently linked, and the legislation should facilitate the imposition of the least restrictive measure needed to ensure adequate community safety.

10.70 To achieve this, we propose a single set of legislative tests that the court would apply to determine which preventive measure, if any, it should impose. The tests are designed so that the preventive measure:

- (a) is available only where an eligible person poses a high risk of committing a further qualifying offences;
- (b) is the least restrictive necessary in the circumstances to address those risks; and
- (c) only limits the eligible person's rights and freedoms affirmed under the NZ Bill of Rights in ways that can be justified.

10.71 We discuss each of the tests separately below. In summary, the tests are intended to direct the court to which measure with what conditions would best achieve the objective of community safety while imposing only justified limits on a person's rights and freedoms. The tests broadly reflect the approach the courts are currently taking when determining ESO and PPO applications. As discussed above, that approach is to determine whether the statutory criteria are met, whether a less restrictive option would adequately address the risk and whether the order is justified in terms of section 5 of the NZ Bill of Rights. Unlike our proposal, however, the courts' current approach is not fully reflected in the legislative tests. We suggest that the primary legislation should state the tests the court is to apply as comprehensively as possible without the need to refer to case law for any additional elements superimposed on the tests.

### **Standard of proof**

10.72 The new Act should require that the court be “satisfied” the tests are met. This proposal draws on the current test for preventive detention under the Sentencing Act. It is intended to continue the law as settled under *R v Leitch* that the term “satisfied” is inapt to import notions of the burden of proof and of setting a particular standard.<sup>67</sup> Rather, it requires the court to “make up its mind” and come to a judicial decision based on the evidence.<sup>68</sup>

### **Applications should particularise the preventive measure and special conditions sought**

10.73 The tests then contemplate that, when the chief executive applies to the court, they will seek orders for a specific preventive measure. If the application is for community preventive supervision or residential preventive supervision, it should include any special conditions the chief executive wishes the court to impose as part of those measures (no special conditions would apply to secure preventive detention). We explain our proposal in relation to the imposition of special conditions further below.

### **High risk of committing a further qualifying offence in the next three years**

10.74 The first of the tests is that the court should be satisfied that there is a high risk that the eligible person will commit a further qualifying offence within the relevant period.

10.75 We propose that the legislative tests use the concept of “risk”. This differs from the current test for preventive detention, which centres on the court being satisfied that the person is “likely to commit” another qualifying offence.<sup>69</sup> It also differs from the current tests for ESOs and PPOs. While those tests use the language of “risk”, the legislation requires an evaluation of risk to be linked to the existence of the traits and behavioural characteristics.<sup>70</sup> The tests we propose would require the court to assess the person’s risk of reoffending as a stand-alone inquiry. We prefer this approach for the following reasons:

- (a) First, as discussed above, the risk a person will reoffend calls for an assessment of the complex interaction between a range of factors relevant to that person. As we explain further in Chapter 11, risk assessments conducted by health assessors aim to generate an individualised appreciation of the person’s risk. These risk assessments should combine the use of actuarial risk assessment tools (described further in Chapter 11) and a discussion of the psychological, situational and environmental concerns that may cause that particular individual to offend.<sup>71</sup> Assessments looking at the interplay of these factors are, in our view, best understood through the concept of risk.<sup>72</sup> Conversely, we do not think an inquiry that recognises that

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<sup>67</sup> *R v Leitch* [1998] 1 NZLR 420 (CA) at 428.

<sup>68</sup> *R v Leitch* [1998] 1 NZLR 420 (CA) at 428.

<sup>69</sup> Sentencing Act 2002, s 87(2)(c).

<sup>70</sup> Parole Act 2002, s 107IAA; and Public Safety (Public Protection Orders) Act 2014, s 13(2).

<sup>71</sup> Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 98–99.

<sup>72</sup> In *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [52], te Kōti Pīra | Court of Appeal explained:

Risk assessments and the related judicial decision making for risk management are best informed through an individualised formulation of risk. This should draw upon a variety of different sources of information in an attempt to identify risk factors within an aetiological (causative) framework. This recognises that risk is contingent upon factors that are both environmental and inherent in the individual.

reoffending is contingent on individualised risk factors lends itself to assessments expressed in terms of “likelihood”.

- (b) Second, in any event, where the legislation does use the word “likely”, the courts tend to revert to the language of “risk” in their decisions. For example, prior to amendments in 2014, the Parole Act required the court to find that the offender was “likely” to commit an offence to impose an ESO. The Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* explained that, “[t]he word “likely” does not, in itself, provide much guidance on the level of probability required”.<sup>73</sup> Instead, the Court said it preferred to treat its jurisdiction to impose ESOs as depending upon “the risk of relevant offending being both real and ongoing and one that cannot be sensibly ignored having regard to the nature and gravity of the likely re-offending”.<sup>74</sup> Similarly, in *B v R*, when considering whether to impose preventive detention, the Court of Appeal explained that a court “must conduct a fact intensive inquiry”, which is “essentially an exercise in the judicial evaluation of the risk the offender would pose to the community”.<sup>75</sup>

10.76 We have opted for a threshold of “high risk” of further qualifying offending if the person was not made subject to the preventive measure sought. This differs from the current law, which, while using different thresholds, provides a “very high risk” threshold for PPOs and ESOs (in respect of violent reoffending). In our view, it is acceptable for the threshold of “high risk” to apply in respect of all types of reoffending and in respect of all preventive measures.<sup>76</sup> While lower than the “very high risk” threshold, we do not anticipate the threshold would widen the scope of the regime. That is because this element of the tests acts as an initial criterion as to whether a preventive measure should be imposed but does not operate in isolation. The other two tests require the court to assess whether the measure would be the least restrictive and justified in the circumstances.

10.77 We think a consistent threshold in respect of all further qualifying offences and in respect of all preventive measures is preferable. Several submitters favoured a consistent threshold rather than the differing thresholds under the current law. Similarly, all comparable jurisdictions we have researched apply the same threshold to all offending types.<sup>77</sup>

10.78 The qualifying offences that a person should be at high risk of committing should be defined in the new Act as “further qualifying offences”. As set out in Chapter 8, we propose that further qualifying offences be defined in the new Act as including all qualifying offences with the exception of:

- (a) imprisonable offences under the Films, Videos, and Publications Classification Act 1993;
- (b) attempts and conspiracies to commit qualifying offences; and

<sup>73</sup> *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [11].

<sup>74</sup> *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [11].

<sup>75</sup> *B v R* [2013] NZCA 594 at [14].

<sup>76</sup> For completeness, we do not favour a threshold lower than “high risk”. A lower threshold would not, in our view, be in proportion to the severity of the restrictions a preventive measure would impose. We note too the precedent within the current law governing ESOs and PPOs for thresholds centring on “high risk” and “very high risk”.

<sup>77</sup> We have examined the law in England and Wales, the Australian jurisdictions and Canada.



(c) offences under the Prostitution Reform Act 2003.

10.79 We think the tests should include a temporal element. Most submitters who addressed this matter supported the suggestion. A temporal element will require the court to assess the high risk the eligible person will commit a qualifying offence within the coming three years. This period is linked to the intervals at which the court is required to review a preventive measure, which is three years (see Chapter 18). We do not propose the “imminence” test under the PPO Act should continue because, as explained above, a test linked to the first suitable opportunity to reoffend may not accurately reflect reoffending behaviour.

### *The preventive measure is the least restrictive measure*

10.80 The second test should require the court to be satisfied that the preventive measure sought is the least restrictive adequate to address the high risk that the eligible person will commit a further qualifying offence. By “least restrictive”, we mean that the preventive measure interferes with the person’s rights and freedoms to the least extent necessary.

10.81 This element performs an important function in aligning the tests with human rights law. To determine whether a limit is justified, the courts often assess, among other things, whether the measure impairs rights no more than is necessary.<sup>78</sup>

10.82 The courts are, to an extent, already attempting to apply the least restrictive measure. As noted above, a court will not impose preventive detention or a PPO if it considers an ESO would adequately address the reoffending risks, even though this approach is not expressed in the current legislative tests. In our view, it is preferable that this requirement be provided for within the tests to make the primary legislation as clear and comprehensive as possible.

### *The preventive measure is proportionate*

10.83 The third test we propose recognises that there may be cases where a person poses a high risk of committing a further qualifying offence and the preventive measure sought would be the least restrictive, but the preventive measure would be an unjustified intrusion on a person’s rights and freedoms. The measure may be unjustified where, because of the nature of the risks the person poses, the community protection benefits provided by the measure do not justify the way the measure would adversely affect the person. For example, the further qualifying offending the person is at high risk of committing may be of a relatively low level of severity,<sup>79</sup> but it may be that the offending cannot be prevented other than through a more restrictive measure such as secure preventive detention or residential preventive supervision. In that case, the indefinite detention of the person might be considered disproportionate.

10.84 The inclusion of the test resembles the approach the courts are already taking in practice. As noted above, the courts have found ESOs to engage the protection against second penalties under the NZ Bill of Rights. The courts have developed an approach whereby, if the statutory criteria for an ESO are met, the court will undertake the additional inquiry

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<sup>78</sup> *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. We discuss the justification for preventive measures further in Chapter 3.

<sup>79</sup> In Chapter 8, we propose that offences such as indecent assault remain as qualifying offences. These offences may involve a diverse range of behaviour. Some may be regarded as of relatively minor severity.

of balancing the right not to be subject to second punishment against the statutory purpose to protect the public from the risk the person will reoffend.<sup>80</sup> In our view, the tests expressed in the new Act should state as comprehensively as possible the inquiry the court is required to make, including any overall proportionality analysis.

- 10.85 A preventive measure is likely to limit several rights such as freedom of expression, freedom of association, freedom of movement and protection from second penalties. These rights engage different values, and what may be regarded as a justified limit also differs. Different people might have their rights affected in different ways depending on the circumstances of the case and the individual concerned. These are matters the court may need to weigh on a case-by-case basis.

### **Factors the court should take into account**

- 10.86 Like the test for preventive detention, we propose that the legislation express a non-exhaustive list of matters relevant to whether the tests are met. The particular matters we have identified, which we anticipate will be relevant in nearly all cases, include:

- (a) the health assessor reports provided in support of the application;
- (b) the eligible person's criminal record of offending;
- (c) efforts made by the eligible person to address the cause or causes of their qualifying offending, which would include both positive and negative steps;
- (d) how the preventive measure might be administered in practice; and
- (e) any other possible preventive measure that the court could impose that would comply with the tests.

- 10.87 We therefore propose the court be required to take these matters into account. In addition, we propose that the tests make clear that the court may take into account any other information relevant to whether the three primary tests are satisfied.

### **Traits and behavioural characteristics should not be prescribed in the tests**

- 10.88 We propose that the tests for preventive measures should not reference specific traits and behavioural characteristics because of the issues we have identified with the tests for ESOs and PPOs. Omitting the requirement that the court be satisfied that a person displays any specific traits or behavioural characteristics will not, however, preclude traits or behavioural characteristics being brought to the attention of the court. Some traits and characteristics are likely to be highly relevant to the risks the person will reoffend and what measures are necessary and justified to address those risks. The extent to which traits and characteristics are relevant to the primary tests can be dealt with through evidence such as the health assessment reports (see Chapter 11) or other expert evidence and argument.

### **The court should set special conditions when imposing a preventive measure**

- 10.89 As we explain in Chapters 14 and 15, it should be possible for special conditions to apply to a person subject to community preventive supervision or residential preventive

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<sup>80</sup> *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53]; and *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [31].

supervision. We propose that the court should set special conditions at the time it imposes these measures by applying the same legislative tests. This approach would depart from the current law in two key respects. First, it would place the power to impose special conditions with the court rather than the Parole Board (or an equivalent specialist body). Second, the court would determine whether to impose any special conditions as part of its overall consideration of whether to impose community preventive supervision or residential preventive supervision under the same legislative tests.

10.90 We propose placing the power to impose special conditions with the court rather than the Parole Board or an equivalent specialist body for the following reasons:

- (a) Enabling the courts to consider the imposition of a preventive measure and special conditions together would address the inefficiencies caused by multiple hearings concerning similar issues and the same evidence.
- (b) Submitters who addressed this issue favoured the courts having power to set special conditions rather than the Parole Board. Some pointed to shortcomings in the review process of Parole Board decisions, in particular the limited function of judicial review in examining the Parole Board’s decision making. This may be inappropriate given the significant restrictions special conditions can impose on people’s lives. We agree that, given the potential restrictiveness of some conditions, special conditions should be imposed through a court decision and subject to full appeal rights.
- (c) In almost all jurisdictions we have examined, the imposing authority — a court — is also the authority to determine which special conditions should apply.<sup>81</sup>
- (d) There are already situations where the court may impose supervision conditions — when imposing an interim supervision order or release conditions for offenders on short-term prison sentences.<sup>82</sup>
- (e) Lastly and most importantly, to impose a preventive measure, the court should be satisfied that the measure is the least restrictive adequate to address the risks the person poses and is proportionate to those risks. It would be difficult for the court to reach a view on this matter if the special conditions of the measure would be set subsequently by a separate body.

10.91 Relatedly, we propose that special conditions should be imposed together with the relevant preventive measures and under the same primary legislative tests. A preventive measure and the standard and special conditions of that measure are indivisible from each other. The conditions are the specific restrictions the preventive measures will impose. It is not logical nor possible to justify the imposition of the preventive measures on a different basis to the imposition of the special conditions. They are one and the same.

10.92 We recognise that the Court of Appeal in *Grinder* was satisfied that the Parole Board could apply a less stringent test to special conditions than to decisions regarding release from or recall to custody. As discussed above, the test for release or recall centres on whether the person poses an “undue risk” to the community. The Court of Appeal held that special conditions may be imposed to address the person’s risk of reoffending even

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<sup>81</sup> This is the case in Australia (Cth), New South Wales, Northern Territory, Queensland, Tasmania, Victoria, England, Wales, Scotland, Northern Ireland and Ireland.

<sup>82</sup> Parole Act 2002, s 107FA(3); and Sentencing Act 2002, s 93.

when that risk is not an undue one, provided they are not “more onerous, or last longer, than is consistent with the safety of the community” as required by section 7(2) of the Parole Act and are for the purposes specified in section 15(2) of the Act.<sup>83</sup>

- 10.93 The Court’s view was based on its interpretation of sections 7 and 15 of the Parole Act regarding the imposition of special conditions. Those provisions govern the imposition of special conditions of parole generally. They are therefore calibrated to the release on parole of people serving determinate sentences, in respect of whom special conditions may not last longer than six months beyond their sentence expiry date.<sup>84</sup> It is questionable, in our view, whether those tests are appropriate for people subject to indeterminate preventive measures for whom special conditions may potentially endure for the rest of their lives. A better approach, we suggest, is to justify restrictions of this nature based on the primary objective of preventing serious reoffending rather than on an ancillary or other objective.
- 10.94 We also note that, like preventive detention, the test for imposing special conditions under an ESO is not tied to the primary tests for imposition. Rather, special conditions must be for the purposes specified in section 15(2).<sup>85</sup> There is, as discussed above, some uncertainty as to whether the principle that conditions must not be “more onerous, or last longer, than is consistent with the safety of the community” applies because section 7(2)(a) does not refer to extended supervision conditions. Our proposal would resolve this uncertainty. Furthermore, in the few cases where the test has been considered, albeit briefly, the courts have accepted that there should be a fact-specific inquiry into the nexus between the risk posed by the person and the effectiveness of the special condition.<sup>86</sup> In our view, this approach supports the proposal to set special conditions based on the primary tests for imposition.

### Ability for the court to impose a less restrictive measure

#### PROPOSAL

##### P24

If the court is not satisfied the tests in P21 are met, the new Act should confer on the court the power in the same proceeding to impose a less restrictive measure if satisfied the tests are met in respect of that less restrictive measure.

- 10.95 If the court is not satisfied the tests are met in respect of the preventive measure sought, we propose that the court should have power to impose a less restrictive preventive measure on its own initiative. The purpose of giving the court this power is to avoid duplicative proceedings by removing the need for a fresh application if the court declines an application for a specific preventive measure. Because a primary component of the tests is that the court must be satisfied that the measure sought is the least restrictive necessary in the circumstances, it should receive evidence and argument on whether a

<sup>83</sup> *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [52].

<sup>84</sup> Parole Act 2002, s 29.

<sup>85</sup> Parole Act 2002, s 107K(4).

<sup>86</sup> *Chief Executive of the Department of Corrections v Kepu* [2021] NZHC 2745 at [65]; and *Chief Executive of the Department of Corrections v Martin* [2016] NZHC 275 at [49].

lesser measure would be suitable. The court may then be placed to impose a less restrictive measure if satisfied, based on the evidence and argument presented, the less restrictive measure satisfies the tests. The court could also call for further evidence and argument in a proceeding on this point.

- 10.96 We also propose that the procedure contemplated currently by section 107GAA of the Parole Act does not continue. That provision prescribes a procedure to be followed when the chief executive applies for a PPO and an ESO in the alternative. The court “must not hear” the ESO application until the court has declined to make the PPO. We discuss issues with this requirement in Chapter 4. If the chief executive applies for preventive measures in the alternative, given the necessity for the court to consider whether a less restrictive measure would offer adequate public protection, the better approach is for the court to hear and determine both applications in the same hearing.

## Interim preventive measures

### PROPOSALS

P25

Before an application for a preventive measure is finally determined under the new Act, the court should have power to impose any preventive measure on an interim basis if one or more of the following events occur:

- a. An eligible person is released from detention.
- b. An eligible person who is a returning offender arrives in Aotearoa New Zealand.
- c. The court directs the chief executive of Ara Poutama Aotearoa | Department of Corrections to consider an application in respect of the person under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
- d. The chief executive of Ara Poutama makes an application to escalate the person to a more restrictive preventive measure.

P26

To impose an interim preventive measure under the new Act, the court should be satisfied the primary legislative tests are made out on the available evidence in support of the application for the interim measure.

P27

If the court imposes residential preventive supervision or community preventive supervision as an interim preventive measure, the standard conditions of that measure should apply. The court should also have power to impose any special conditions that may be imposed under that measure.

10.97 We propose that the law continue to make provision for the imposition of preventive measures on an interim basis pending the determination of an application for a preventive measure. The ability to seek an interim measure should arise in four scenarios when:

- (a) a person would otherwise be released from prison before the court imposes a preventive measure;
- (b) a returning offender who is eligible for a preventive measure returns to Aotearoa New Zealand (we address the eligibility of returning offenders in Chapter 7);
- (c) it appears to the court that the person may be “mentally disordered” or “intellectually disabled” and it may be appropriate that an application for a compulsory treatment order or compulsory care order be made in respect of the person instead of the application for the preventive measure proceeding; or
- (d) the chief executive considers that the preventive measure to which a person is subject is insufficient to address the risks they pose and applies for the imposition of

a more restrictive measure (we discuss the ability to escalate a person to a more restrictive measure in Chapter 17).<sup>87</sup>

10.98 The current law provides for the imposition of an interim supervision order pending the determination of an application for an ESO.<sup>88</sup> Similarly, pending the determination of an application for a PPO, the court may impose an interim detention order.<sup>89</sup> In both instances, the legislation sets out the court's power to make interim orders but does not prescribe a test. The courts have, however, developed an approach following the Supreme Court's decision in *Chisnall v Chief Executive of the Department of Corrections*.<sup>90</sup> The Supreme Court held that, when determining whether to impose an interim detention order, the court must be satisfied that:<sup>91</sup>

- (a) the statutory criteria for making a PPO are made out, even though the assessment is provisional until the substantive application can be heard; and
- (b) no less restrictive conditions can be put in place that would adequately address the risk posed by the person.

10.99 The Court reasoned that it was appropriate to be satisfied the criteria for a PPO be made out given the deprivation of liberty involved. If the conditions for the substantive PPO are present, the Court said, insufficient justification for interim detention will exist.<sup>92</sup>

10.100 The Court noted that the evidence in support of the interim detention order may be provisional and untested. It may be that further evidence and argument presented at the substantive hearing may lead the court to change its conclusion as to whether the statutory criteria are met.<sup>93</sup>

10.101 The courts have applied this approach when considering interim supervision orders under the Parole Act. They have held that, to impose an interim order, the court must be satisfied, albeit on a provisional basis, that the statutory criteria for an ESO are made out.<sup>94</sup> Like interim detention orders, the courts reasoned that the potential restrictions under an interim supervision order are substantial and it is appropriate the court be satisfied (on a provisional basis) the criteria for a substantive order be met.<sup>95</sup>

10.102 The proposal we present for interim measures reflects the test the courts have developed. We consider it preferable, however, that the test be expressed within the new

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<sup>87</sup> We note the ability to seek an interim preventive measure whenever a more restrictive measure is sought would be broader than the current position in respect of interim detention orders under the Public Safety (Public Protection Orders) Act 2014. Section 107(1)(b) provides the ability to seek an interim detention order only when an intensive monitoring condition or a condition requiring the long-term full-time placement of the person "ceases". The Kōti Pira I Court of Appeal has interpreted this provision as requiring that an intensive monitoring condition still be in place at the time an application for a PPO and interim detention order are made: *R (CA464/2018) v Chief Executive of the Department of Corrections* [2019] NZCA 60 at [29]-[38].

<sup>88</sup> Parole Act 2002, s 107FA.

<sup>89</sup> Public Safety (Public Protection Orders) Act 2014, s 107.

<sup>90</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83.

<sup>91</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83 at [32]-[33], [40] and [83]-[84].

<sup>92</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83 at [35].

<sup>93</sup> *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83 at [41].

<sup>94</sup> *Chief Executive of the Department of Corrections v Ihimaera* [2017] NZHC 2228 at [14].

<sup>95</sup> *Chief Executive of the Department of Corrections v Ihimaera* [2017] NZHC 2228 at [13]-[14].

Act. The court should be satisfied, on its provisional assessment based on the available evidence in support of the application for an interim measure, that the primary tests we present for the imposition of substantive measures are made out.

- 10.103 Similar to the interim supervision orders under the Parole Act, the court should have power to impose conditions when imposing residential preventive supervision and community preventive supervision on an interim basis. We suggest, however, that the standard conditions of those measures should apply automatically. This departs from the Parole Act, which requires the court to impose any standard condition individually.<sup>96</sup> We consider the proposed approach would make interim applications more straightforward and would better align with how the primary tests are intended to be applied in substantive applications. The court should continue to have the ability to impose individual special conditions if satisfied, on a provisional assessment, the primary tests for the imposition of those conditions are made out.
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<sup>96</sup> Parole Act 2002, s 107FA(3).



**CHAPTER 11**

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# Evidence of reoffending risk

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**IN THIS CHAPTER, WE CONSIDER:**

- the evidence a court relies on when deciding whether to impose a preventive measure;
- issues with the current law and practice; and
- proposals to ensure evidence from expert health assessors is considered by the court when imposing preventive measures and to ensure the court can take into account a broad range of other evidence.

**CURRENT LAW**

11.1 For extended supervision order (ESO) and public protection order (PPO) proceedings, a court may receive any evidence, whether or not it would otherwise be admissible in a court of law.<sup>1</sup> The Public Safety (Public Protection Orders) Act 2014 (PPO Act) nevertheless provides that the rules relating to privilege and confidentiality remain for PPO proceedings.<sup>2</sup>

**Health assessor reports**

11.2 Health assessor reports are the principal evidence on which a court will determine whether to impose preventive detention, an ESO or a PPO. A “health assessor” is defined as a registered psychiatrist or psychologist.<sup>3</sup>

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<sup>1</sup> Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108(1).

<sup>2</sup> Public Safety (Public Protection Orders) Act 2014, s 108(2).

<sup>3</sup> Sentencing Act 2002, s 4 definition of “health assessor”; Parole Act 2002, s 107F(2); and Public Safety (Public Protection Orders) Act 2014, s 3 definition of “health assessor”.

- 11.3 The legislation requires health assessor reports to be provided to the court when preventive detention is sought at sentencing, or when the chief executive of Ara Poutama | Department of Corrections applies for an ESO or PPO.<sup>4</sup>
- 11.4 For preventive detention, the Sentencing Act 2002 provides that the court must not impose the sentence unless it has considered reports from two health assessors regarding the “likelihood of the offender committing a further qualifying sexual or violent offence”.<sup>5</sup>
- 11.5 For ESOs, the Parole Act 2002 requires the chief executive to accompany an ESO application with one health assessor report (although, in practice, more than one is often provided).<sup>6</sup> The report must address one or both of the questions:<sup>7</sup>
- (a) whether—
    - (i) the offender displays each of the traits and behavioural characteristics specified in section 107IAA(1); and
    - (ii) there is a high risk that the offender will in future commit a relevant sexual offence:
  - (b) whether—
    - (i) the offender displays each of the behavioural characteristics specified in section 107IAA(2); and
    - (ii) there is a very high risk that the offender will in future commit a relevant violent offence
- 11.6 For PPOs, the PPO 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.<sup>8</sup> The reports must address:<sup>9</sup>
- (a) whether the person exhibits the traits and behavioural characteristics described in section 13(2); and
  - (b) whether there is a very high risk of imminent serious sexual or violent offending by the person.
- 11.7 A health assessor report is not required when the Parole Board considers whether to direct the release of a person sentenced to preventive detention. However, Ara Poutama must supply the Parole Board with a parole assessment report. The Parole Board may also consider reports prepared for the purpose of sentencing, and it may request psychological assessment reports from Ara Poutama about the person’s risk of reoffending.<sup>10</sup>

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<sup>4</sup> Sentencing Act 2002, s 88(1)(b); Parole Act 2002, s 107F(2); and Public Safety (Public Protection Order) Act 2014, ss 9 and 13.

<sup>5</sup> Sentencing Act 2002, s 88(1)(b).

<sup>6</sup> Parole Act 2002, s 107F(2).

<sup>7</sup> Parole Act 2002, s 107F(2A).

<sup>8</sup> Public Safety (Public Protection Orders) Act 2014, s 9(a).

<sup>9</sup> Public Safety (Public Protection Orders) Act 2014, s 9(b).

<sup>10</sup> Parole Act 2002, s 43(1)(a) and (c). A parole assessment report will include risk assessment information, including the person’s RoC\*RoI category. It is typically prepared by Prison Service staff with the assistance of parole officers: New Zealand Parole Board “Parole process” [https://www.paroleboard.govt.nz/about\\_us/parole\\_process](https://www.paroleboard.govt.nz/about_us/parole_process) and *Department of Corrections: Managing offenders on parole* (Controller and Auditor-General, February 2009) at 14-15.

## Health assessment in practice

- 11.8 Health assessors produce an opinion on the risk of reoffending based on an individualised assessment of the person concerned. An assessor will use a combination of risk assessment tools and clinical judgement.<sup>11</sup>
- 11.9 In general terms, a risk assessment tool is a statistical method that uses empirically predictive risk factors or behaviour to calculate a person’s risk of reoffending. Risk assessment tools have been developed in response to the general inaccuracy of unstructured clinical evaluation of risk.<sup>12</sup> Dozens of risk assessment tools, each with unique strengths and weaknesses, have been created and are widely used around the world in criminal justice settings.<sup>13</sup>
- 11.10 To develop a tool, researchers use data collected from a sample of convicted individuals to identify a list of risk factors that are associated with criminal offending. These factors may be “static” or “dynamic”. Static factors, such as prior offending, are features not amenable to change. Dynamic factors, such as substance abuse, are amenable to change and can be targeted in treatment programmes. Using statistical methods, weight is then assigned to each risk factor based on their relative importance in predicting further offending. To administer the tool, an assessor will use information they gather about an individual to assign points to the different risk factors. The tool provides an arithmetic or other weighting method to calculate a score based on the extent to which an individual displays the risk factors. Once a score is produced, assessors then apply the tool’s guidelines to classify individuals into categories of risk.<sup>14</sup>
- 11.11 Some tools are designed to predict only sexual recidivism risk or only violent recidivism risk. Others focus exclusively on personality traits and characteristics and can add additional context to understanding an individual’s risk. Tools are researched, tested and developed to refine their predictive accuracy.<sup>15</sup> The following table sets out some common risk assessment tools and the acronyms by which they are often referred.

<sup>11</sup> *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [50]–[54]. See also Simon France (ed) *Adams on Criminal Law - Sentencing* (online ed, Thomson Reuters) at [PA1071.05].

<sup>12</sup> *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.

<sup>13</sup> Julie Blais, Kelly M Babchishin and R Karl Hanson “Improving Our Risk Communication: Standardized Risk Levels for Brief Assessment of Recidivism Risk-2002R” (2022) 34 *Sexual Abuse* 667 at 669.

<sup>14</sup> Lucy Moore *Literature Review – Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023); John Monahan and Jennifer L Skeem “Risk Assessment in Criminal Sentencing” (2016) 12 *Annual Review of Clinical Psychology* 489; and Bernadette McSherry “Risk Assessment, Predictive Algorithms and Preventive Justice” in John Pratt and Jordan Anderson (eds) *Criminal Justice, Risk and the Revolt against Uncertainty* (Palgrave Macmillan, Cham, 2020) 17.

<sup>15</sup> 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.

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)

11.12 Alongside the tools, health assessors draw on clinical judgement and additional factors relevant to reoffending to provide an overall assessment of a person's risk.<sup>16</sup> This assessment may be based on evidence obtained from validated sources or clinical experience. A clinician may include situational and environmental factors relevant to the individual in their assessment.<sup>17</sup> Clinical judgement is particularly important for evaluating the nature, severity and imminence of likely reoffending because, as noted below, these are matters that risk assessment tools cannot predict.<sup>18</sup> Clinical judgement is also needed to address whether a person displays the traits and behavioural characteristics that are statutorily required to impose an ESO or a PPO.

## ISSUES

### Limitations of risk assessment tools

11.13 In the Issues Paper, we explained that there are some criticisms of risk assessment tools in the commentary on preventive detention, ESOs and PPOs.<sup>19</sup> These criticisms point to specific limitations of risk assessment tools, including:

- (a) **Risk assessment tools do not assess individualised risk.** A risk categorisation generated from risk assessment tools is based on the extent to which the person being assessed shares characteristics with similar offenders. Therefore, some maintain that risk assessment tools do not provide insight into the propensity of the

<sup>16</sup> Lucy Moore *Literature Review — Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 19.

<sup>17</sup> Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 98–99.

<sup>18</sup> Lucy Moore *Literature Review — Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 18–19.

<sup>19</sup> Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, 2023) (Issues Paper) at [9.13]–[9.20].

individual in question to commit an offence because it is an extrapolation based on others' behaviour.<sup>20</sup>

- (b) **Risk assessment tools do not predict the severity or imminence of future offending.** 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.<sup>21</sup> Beyond that, the results of a risk assessment will not provide evidence as to how severe or how imminent potential reoffending may be.<sup>22</sup>
- (c) **Problems can arise from using unsuitable sample data.** Risk assessment tools are only as useful as the data on which they have been developed.<sup>23</sup> Issues can arise if the sample data is unreliable or not representative of the population. 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.<sup>24</sup> 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.<sup>25</sup>
- (d) **Risk assessment tool results may not be adequately scrutinised.** The technical nature of the psychological evidence presented through risk assessment tools may mean the court does not adequately scrutinise the evidence. In some instances, courts have accepted the conclusions generated from the risk assessment tools without inquiring into whether the results are sufficiently accurate.<sup>26</sup> Relatedly, confusion may arise because the levels of risk specified by a tool are not designed to align with the legislative tests of the preventive regimes.<sup>27</sup> Despite receiving the

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<sup>20</sup> *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (New South Wales Sentencing Council, 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 *JCCL* 78 at 86.

<sup>21</sup> Kris Gledhill "Preventive Sentences and Orders: The Challenges of Due Process" (2011) 1 *JCCL* 78 at 86; and Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 97.

<sup>22</sup> 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.

<sup>23</sup> Stephen D Gottfredson and Laura J 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.

<sup>24</sup> Stephen D Gottfredson and Laura J Moriarty "Statistical Risk Assessment: Old Problems and New Applications" (2006) 52 *Crime and Delinquency* 178 at 184.

<sup>25</sup> Lucy Moore *Literature Review – Risk assessment of serious offending* (Commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 16-17.

<sup>26</sup> 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.

<sup>27</sup> Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 95.

highest risk categorisation according to a particular tool, a person may not be of sufficiently high risk to satisfy the statutory test.<sup>28</sup>

11.14 In the Issues Paper we stated a preliminary view that reform was not needed to address these limitations.<sup>29</sup> Rather, they can be appropriately addressed as matters of practice within the legal framework. We outlined the practices that factored into this decision and that ought to continue, these included:

- (a) **Oversight, research and calibration of individual tools.** Ara Poutama currently takes steps to calibrate and validate risk assessment tools.<sup>30</sup> Ara Poutama should continue to take responsibility for ensuring risk assessment tools are used appropriately. It can ensure risk assessment tools are regularly reviewed and validated for the relevant populations on which they are used. We would expect, if a tool has not been subject to this oversight, that the health assessor’s report would reflect this and be properly considered by the court.<sup>31</sup>
- (b) **Communication about the limitations of tools to the court and integration of results with the assessor’s overall opinion.** When the results of risk assessment tools are used to formulate health assessor reports, the courts have established how they expect the evidence to be presented.<sup>32</sup> The limitations of the relevant tools should be communicated to the court. The results produced by risk assessment tools should be integrated with other relevant information known to relate to the risk a 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.<sup>33</sup>
- (c) **Testing health assessor reports in court.** The case law shows that judges, opposing counsel or the health assessors routinely note the limitations of risk assessment tools and assess the weight to be given to their results accordingly.<sup>34</sup> Instances where this has not occurred have been corrected on appeal.<sup>35</sup>

<sup>28</sup> See *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [146] and [151]-[152]. In the context of PPOs, Te Kōti Matua | High Court explained that being placed in the highest clinical risk category does not itself establish that the person is at very high risk of imminent sexual offending. It cautioned that the different appreciations of risk between risk assessment tools and the legislative thresholds is a limitation on the utility of the tools. As a result, the Court said it was “largely reliant on the wider assessment and clinical judgement provided by the expert psychological and psychiatric opinions that address the statutory test”.

<sup>29</sup> Issues Paper at [9.21]-[9.26].

<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [53]. See also Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 97-103.

<sup>33</sup> *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.

<sup>34</sup> 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].

<sup>35</sup> *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627.

## Inappropriate use of risk assessment tools on Māori

- 11.15 In the Issues Paper, we explained the prospect that using a sample population affected by racial bias may perpetuate racially disparate risk profiling.<sup>36</sup> In regard to Māori, we noted that Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has heard a complaint that risk assessment tools in Aotearoa New Zealand unfairly capture Māori.<sup>37</sup> However, while the Tribunal found that development of some tools had breached principles of te Tiriti o Waitangi | Treaty of Waitangi, it was unable to conclude on the evidence that prejudice had been caused.
- 11.16 We reflected in the Issues Paper that it is now generally accepted that racism and unconscious bias exist within the criminal justice and corrections system.<sup>38</sup> We also noted that the overrepresentation of Māori, their experience of racism and negative stereotyping, and other issues of systemic disadvantage may lead to lifestyle choices that are more likely to correlate with risk factors identified in some tools.<sup>39</sup> For example, Māori are more likely to have family and friends who have had involvement with the criminal justice system. According to some risk assessment tools that include a focus on peer associations they may therefore receive a higher risk score.<sup>40</sup>
- 11.17 We observed that there is limited evidence available to test this issue. We also remarked that some aspects of current law and practice may help to temper the negative impact of racial bias. This includes the commitments made by government agencies under the *Algorithm Charter for Aotearoa New Zealand* and Ara Poutama’s efforts to validate tools specifically for Māori.<sup>41</sup> We stated that we wanted to hear submitters’ views before adopting views about reform.

## RESULTS OF CONSULTATION

### Limitations of risk assessment tools

- 11.18 We asked submitters whether they agreed with the issues we had identified regarding evidential matters, specifically risk assessment evidence, and if they agreed with our preliminary conclusion that legislative reform is not generally needed to address them.

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<sup>36</sup> Issues Paper at [9.17]-[9.18]. See also Colin Gavaghan and others *Government Use of Artificial Intelligence in New Zealand* (New Zealand Law Foundation, Wellington, 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.

<sup>37</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005).

<sup>38</sup> *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (Ara Poutama Aotearoa | Department of Corrections, 2019) at 12; and Oliver Fredrickson “Risk Assessment Algorithms in the New Zealand Criminal Justice System” [2020] NZLJ 328 at 330.

<sup>39</sup> See generally Armon J Tamatea “Culture is our business: Issues and challenges for forensic and correctional psychologists” (2017) 49 *Australian Journal of Forensic Sciences* 564; and Oliver Fredrickson “Risk Assessment Algorithms in the New Zealand Criminal Justice System” [2020] NZLJ 328 at 330.

<sup>40</sup> 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”.

<sup>41</sup> *Algorithm Charter for Aotearoa New Zealand* (Tauranga Aotearoa | Stats NZ, July 2020) at 1 and 3.

Most submitters who addressed this question disagreed with our preliminary conclusion though several did not provide further detail about this disagreement.<sup>42</sup> Both Public Defence Service and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) agreed with our preliminary view.

- 11.19 Both South Auckland Bar Association and New Zealand Council for Civil Liberties (NZCCL) thought that legislative reform is needed. South Auckland Bar Association submitted that a statutory framework is required to assess and monitor health assessor reports — leaving this in the hands of counsel and judges may not be an efficient use of court resource. NZCCL agreed with the issues we raised but disagreed with our conclusion. It submitted that “legislative reform is badly needed ... to catch up to the standards of algorithm governance prevalent in the OECD”. NZCCL submitted that the Issues Paper had repeated a common fallacy that giving humans ultimate decision-making power mitigates algorithmic errors. NZCCL also disagreed that the New Zealand’s *Algorithm Charter* was an adequate framework for governing risk assessment tools — it maintained that Ara Poutama had failed to scrutinise the tools adequately and adhere to the Charter’s transparency requirements. NZCCL concluded that “predictive algorithms” should not be used in the context of sentencing and preventive detention.
- 11.20 Dr Tony Ellis thought Aotearoa New Zealand should adopt an approach to risk assessment evidence similar to that which operates in Scotland, including establishing a dedicated body like the Scottish Risk Management Authority. The Risk Management Authority is a statutory body that sets standards and publishes guidelines for risk assessment practice, provides advice and training, and accredits practitioners to provide risk assessment reports when a court considers imposing an Order for Lifelong Restriction (an indeterminate sentence similar to preventive detention).

### Inappropriate use of risk assessment tools on Māori

- 11.21 Several submitters commented on whether risk assessment tools are used inappropriately on Māori. Most of them said that the issue requires reform.<sup>43</sup> Some submitters agreed that an issue had been identified but were tentative about expressing a view about reform.<sup>44</sup> NZLS said that reform was not required.
- 11.22 Most submitters did not suggest specific reforms other than advocating for additional scrutiny of the issue. Bond Trust and NZCCL noted that inappropriate use of risk assessment tools was evident not just in relation to Māori but also other ethnic groups. Bond Trust advocated for reform based on international best practice. NZCCL opposed the use of all predictive algorithms in the context of sentencing and preventive detention.
- 11.23 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service said that it was possible that the issue required reform, however it indicated more research was required. Dr Tony Ellis submitted that there was “probably” a case for reform but that the problem stems from a wider issue regarding the overrepresentation of Māori in the criminal justice system.

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<sup>42</sup> They were Bond Trust, Criminal Bar Association, Dr Tony Ellis, The Law Association, New Zealand Council for Civil Liberties, and South Auckland Bar Association.

<sup>43</sup> They were Dr Jordan Anderson, Bond Trust, Criminal Bar Association, The Law Association, New Zealand Council for Civil Liberties, and South Auckland Bar Association.

<sup>44</sup> They were Dr Tony Ellis, and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.



- 11.24 Te Kāhui Ture o Aotearoa | New Zealand Law Society submitted that the issue could be addressed through non-legislative means. It noted that there had been increased awareness of the disproportionate representation of Māori within the justice sector in recent years — report writers, counsel and judges thus act as a check on bias by evaluating and giving appropriate weight to evidence produced by risk assessment tools.
- 11.25 Members of Te Hunga Rōia Māori o Aotearoa also addressed the racial bias of risk assessment tools in their submission. Individual members said that it is generally accepted that some risk assessment tools have not been adapted to Aotearoa New Zealand and there is a possibility of racial bias. They recognised, however, this is a fraught area because experts do not or will not believe they have participated in biased assessments. One member thought it may be beneficial for legislation to prompt decision-makers to take into account the possibility of racial bias.

## PREFERRED APPROACH

### Matters not requiring reform

- 11.26 We consider that reform is not required to address the limitations of the risk assessment tools. Although most submitters disagreed with the preliminary view expressed in the Issues Paper, we do not consider alternatives provide sufficient benefit over what can be achieved within the existing legal and procedural framework. In particular, we remain of the view discussed above that the limitations of risk assessment tools can be addressed through:
- (a) the oversight, research and calibration of risk assessment tools by Ara Poutama;
  - (b) communicating the limitations of the tools to the court and integrating results from the tools with other relevant information to develop an overall assessment of risk; and
  - (c) opposing counsel, experts and judges testing health assessor reports.
- 11.27 Rejecting use of risk assessment tools in a blanket way is inconsistent with the general opinion that they are a necessary component of a psychological assessment and therefore, when their results are explained adequately to the court, useful to determine a person's risk.
- 11.28 We have considered the suggestion that a more comprehensive statutory framework could be put in place to govern and monitor which risk assessment tools are used when they form part of a health assessment. We do not, however, consider this reform is required. We understand that health assessors will usually explain to the court what a particular tool demonstrates and the weight its findings should be given. In addition, Ara Poutama's psychology practice team and the Chief Psychologist provide guidance and oversight including scrutiny of incoming health assessor reports as well as the development of guidance and templates for health assessors. These practices should continue to ensure that the court receives satisfactory information from practitioners on which to base its determination. We expect that, in response to the new Act, Ara Poutama will ensure the evidence provided by health assessors addresses the requirements with respect to the legislative tests.

- 11.29 We have considered the alternative suggestion raised in consultation that reforms should assign functions related to risk assessment practice to a statutory body. Such an entity could have responsibility to train and accredit assessors as well as to approve and guide the use of risk assessment tools.<sup>45</sup> This kind of oversight could provide a greater level of independence and accountability as well as more clarity about best practice. In our view, however, oversight of this kind is not required because these functions are adequately performed by Ara Poutama and its psychology practice team. Additionally, establishing and sustaining a separate body is likely to be resource intensive, and it may be inefficient to staff it with professionals who have essentially the same expertise as those who currently operate within Ara Poutama. Overall, we conclude that case-by-case judgement of clinicians and the research and oversight role of the Chief Psychologist at Ara Poutama is sufficient to provide necessary guidance to health assessors about the use of risk assessment tools.
- 11.30 Most submitters recognised that risk assessment tools can perpetuate bias against Māori. Despite that, submitters did not suggest specific reforms and we have not identified changes beyond what can be achieved within the existing law and procedure. We note the increasing recognition that an accurate understanding of a person's risk requires an assessment of a person in their individual cultural context. We recognise and encourage the increasing awareness of bias and expect risk assessment practice will continue to grapple this issue.<sup>46</sup>

## Health assessor reports

### PROPOSAL

#### P28

The new Act should require the chief executive of Ara Poutama Aotearoa | Department of Corrections to file with the court:

- a. two health assessor reports to accompany an application to impose secure preventive detention or residential preventive supervision on an eligible person;
- b. one health assessor report to accompany an application to impose community preventive supervision on an eligible person.

<sup>45</sup> Scotland is the only jurisdiction we have considered that has a body that performs similar functions — the Risk Management Authority established under the Criminal Justice (Scotland) Act 2003, ss 3–13. Establishing a body with similar functions has been considered in Australia: see Patrick Keyzer and Bernadette McSherry “The Preventive Detention of ‘Dangerous’ Sex Offenders in Australia: Perspectives at the Coalface” (2013) 2 *International Journal of Criminology and Sociology* 296 at 304; *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (New South Wales Sentencing Council, May 2012) at [5.36]; and *High-Risk Offenders: Post-Sentence Supervision and Detention: Final Report* (Victoria Sentencing Advisory Council, May 2007) at [3.6.30].

<sup>46</sup> *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (Ara Poutama Aotearoa | Department of Corrections, 2019); and Armon J Tamatea “Culture is our business: Issues and challenges for forensic and correctional psychologists” (2017) 49 *Australian Journal of Forensic Sciences* 564.

## PROPOSAL

P29

The new Act should specify that a health assessor's report must provide the assessor's opinion on whether:

- a. the person is at high risk of committing a further qualifying offence in the next three years if the preventive measure is not imposed on them; and
- b. having regard to the nature and extent of the high risk the person will commit a further qualifying offence, the preventive measure is the least restrictive measure adequate to address the high risk that the person will commit a further qualifying offence.

11.31 We propose that applications for a preventive measure should be accompanied by health assessor reports — two reports where secure preventive detention and residential preventive supervision is sought and one report where community preventive supervision is sought. Requiring this type of report is established practice in both Aotearoa New Zealand and overseas. Other jurisdictions with post-sentence preventive regimes require that a person be assessed by an expert and that the expert submit a report to the court.<sup>47</sup> The same applies to overseas jurisdictions that have preventive sentences.<sup>48</sup> The new Act should also describe the elements of the legislative test that a health assessor report should address. The court should consider these reports in order to determine the first and second components of the legislative test we outline in Chapter 10.

11.32 Through our engagement and research, we are aware that there are a limited number of experts who can provide health assessor reports. The number of reports that should be provided to the court is therefore a question that needs to be considered in light of what information the courts need before them but also what is practically possible. We are mindful too that undue pressure on the health assessor workforce may cause delays and potentially limit the experts a person defending an application can retain.

11.33 Our proposal that the new Act require two reports for secure preventive detention and residential preventive supervision applications accords with current law regarding the number of health assessments required for existing highly restrictive preventive measures (preventive detention and PPOs).<sup>49</sup> To impose secure preventive detention or residential preventive supervision, the court must be satisfied the person is at high risk of reoffending and that the nature and extent of that risk can be managed in no other way than via these measures. These are likely to be complex and contestable inquiries requiring a high

<sup>47</sup> These requirements are expressed in each post-sentence preventive regime in Australia — New South Wales: Crimes (High Risk Offenders) Act 2006 (NSW), ss 5H and 6(3)(b); Northern Territory: Serious Sex Offenders Act 2013 (NT), s 25; Queensland: Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD), ss 8, 9 and 12; South Australia: Criminal Law (High Risk Offenders) Act 2015 (SA), s 7(3); Victoria: Serious Offenders Act 2018 (VIC), s 13, pt 10 and pt 18; Tasmania: Dangerous Criminals and High Risk Offenders Act 2021 (TAS), s 28; and Western Australia: High Risk Serious Offenders Act 2020 (WA), s 46(2)(a).

<sup>48</sup> Scotland: Criminal Procedure (Scotland) Act 1995, s 210B; and Canada: Criminal Code RSC 1985 c C-46, s 752.1.

<sup>49</sup> Scotland and Canada require only a single expert report in order to impose preventive sentences. For post-sentence measures, Victoria and Tasmania require a report from *at least one* expert and the remainder of Australian jurisdictions stipulate that two expert reports are required.

degree of expert input. We consider the court would benefit from the opinions expressed in two health assessor reports.

- 11.34 We recognise that residential preventive supervision is intended to replace ESOs that detain people through a combination of residential restrictions and programme conditions. Under the current law, ESO applications need only be supported by one health assessor report. We do not, however, anticipate a requirement to submit two health assessor reports will materially increase the demands on health assessors. ESOs with these particular restrictions represent a small number of ESOs.<sup>50</sup> In addition, because the Parole Board sets special conditions for these ESOs, we understand it is common for additional health assessor reports to be submitted to the Parole Board.
- 11.35 We propose that the new Act require a single report for community preventive supervision applications. This corresponds with the current requirement for ESOs. We have encountered no concerns about the adequacy of one report for a preventive measure of this nature. We also note that our proposal below allows for both the court and the individual concerned to request additional health assessor reports. We understand that it is common for individuals to obtain an independent health assessor report when the court considers imposing an ESO and we envision this will continue with respect to community preventive supervision. As a result, the court will be able to test health assessor reports submitted by the chief executive against evidence from different experts.
- 11.36 Currently, health assessor reports for ESOs and PPOs must address whether or not the person displays traits and characteristics outlined in legislation and whether the individual being assessed meets the test of being a high risk or very high risk of committing a relevant offence. In Chapter 10, we propose that, in contrast to the current law, the legislative tests should not require the court to determine whether a person displays specific traits or behavioural characteristics. Our proposal does not preclude health assessors from focusing on specific traits or characteristics in their reports if they are relevant to the tests of high risk of reoffending and least restrictive measure.
- 11.37 Some overseas jurisdictions prescribe what a report should contain in more detail.<sup>51</sup> Others provide non-legislative guidance on what elements to include.<sup>52</sup> We do not consider it is beneficial to be prescriptive. The issues we outline in Chapter 10 regarding specific traits or characteristics would apply similarly here if we were to recommend prescriptive elements for health assessor reports. Therefore, our preferred approach is to enable health assessors to focus on any matters they consider relevant to the legislative tests. We anticipate that assessors will continue to draw on best practice guidance developed by Ara Poutama and the professions of psychology and psychiatry.

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<sup>50</sup> As of August 2023, there were 26 individuals subject to ESOs with residential restrictions and programme conditions. This amounts to around 10 per cent of all ESOs. See *Regulatory Impact Statement: Programme Conditions for Extended Supervision Orders* (Ara Poutama Aotearoa | Department of Corrections, August 2023) at 8 and 10.

<sup>51</sup> For example, in Victoria, the legislation directs that the expert report must address matters related to propensity, progression of offending behaviour, efforts made to address causes of offending or participation in treatment and other relevant matters: *Serious Offenders Act 2018* (VIC), s 269.

<sup>52</sup> For example, the Canadian Criminal Code does not specify the matters an assessor must address in their reports. Public Safety Canada publishes guidance documents that include suggested factors designated experts should discuss: *The Investigation, Prosecution and Correctional Management of High-Risk Offenders: A National Guide* (Public Safety Canada, December 2009) at 22-24.

## PROPOSAL

P30

The new Act should define a health assessor as a health practitioner who:

- a. is, or is deemed to be, registered with Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand specified by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine and who is a practising psychiatrist; or
- b. is, or is deemed to be, registered with Te Poari Kaimātai Hinengaro o Aotearoa | New Zealand Psychologists Board specified by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of psychology.

11.38 We propose that the new Act defines the term “health assessor” in the same way as ESO and PPO legislation currently defines it. Australian jurisdictions have similar criteria.<sup>53</sup> Canada has looser legislative requirements regarding who may provide an assessment, but the opinion submitted to the court is overseen by a clinician with psychiatric expertise.<sup>54</sup> In Scotland, assessors must be accredited by a panel of the Risk Management Authority that scrutinises their credentials. They must also agree to abide by a Code of Conduct developed by the Authority.<sup>55</sup> We consider a separate accreditation procedure to be unnecessary — health assessors are already subject to professional oversight and we have not encountered any suggestion that reform is required with regard to training or accreditation.

## PROPOSALS

P31

The new Act should provide that the court may, on its own initiative, direct that an additional health assessor report be provided.

P32

The new Act should provide that the person against whom an application for a preventive measure is made may submit an additional health assessor report prepared by a health assessor they have engaged.

<sup>53</sup> Serious Sex Offenders Act 2013 (NT), s 4 definition of “medical expert”; Criminal Law (High Risk Offenders) Act 2015 (SA), s 4 definition of “prescribed health professional”; Dangerous Criminals and High Risk Offenders Act 2021 (TAS), ss 3 definition of “psychiatrist”, definition of “psychologist” and 28(5); Crimes (High Risk Offenders) Act 2006 (NSW) ss 4 definition of “qualified psychiatrist” and 7(4); Serious Offenders Act 2018 (VIC), s 3 definition of “medical expert”; and Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD), sch 1 definition of “psychiatrist”.

<sup>54</sup> Criminal Code RSC 1985 c C-46, s 752.1; and *High Risk Offenders: A Handbook for Criminal Justice Professionals* (Solicitor-General of Canada, May 2001) at 73–74.

<sup>55</sup> Risk Assessment and Minimisation (Accreditation Scheme) (Scotland) Order 2006; and “Risk Assessors” Risk Management Authority <[www.rma.scot](http://www.rma.scot)>.

11.39 Our proposal permits both the court and the person subject to an application to obtain a separate report from a health assessor.<sup>56</sup> Reports directed or requested under this provision would address the legislative test in the same manner as other reports. In addition, we envisage that such reports could also comment on the reports of health assessors that accompanied an application. As with the PPO legislation, the new Act should continue to provide that the expense of these reports be met with public money, either through legal aid or otherwise.<sup>57</sup>

## Other evidence

### PROPOSAL

#### P33

The new Act should provide that the court may receive and consider any evidence or information it thinks fit for the purpose of determining an application or appeal, whether or not it would otherwise be admissible. The rules applying to privilege and confidentiality under subpart 8 of Part 2 of the Evidence Act 2006, and rules applying to legal professional privilege, should continue to apply.

11.40 We propose that the new Act continue the status quo regarding the court's ability to receive and consider evidence.<sup>58</sup> Most other jurisdictions also expressly allow for the court to take into account information from a broad range of sources. We envisage that this provision will ensure the court is able to consider a range of evidence including additional information from Ara Poutama, from the individual themselves and from organisations that have supported them or propose to do so during the period of the measure. We envisage that, when a person may be placed in the care of an organisation that operates a facility or programme to administer the preventive measure, the organisation should be able to share its views with the court.

11.41 The broad application of this provision should ensure the court can receive views from whānau, hapū, marae and iwi or from any person who has a shared sense of whānau identity who wishes to be heard. These views may address how a person's background and connections to community are relevant to their level of risk. They may also relate to any processes to address the person's reoffending risk that involve the person and their family, whānau, or community.

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<sup>56</sup> See Public Safety (Public Protection Orders) Act 2014, s 10.

<sup>57</sup> See Public Safety (Public Protection Orders) Act 2014, s 10(5)-(6).

<sup>58</sup> Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108.

**CHAPTER 12**

# Proceedings under the new Act

**IN THIS CHAPTER, WE CONSIDER:**

- whether proceedings under the new Act should fall under the courts' civil or criminal jurisdiction;
- rights of appeal;
- opportunities for family, whānau, hapū, iwi and others to share their views with the court;
- opportunities for victims to participate; and
- suppression of names, evidence and submissions, and details of measures in proceedings.

**INTRODUCTION**

12.1 In this chapter, we consider several matters that arise when the courts hear and determine applications relating to preventive measures. We make several proposals for court proceedings under the new Act.

**JURISDICTION FOR PROCEEDINGS UNDER THE NEW ACT****PROPOSAL****P34**

Te Kōti Matua | High Court and te Kōti-a-Rohe | District Court should hear and determine applications for preventive measures under the new Act under their criminal jurisdiction.

- 12.2 Currently, the law governing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) is spread across three different statutes. We discuss issues resulting from this fragmentation in Chapter 4. Of particular procedural relevance is that, while preventive detention and ESOs are governed by criminal procedure, PPOs were designed as a “civil” regime by requiring applications for PPOs to be made by originating application to te Kōti Matua | High Court.<sup>1</sup>
- 12.3 In the Issues Paper, we identified two concerns with the civil procedural context of PPOs compared to the criminal process of preventive detention and ESOs.<sup>2</sup> First, lawyers working in the area of preventive measures are most likely to be approved legal aid providers for criminal matters but not for civil services. This means that a lawyer who has represented someone in all other aspects of the criminal process may be unable to act in respect of the PPO application to the detriment of the client. Second, lawyers who do act on PPO matters normally practise in criminal jurisdictions and so may be less familiar with the civil process, giving rise to procedural inefficiencies.
- 12.4 As we outline in Chapter 10, we consider the High Court should have jurisdiction to determine applications for residential preventive supervision and secure preventive detention, whereas te Kōti-a-Rohe | District Court should have jurisdiction to determine applications for community preventive supervision.
- 12.5 We propose that applications should be handled under the courts’ criminal jurisdiction. We consider that the criminal jurisdiction more appropriately reflects the role of the state in the imposition and administration of preventive measures compared to a civil approach. It also recognises that the trigger for consideration of a preventive measure is previous criminal offending. Crucially, a criminal approach would address the practical issues identified above with the current civil process for PPOs and so allow for continuity of counsel and ensure procedural efficiency. The consolidation of all preventive measures within the courts’ criminal jurisdiction means that lawyers working in this area, who will most likely be approved legal aid providers for criminal matters, will be able to continue to act for clients.
- 12.6 A criminal process also more accurately reflects the nature of preventive measures. The positioning of PPOs as a civil measure was an intentional attempt to avoid the conclusion that PPOs are punitive. This approach was rejected by te Kōti Pīra | Court of Appeal in *Chisnall v Attorney-General*.<sup>3</sup> The Court emphasised that what matters most is the punitive effect of a preventive measure, “regardless of whether the process is described as criminal or civil”.<sup>4</sup>
- 12.7 A possible concern with a criminal approach is therefore that it could mean the imposition of a preventive measure is construed as a second punishment. We discuss this concern in more detail in Chapter 4. There, we suggest that, to the extent that our proposal for a post-sentence preventive regime limits the protection against second punishment, that limitation is capable of justification for the purpose of section 5 of the New Zealand Bill of

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<sup>1</sup> Te Aka Matua te Ture | Law Commission *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* (NZLC IP51, 2023) (Issues Paper) at [4.3]; and Public Safety (Public Protection Orders) Act 2014, ss 8(1) and 104.

<sup>2</sup> Issues Paper at [4.15].

<sup>3</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [162].

<sup>4</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [192].



Rights Act 1990. We draw particular attention to the safeguards within the legislative tests for imposition of a preventive measure (discussed in Chapter 10) and the reorientation of the preventive regime away from more punitive elements towards rehabilitation and reintegration (discussed in Chapters 5 and 13). For the purposes of this discussion, we do not consider that the determination of applications for preventive measures within the courts' criminal jurisdiction negates this conclusion. Any concerns about punitive aspects should be focused on the substance of the measure rather than the process of their imposition.<sup>5</sup>

## RIGHTS OF APPEAL

### PROPOSAL

P35

The new Act should provide for a right of appeal to te Kōti Pira | Court of Appeal against decisions by te Kōti Matua | High Court or te Kōti-a-Rohe | District Court determining an application to:

- a. impose a preventive measure;
- b. impose a preventive measure on an interim basis;
- c. review a preventive measure;
- d. terminate a preventive measure; and
- e. escalate a person to a more restrictive measure (including to a prison detention order).

- 12.8 Currently, there are different mechanisms for challenging decisions relating to the imposition of preventive detention, ESOs or PPOs. This compounds the problems with the fragmentation of the law as a whole, creating both substantive differences in the level of available challenge to decisions and procedural inefficiencies.
- 12.9 This problem is exemplified by the approach to challenging a decision in relation to an ESO where more than one appeal procedure applies.<sup>6</sup> If a person wishes to challenge a decision by a court in relation to an ESO — for example, the making or failure to make an ESO, cancellation of an ESO or decision to confirm or cancel an ESO on review — the applicable review mechanism is an appeal to the Court of Appeal.<sup>7</sup> These appeals are conducted as if they are appeals against sentence in the criminal jurisdiction.<sup>8</sup> 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.<sup>9</sup>
- 12.10 In contrast, if a person wishes to challenge a decision by the New Zealand Parole Board (Parole Board) in relation to an ESO — for example, the imposition of particular conditions

<sup>5</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [155].

<sup>6</sup> Issues Paper at [10.88]–[10.93].

<sup>7</sup> Parole Act 2002, s 107R.

<sup>8</sup> Parole Act 2002, s 107R(2).

<sup>9</sup> Criminal Procedure Act 2011, s 250(2).

— 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 convenor.<sup>10</sup> If a person wishes to challenge the decision further, there is no right of appeal but they can apply for judicial review by the court.<sup>11</sup> Judicial review proceedings are civil in nature. In our Issues Paper, we identified two particular concerns with this approach:<sup>12</sup>

- (a) Lawyers who act in relation to ESO matters will generally have expertise and be legal aid approved for criminal proceedings but may not for civil proceedings. This can result in procedural inefficiencies and be to the detriment of a client.
- (b) Judicial review is 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.

- 12.11 It follows from our conclusion that the law on preventive measures should be consolidated into a single statute, to be administered by the courts in their criminal jurisdiction, that there should be a right of appeal against decisions made by the determining court. Our proposal, given the split jurisdiction between the High Court for decisions relating to secure preventive detention and residential preventive supervision and the District Court for community preventive supervision, is that the Court of Appeal should hear all appeals relating to preventive measures. This reflects the current approach to appeals relating to ESOs whereby every appeal must be made to the Court of Appeal regardless of whether the ESO was imposed by the High Court or the District Court.<sup>13</sup> We also consider this creates a single uniform approach for challenging decisions relating to the imposition of a preventive measure, which addresses concerns about fragmentation of the law. More generally, a right of appeal within a criminal jurisdiction enables greater procedural efficiency and continuity of counsel by allowing criminal lawyers to continue to act for clients and be legal aid approved in appeals processes.
- 12.12 As preventive measures will be administered as criminal proceedings, the process of appeal should be managed through the Criminal Procedure Act 2011 (CPA) rather than the new Act creating a separate process.<sup>14</sup> For the avoidance of doubt, the right of appeal would apply both to the person subject to a preventive measure and the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive). This aligns with the standard approach to appeals in criminal proceedings, which grants both parties the right to appeal against the determination of a court.<sup>15</sup>
- 12.13 We consider that a right of appeal is more appropriate than a judicial review process for challenging decisions. As we note above, judicial review is limited to reviewing the decision-making process and procedure rather than the correctness of the decision itself. Because the imposition of a preventive measure involves a significant restriction on a

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<sup>10</sup> Parole Act 2002, ss 67 and 107S.

<sup>11</sup> See for example *Coleman v Chief Executive of the Department of Corrections* [2020] NZHC 1033, where te Kōti Matua | High Court said at [33] the appropriate procedure to challenge the conditions of an intensive supervision order was judicial review.

<sup>12</sup> Issues Paper at [10.91]–[10.92].

<sup>13</sup> Parole Act 2002, s 107R(2).

<sup>14</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [28.2].

<sup>15</sup> Criminal Procedure Act 2011, ss 244 and 246.

person's rights and freedoms, the decision itself — rather than just the decision-making process — should be open to re-examination.

- 12.14 The Legislation Design and Advisory Committee's *Legislation Guidelines* state that “the legislation should provide a right of appeal if the rights or interests of a particular person are affected by an administrative decision”.<sup>16</sup> We also note the views of the United Nations Human Rights Committee in *Miller v New Zealand* that a right of appeal under article 9(4) of the International Covenant on Civil and Political Rights is important for preventing a finding that detention is arbitrary.<sup>17</sup> This highlights the particular importance of a court being able to engage in a “full review of the facts” in order to evaluate the appropriateness of preventive measures that involve a measure to detain.
- 12.15 We consider it is important for legislation to clearly state the matters in relation to which a right of appeal would arise. Our proposal would provide a right of appeal against decisions by the courts relating to the imposition, review, termination and escalation of preventive measures. The reference to “preventive measures” in this section includes any special conditions that form part of the relevant preventive measure. This is appropriate given that imposition (even on an interim basis) or variation of a preventive measure or its component conditions can have serious consequences for the person subject to them and implications for community safety. For the avoidance of doubt, we think that appeal rights against review decisions to vary or terminate a preventive measure should not stay the operation of the measure in question. This is the case in comparable jurisdictions.<sup>18</sup>
- 12.16 Our proposal here sits alongside our proposal in Chapter 18 that there should be a right of appeal against the decisions of the review panel to vary special conditions.

## VIEWS OF KIN GROUPS

### PROPOSAL

#### P36

When a court hears and determines applications for the imposition or review of a preventive measure in respect of a person, the new Act should require the court to consider any views expressed by the person's family, whānau, hapū, marae or iwi or anyone holding a shared sense of whānau identity with the person.

- 12.17 Throughout our engagement and consultation with Māori in this review, we heard that, when a court considers a preventive measure in respect of a person, kin groups ought to have an opportunity to share their views with the court.
- 12.18 The kin groups may be the person's family, whānau, hapū, marae or iwi. We also recognise that some Māori may not be connected to these groups but instead hold a whānau-like relationship with other people. While we have based the proposal on the

<sup>16</sup> Legislation Design and Advisory Committee *Legislation Guidelines 2021 Edition* (September 2021) at [28.2].

<sup>17</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.15]. See also the discussion in the Issues Paper at [11.32]–[11.36].

<sup>18</sup> We have looked at the Australian jurisdictions, Canada, England and Wales, Ireland and Scotland. Only in Ireland could the court decide that the appeal would stay the order in question: *Sex Offenders Act 2001* (Ireland), s 18.

views we heard from Māori and we expect it to be of most relevance to Māori, we also include reference to family in this proposal for it to apply more broadly.

- 12.19 As we noted in the Issues Paper, the views these groups share may provide:<sup>19</sup>
- (a) information about the person's background and cultural context;
  - (b) insight, including in terms of the relevant tikanga, on the risks posed by the person;
  - (c) input on whether a preventive measure (if any) is appropriate, including any conditions relevant to that measure; and
  - (d) input on whether it would be appropriate to place the person into the care of a particular Māori group to administer the preventive measure.
- 12.20 Enabling kin groups to share their views when the courts make determinations regarding preventive measures would, in our view, better facilitate tino rangatiratanga guaranteed under te Tiriti o Waitangi | Treaty of Waitangi. These groups have an interest in the proceedings owing to their whānau or other kin relationship with the person considered at risk of reoffending. As we explain in Chapter 6, a preventive measure has the potential to isolate people from their communities and preclude meaningful relationships with whānau, hapū and iwi. This may disrupt the fundamental tikanga values of whakapapa and whanaungatanga. Conversely, our proposal in Chapter 6 for people subject to preventive measures to be placed within the care of a Māori group such as a whānau, hapū, iwi or marae may help maintain whakapapa and whanaungatanga connections. For these reasons, a person's kin groups may have clear views on the risks the person poses and what should be the appropriate way of responding to those risks. Allowing these groups the opportunity to share their views on these matters will go some way to improving Māori participation in decisions affecting Māori and their communities.
- 12.21 In the Issues Paper, we asked for feedback about whether the law should require the court to take into account views of kin groups when considering imposing a preventive measure.<sup>20</sup> Most submitters supported this suggestion, with some commenting on how it could best be implemented.<sup>21</sup> The New Zealand Council for Civil Liberties said that it agreed in principle but maintained that opportunities to address the courts (and support for doing so) should not be limited by ethnicity. The Criminal Bar Association suggested that the precise form of how the courts receive the views should be developed in consultation with Māori.
- 12.22 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) expressed some reservations. It said that existing legislation provides adequate means for people to be heard and noted that the judges and counsel involved in preventive proceedings can bring these views to the courts' attention. With regard to sentencing proceedings, the NZLS cautioned that widening the scope of those given privilege to speak may result in material before the court that is unrelated the individual's character or circumstances.

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<sup>19</sup> Issues Paper at [9.28].

<sup>20</sup> Issues Paper at [9.33] and [12.10]–[12.14].

<sup>21</sup> Dr Jordan Anderson, Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, Te Hunga Rōia Māori o Aotearoa, The Law Association.

- 12.23 Members of Te Hunga Rōia Māori o Aotearoa were generally supportive but voiced concerns about courts becoming “gatekeepers” of information if the law required a person to be invited to address the court. Members said that the court should be required to consider views in order to avoid it becoming merely a perfunctory exercise. Several commented that the intent of the proposal would benefit from the extension of current mechanisms and services that assist involvement in the court process (which we comment on further below).
- 12.24 Our proposal is not prescriptive about the nature of the views that kin groups may express. The current law enables the courts to receive a wide range of evidence and information when considering whether to impose a preventive measure.<sup>22</sup> We have proposed a similar approach under the new Act — the court may receive and consider any information it thinks fit whether or not it would otherwise be admissible (see Chapter 11). We received positive feedback about this non-prescriptive approach at a wānanga with tikanga experts, academics and Māori criminal lawyers in January 2024. Participants emphasised that the law should be as flexible as possible to ensure views could be shared on the kin group’s own terms and to enable the court to receive relevant information it might not otherwise obtain.

## PROPOSAL

P37

The Government should continue to develop and support ways to facilitate the court to hear views from whānau, hapū, marae, iwi and other people holding a shared sense of whānau identity.

- 12.25 During engagement, we heard that enabling kin groups to share their views depends on supporting people as well as making operational changes to improve their access to the court system.<sup>23</sup> We also heard that putting resources into promoting access to justice was welcome, but some will still choose not to participate because of the strain felt by whānau when they have kin involved with the criminal justice system.
- 12.26 Currently, there are a range of initiatives to facilitate the participation of kin groups in court proceedings. For instance, the judiciary, the Government and the community have collaborated to design changes to the culture and operation of the District Court through Te Ao Mārama framework. We view that framework’s core principle — that courts should provide space for people to be “seen, heard, and understood and meaningfully participate in proceedings that relate to them” — as an essential element that should guide implementation of our proposal.<sup>24</sup> We also note the evolving practice of providing

<sup>22</sup> Sentencing Act 2002, s 27; Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108(1).

<sup>23</sup> This matter is raised in regard to the justice system generally, for example in Te Uepū Hāpai | 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 30.

<sup>24</sup> Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand *Te Ao Mārama: Best Practice Framework* (December 2023) at 7. The government-led Criminal Process Improvement Programme as another useful model of transformative change to the court system: Te Tāhū o te Ture | Ministry of Justice “Criminal Process Improvement Programme (CPIP)” (28 October 2022) <[www.justice.govt.nz](http://www.justice.govt.nz)>.

cultural reports in the context of sentencing,<sup>25</sup> the delivery of whānau-centred support programmes<sup>26</sup> and the creation of specific roles to assist the court or to provide guidance on court processes.<sup>27</sup>

- 12.27 We propose that the Government, in collaboration with the courts, continue to develop and support both structural and practical means that facilitate participation in proceedings under the new Act. Our proposal envisions the continued implementation of current developments as well as encouraging further initiatives specific to proceedings that relate to preventive measures.

## ROLE OF VICTIMS

- 12.28 An important question for proceedings under the new Act is what rights victims of serious sexual and violent offences should have to participate.
- 12.29 In recent years, there has been increasing emphasis on the role of victims in the criminal justice system, for example, through the enactment of the Victims' Rights Act 2002. Subsequent reforms of that Act culminated in the publication of the Victims Code and the creation of the role of Chief Victims Advisor.<sup>28</sup>
- 12.30 Under the current law, victims are entitled to receive information and share their views relating to preventive measures in various ways. To summarise the main rights:
- (a) In respect of preventive detention, victims have rights to:
- (i) provide information to the court at sentencing by way of victim impact statements;<sup>29</sup>
  - (ii) be given notice of any pending parole hearing for a person subject to preventive detention and an explanation of how to participate in that hearing;<sup>30</sup>
  - (iii) make written and oral submissions to the Parole Board;<sup>31</sup>
  - (iv) receive notice about the outcome of any parole hearing, including whether a person is to be released from prison and if so on what conditions;<sup>32</sup> and

<sup>25</sup> For example, providing information under s 27 of the Sentencing Act 2002 has resulted in a tendency to engage independent professional report writers to prepare reports on behalf of defendants. See *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [141]–[142].

<sup>26</sup> For example, Whakaorangia te Mana Tangata — an initiative designed and provided by local iwi and service providers to support Māori offenders, victims and whānau through the court process: Te Tāhū o te Ture | Ministry of Justice “Whakaorangia te Mana Tangata” <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>27</sup> For example, Kaiārahi (Court Navigators) — a role established to assist people to engage with te Kōti Whānau | Family Court. Subject to resourcing, the roles may also be expanded into the criminal jurisdiction: Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand *Te Ao Mārama: Best Practice Framework* (December 2023) at 38.

<sup>28</sup> Kim McGregor “Putting victims at the heart of the criminal justice system” (2019) 7 Practice: The New Zealand Corrections Journal 8.

<sup>29</sup> Sentencing Act 2002, s 8(f) (court must take into account any information concerning the effect of offending on victims); and Victims' Rights Act 2002, pt 2AA (procedures to provide victim impact statements at sentencing).

<sup>30</sup> Parole Act 2002, s 43(2)(b) and (2A).

<sup>31</sup> Parole Act 2002, s 49(4) and 50A. With the leave of the Parole Board, the person may be represented by counsel or have another person speak for them.

<sup>32</sup> Parole Act 2002, s 50(1)(a)–(b).

- (v) receive notice if a person subject to preventive detention has been convicted of breaching any release conditions or if the Parole Board has made or refused to make a decision regarding the recall of the person.<sup>33</sup>
- (b) In respect of ESOs, victims have rights to:
- (i) receive notice of any hearing (including hearings in respect of an application for an ESO, cancellation of an ESO and appeals);<sup>34</sup>
  - (ii) receive notice of the outcome of any hearing;<sup>35</sup>
  - (iii) at hearings, to make written submissions to the court and, with the leave of the court, to appear and make oral submissions;<sup>36</sup>
  - (iv) to receive notice if the Parole Board is considering imposing any special conditions under an ESO, has imposed any special conditions or varies or discharges any conditions of the ESO;<sup>37</sup>
  - (v) to make written submissions to the Parole Board and, with the leave of the Parole Board, to appear and make oral submissions on whether special conditions should be imposed, what the conditions should be and their duration;<sup>38</sup> and
  - (vi) receive notice if the person is convicted of a breach of the conditions of their ESO, the ESO expires or the person subject to the ESO dies.<sup>39</sup>
- (c) In respect of PPOs:
- (i) victims have rights to receive notice: that an application for a PPO has been made;<sup>40</sup> of the outcome when an application is determined or suspended;<sup>41</sup> that an application for review of the order has been made;<sup>42</sup> of the outcome of a review;<sup>43</sup> that a PPO is replaced by a protective supervision order;<sup>44</sup> that the chief executive or person subject to a protective supervision order applies for its review;<sup>45</sup> or when a protective supervision order is cancelled;<sup>46</sup> but
  - (ii) victims have no rights to make submissions in proceedings relating to PPOs.

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<sup>33</sup> Victims' Rights Act 2002, ss 36, 36A.

<sup>34</sup> Parole Act 2002, s 107H(4).

<sup>35</sup> Parole Act 2002, s 107H(7).

<sup>36</sup> Parole Act 2002, s 107H(5).

<sup>37</sup> Parole Act 2002, s 107K(6). The Parole Board may withhold notification if it determines that disclosure "would unduly interfere with the privacy of any other person (other than the offender)": s 107K(8).

<sup>38</sup> Parole Act 2002, s 107K(7).

<sup>39</sup> Parole Act 2002, s 107V.

<sup>40</sup> Public Safety (Public Protection Orders) Act 2014, s 8(2).

<sup>41</sup> Public Safety (Public Protection Orders) Act 2014, s 14.

<sup>42</sup> Public Safety (Public Protection Orders) Act 2014, ss 16(4) and 17(2).

<sup>43</sup> Public Safety (Public Protection Orders) Act 2014, s 18(5).

<sup>44</sup> Public Safety (Public Protection Orders) Act 2014, s 93(4).

<sup>45</sup> Public Safety (Public Protection Orders) Act 2014, ss 99(3) and 100(2).

<sup>46</sup> Public Safety (Public Protection Orders) Act 2014, s 102(d).

- 12.31 Some of these rights are available to certain victims but not others. In respect of preventive detention, all victims as defined under section 4 of the Victims' Rights Act have the right to provide victim impact statements. Other rights are only available to victims who have asked for information about an offender in accordance with Part 3 of the Victims' Rights Act.<sup>47</sup> Part 3 of the Act provides that a victim of specified offences may ask to be given notice or advice of ongoing matters or decisions or directions and copies of orders and conditions regarding an offender. This reflects the post-sentence nature of ESOs, PPOs and matters relating to parole for people subject to preventive detention. Because the rights given to this category of victims only apply to victims who have asked to be given information, we refer to this category of victims as "registered victims".

## Rights of victims under the new Act

### PROPOSALS

P38

The new Act should provide that the chief executive of Ara Poutama Aotearoa | Department of Corrections must notify, as soon as practicable, each victim of a person who is considered for or subject to a preventive measure:

- a. that an application for a preventive measure has been made;
- b. of the outcome of an application when the application is determined or suspended;
- c. of any special conditions that are imposed on a person subject to community preventive supervision or residential preventive supervision and when these are varied or terminated;
- d. that an application to the court for review of a preventive measure has been made;
- e. of the outcome of any review conducted by the court;
- f. that the person subject to a preventive measure has died;
- g. that the person subject to a preventive measure has escaped from a secure facility;
- h. that the person subject to residential preventive supervision or community preventive supervision has been convicted of a breach of their conditions.

P39

The new Act should provide that notification to victims regarding special conditions may be withheld if disclosure would unduly interfere with the privacy of any other person.

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<sup>47</sup> See the definitions of "victim" under s 4(1) of the Parole Act 2002 and s 3 of the Public Safety (Public Protection Orders) Act 2014. The only exception is that victims to whom Part 3 of the Victims' Rights Act 2002 does not apply may still make written submissions to the Parole Board in respect of any parole hearing as of right but may only appear and make oral submissions with the leave of the Parole Board: Parole Act 2002, s 50A(2)(a)–(b).



## PROPOSALS

P40

The new Act should:

- a. entitle victims to make written submissions and, with the leave of the court, oral submissions, when the court is determining an application to impose or review a preventive measure; and
- b. provide that victims may be represented by counsel and/or a support person or people if making an oral submission to the court.

P41

For the purposes of the new Act, a victim should be defined as a person who:

- a. is a victim of a qualifying offence committed by a person:
  - i. against whom an application for a preventive measure has been made; or
  - ii. who is subject to a preventive measure imposed under the Act; and
- b. who has asked for notice or advice of matters or decisions or directions and copies of orders and conditions and has given their current address under section 32B of the Victims' Rights Act 2002.

12.32 We propose that the new Act should continue many of the rights victims have under the current law regarding preventive measures.

### Notification

12.33 In our view, it is appropriate that victims of people considered for, or subject to, a preventive measure receive notifications about the preventive measure. This approach aligns with the rights afforded to victims under Part 3 of the Victims' Rights Act 2002. It generally continues the current law regarding parole hearings for people subject to preventive detention and court proceedings relating to ESOs and PPOs. We have encountered little criticism with this approach.

12.34 The underlying reasons for notifying victims include the following considerations:

- (a) Notifications can increase victims' sense of safety and provide emotional reassurance to them. In some circumstances such as where a victim knows an offender, knowledge of what is happening may also enable them to take practical steps that increase their physical safety.<sup>48</sup>
- (b) Notifications promote victims' dignity more generally. Research suggests there is a deep link between being provided adequate information and victims' perception that they have been acknowledged and treated with respect. Absence of information can

<sup>48</sup> Manaaki Tāngata | Victim Support "Victim Notification Register" <[www.victimsupport.org.nz](http://www.victimsupport.org.nz)>; and Elaine Wedlock and Jacki Tapley *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner, March 2016) at 13–14.

cause victims to experience further harm and distress affecting their recovery and reducing their confidence in the justice system.<sup>49</sup>

- (c) Notifications of pending hearings or processes serve a practical purpose in the sense they may trigger engagement and reinforce or facilitate victims to engage other rights such as to provide information or access assistance during the course of the legal process.
- 12.35 An aim for the proposed new Act is to distance preventive measures from the criminal justice contexts of sentencing and parole. We do not consider that providing victims with information about a preventive measure like current notification requirements relating to parole, ESOs and PPOs undermines this. The provision of information about preventive measures is focused on the rights of victims, not because of any connection between the proposed new Act and sentencing and parole.
- 12.36 We are cautious about suggesting a blanket requirement that victims must be notified of each conviction for breaching conditions. Some breaches may be relevant to a victim's safety, for example, where a breach involves behaviour that directly threatens that individual. But some may not. However, the Victims' Rights Act and the Parole Act 2002 have set a standard that all convictions for breaches must be notified. In Chapter 17, we outline our view that a conviction should only arise from a significant breach of a condition that has implications for community safety. On this basis, we propose that the new Act should align with the Parole Act by requiring notifications for all breach convictions.
- 12.37 Currently, the Parole Board must notify victims about release conditions for preventive detention and special conditions for ESOs but notification may be withheld if disclosure would unduly interfere with the privacy of any other person.<sup>50</sup> When a court imposes either community preventive supervision or residential preventive supervision, it should also have the ability to impose special conditions (see Chapters 14 and 15). Both the court and the review panel should have authority to vary or terminate those conditions (see Chapter 18). The new Act should continue to provide that victims be notified about what special conditions are imposed with respect to preventive measures and when they are varied or terminated. It should also provide they may be withheld on the same grounds as current law — that disclosure would unduly interfere with the privacy of any other person.

### Submissions

- 12.38 We propose that victims have rights to make submissions to the court, although the ability to appear and make oral submissions should require the leave of the court. This is consistent with the approach to ESOs but would give victims greater rights of participation than the current approach to PPOs. We do not propose that the procedure relating to the provision of victim impact statements should apply as it does in relation to preventive detention. That process is more appropriately reserved for sentencing given its focus on the specific impacts of the offending that has occurred rather than the risks going forward.

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<sup>49</sup> Elaine Wedlock and Jacki Tapley *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner, March 2016) at 13–14.

<sup>50</sup> Parole Act 2002, ss 50 and 107K(8)(d).

- 12.39 Our reasons to propose that victims have rights to submit include the following:
- (a) We have heard little complaint with the current provisions permitting victims to make submissions in parole and ESO hearings.
  - (b) We have heard through engagement that victims rarely wish to have their say, but they should be given the option to do so because they are the ones offended against. Some also thought that allowing victims to explain the harm inflicted on them would assist the court to assess what kind of reoffending risk the person concerned poses. They noted that assessment of risk is more than simple likelihood of an offence occurring – the decision-maker may find the quality of past offending relevant to its determination.
- 12.40 We acknowledge some arguments against victims sharing their views when a preventive measure is determined. Potentially, victims' submissions could be irrelevant to, or a distraction from, an analysis of a person's risk of reoffending.
- 12.41 We do not think this concern warrants excluding victims from sharing their views with the court. The courts will be able to give the appropriate weight to victims' submissions.<sup>51</sup>
- 12.42 The current law regarding parole hearings provides for representation and support if a victim makes an oral submission. The Parole Act allows a victim to be represented by counsel and/or to be accompanied by support people who may speak in support of or on behalf of them.<sup>52</sup> Our preferred approach is to mirror the provision for victims to be represented by counsel and/or support people when giving oral submissions in court.
- 12.43 Finally, our proposals do not provide for victims to be notified or to submit to annual reviews conducted by the review panel (see Chapter 18). Rather, victims may only exercise these rights in relation to reviews conducted by the court. Unlike the court, the review panel does not have a decision-making function regarding whether a measure is imposed. The more relevant point in the process for victim input is the court review. We also consider that it would be impractical for the review panel to solicit views from victims each year and potentially burdensome on victims to be involved on such a frequent basis.

### **The definition of victims**

- 12.44 We propose that the victims who should have rights to notifications and to submit are those to which Part 3 of the Victims' Rights Act apply. In other words, the victims must:<sup>53</sup>
- (a) have been victims of "specified offences";<sup>54</sup> and
  - (b) have asked for notice or advice of matters or decisions or directions and copies of orders and conditions and given their current address.
- 12.45 We also suggest that the victims must have been victims of qualifying offences under the new Act.

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<sup>51</sup> We also note that the Parole Board's approach of giving victims' submissions "due weight" when considering parole demonstrates a helpful way of taking victims' views into account. See for example *Smither v New Zealand Parole Board* [2008] NZAR 368 (HC) at [11]–[13] citing the Justice and Electoral Committee's report on the Sentencing and Parole Reform Bill 148-2 at 29–30; and *Green v New Zealand Parole Board* [2022] NZHC 693 at [33]–[51].

<sup>52</sup> Parole Act 2002, s 49(4).

<sup>53</sup> Victims' Rights Act 2002, s 32B(1).

<sup>54</sup> "Specified offences" are defined in s 29 of the Victims' Rights Act 2002.

- 12.46 This approach is broadly consistent with the category of victims who are entitled to notifications and to participate in relation to parole matters, ESOs and PPOs. We note though that some offences that we propose should be qualifying offences may not be “specified offences” under Part 3 of the Victims’ Rights Act. In particular, we propose in Chapter 8 that certain imprisonable offences under the Films, Videos, and Publications Classification Act 1993 be qualifying offences. This could result in a person being a victim of a qualifying offence but not entitled to participate in proceedings relating to preventive measures. We make no proposals in this regard. The Victims’ Rights Act establishes which victims ought to have ongoing rights to information and to provide their views in relation to an offender. It is for the preventive regimes to reflect that policy decision rather than the other way around.

## Protecting victims’ safety and security

### PROPOSAL

#### P42

The new Act should protect information related to victims by:

- a. requiring that a person subject to a preventive measure or against whom an application for a preventive measure has been made:
  - i. does not receive any information that discloses the address or contact details of any victim; and
  - ii. does not retain any written submissions made by a victim;
- b. providing that the court may, on its own initiative or in response to an application, withhold any part of a victim’s submission if, in its opinion, it is necessary to protect the physical safety or security of the victim concerned or others; and
- c. making it an offence for any person to publish information that identifies, or enables the identification of, a victim of a person subject to an application or a preventive measure.

- 12.47 The current law includes certain protections for victims. The Parole Act provides that the Parole Board must ensure that information given to an offender does not disclose the address or contact details of any victim and prohibits retention of victims’ submissions by an offender.<sup>55</sup> Further, it stipulates that, in exceptional circumstances, the Parole Board may withhold certain information (including victim submissions) from an offender if the panel convenor believes it would prejudice the victim’s mental or physical health or endanger the safety of any person.<sup>56</sup> It is also an offence to publish information that identifies or enables the identification of a victim.<sup>57</sup> The Victims’ Rights Act provides similar protections in regard to victim impact statements — offenders may be shown

<sup>55</sup> Parole Act 2002, s 13(2).

<sup>56</sup> Parole Act 2002, s 13(3).

<sup>57</sup> Parole Act 2002, s 13(8).

victim impact statements but are prohibited from retaining copies.<sup>58</sup> A judicial officer may also withhold part of a statement to protect any person’s safety or security.<sup>59</sup>

- 12.48 We consider that these protections are appropriate in the context of preventive measures. Providing certain means to ensure the safety and security of the victim (and their information) ensures their rights can be upheld by reducing the chances of revictimisation or reprisal. Our preferred approach is to substantively repeat provisions designed to protect victims’ safety and security that appear in the Parole Act.

## SUPPRESSION OF NAMES, EVIDENCE AND MEASURE DETAILS

- 12.49 The current law on preventive detention, ESOs and PPOs has various provisions governing the suppression of names and evidence, which draw on the relevant provisions of the CPA:<sup>60</sup>
- (a) As preventive detention is imposed at the time of sentencing for the original offending, the relevant provisions relating to suppression under the CPA will apply.
  - (b) Section 107G(10) of the Parole Act states that the provisions of the CPA governing public access and restrictions on reporting apply to the hearing of an application for an ESO “with all necessary modifications” and as if the hearing were a proceeding in respect of an offender under sections 128–142A of the Crimes Act 1961.
  - (c) The Public Safety (Public Protection Orders) Act 2014 (PPO Act) does not have a specific provision governing name suppression in PPO proceedings. However, the court has found that the issue would be dealt with under the court’s inherent jurisdiction, applying the same considerations as the exercise of power under section 200 of the CPA.<sup>61</sup> Section 110 of the PPO Act provides for the court to make an order forbidding publication of evidence and submissions broadly on the basis of the same threshold grounds set out in section 205(2) of the CPA.<sup>62</sup>
- 12.50 There is a strong presumption in favour of open court proceedings and for the media to report proceedings as surrogates of the public.<sup>63</sup> Publication is therefore the norm, and the onus is on the applicant seeking suppression to satisfy the judge that suppression should be granted.<sup>64</sup> This approach is grounded in the long-standing principle of open justice, which is enshrined in the NZ Bill of Rights<sup>65</sup> and has been affirmed on multiple

<sup>58</sup> Victims’ Rights Act, ss 23–24.

<sup>59</sup> Victims’ Rights Act 2002, s 25.

<sup>60</sup> These are ss 200–205 of the Criminal Procedure Act 2011. Most relevant for the purpose of our discussion are ss 200 (court may suppress identity of defendant) and 205 (court may suppress evidence and submissions). The Act also allows for the automatic suppression of the identity of a defendant and complainant in specified sexual cases (ss 201 and 203); the automatic suppression of child complainants and witnesses (s 204); and for the court to make an order suppressing the identity of witnesses, victims and connected person in specific circumstances (s 202).

<sup>61</sup> *CJW v Chief Executive of the Department of Corrections* [2016] NZHC 469 at [14].

<sup>62</sup> The only difference between the two is that s 205(2)(b) of the Criminal Procedure Act 2011 allows for the court to make a suppression order if publication would be likely to “create a real risk of prejudice to a fair trial”, while this is omitted from s 110(2) of the Public Protection (Public Protection Orders) Act 2014.

<sup>63</sup> *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

<sup>64</sup> *Robertson v New Zealand Police* [2015] NZCA 7 at [44].

<sup>65</sup> New Zealand Bill of Rights Act 1990, s 25(a): “the right to a fair and public hearing by an independent and impartial court”.

occasions by the courts.<sup>66</sup> The justifications for the open justice principle include the standards that publicity imposes on those with roles in the justice process, the possibility that publicity will encourage other witnesses to come forward, the legitimate public interest in seeing justice to be done and offenders held to account and the role of public denunciation and deterrence as a function of the justice system.<sup>67</sup> The open justice principle also promotes transparency and scrutiny of criminal proceedings and decision making, so maintaining public confidence in the administration of justice.<sup>68</sup>

- 12.51 The suppression provisions in the CPA therefore allow for a court to make an order suppressing names and details in criminal proceedings only in certain circumstances. Sections 200 (court may suppress the identity of defendant) and 205 (court may suppress evidence and submissions) set out grounds for making a suppression order, which includes when publication of the defendant’s name or details of the case would cause “extreme hardship” to them or another person, cause a real risk of prejudice to a fair trial or endanger the safety of any person. The court must apply a two-stage test:<sup>69</sup>
- (a) First, it must consider whether any of the threshold grounds listed in sections 200(2) (for name suppression) or 205(2) (for suppression of evidence or submissions) have been met — that is, the court is satisfied that one or more of the consequences listed will follow if no suppression order is made.<sup>70</sup>
  - (b) Second, and only if one or more of those grounds are established, it must consider whether the order should be made, weighing the competing interests of the applicant for name suppression and the public interest in open justice. Factors held to be relevant in this balancing exercise include the public interests in the nature of offending and the applicant’s character and identity, the stage of the proceedings and the presumption of innocence, the interests of victims and other affected persons and the likely impact publication will have on the applicant’s prospects of rehabilitation.<sup>71</sup>
- 12.52 The issue for this review is, therefore, whether the new Act should similarly allow for the suppression of particular details for a hearing for the imposition of a preventive measure.

## PROPOSAL

### P43

Proceedings under the new Act concerning preventive measures should generally be open to the public.

<sup>66</sup> See for example *Farish v R* [2024] NZSC 65 at [34]; *Ellis v R* [2020] NZSC 137 at [21]; *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]; *Robertson v Police* [2015] NZCA 7 at [43]–[47]; *Victim X v Television New Zealand Limited* [2003] 3 NZLR 220 (CA) at [34]–[36]; and *Television New Zealand Ltd v R* [1996] 3 NZLR 393 (CA) at 395.

<sup>67</sup> *Victim X v Television New Zealand Limited* [2003] 3 NZLR 220 (CA) at [5] citing Joseph Jaconelli *Open Justice: A Critique of the Public Trial* (Oxford University Press, Oxford, 2002).

<sup>68</sup> *Scott v Scott* [1913] UKHL 2, [1913] AC 417 at 463. See also Te Aka Matua o te Ture | Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [1.1].

<sup>69</sup> *M v R* [2024] NZSC 29 at [44]; and *Robertson v Police* [2015] NZCA 7 at [39]–[41].

<sup>70</sup> Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02].

<sup>71</sup> Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02A].

- 12.53 We consider that proceedings under the new Act concerning preventive measures should generally be open to the public. By proceedings, we mean any proceedings relating to an application to impose, review, terminate or escalate a preventive measure.
- 12.54 This represents a continuation of the status quo of the imposition of preventive detention, ESOs and PPOs. It also follows from our proposal, above, that applications for preventive measures should be heard and determined by the District Court and the High Court under their criminal jurisdictions.
- 12.55 This approach also upholds the well-established and “fundamental” principle of open justice.<sup>72</sup> We consider this is the correct starting point. In our view, there is a strong public interest in the outcome of proceedings governing preventive measures in seeing how the state responds to those who pose a risk of serious sexual or violent reoffending and the potential harm that would cause to the community. This is so even if some of the other rationales that underly the open justice principles in ordinary criminal proceedings are not relevant (for example, its role in encouraging other witnesses to come forward).
- 12.56 In reaching this view, we considered whether proceedings governing preventive measures may in fact be more analogous to proceedings heard in private such as proceedings in te Kōti Whānau | Family Court under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. These proceedings concern private medical and personal matters and as such are not open to the public and have more stringent restrictions on their reporting.<sup>73</sup> Although proceedings governing preventive measures can involve consideration of similarly private or intimate details about a person relevant to the assessment of risk (for example, details of past abuse or medical information about substance abuse or mental illness), the difference lies in the public interest in the outcome of proceedings relating to preventive measures.
- 12.57 We also consider that the transparency that comes with proceedings being open is particularly important given the human rights implications of imposing preventive measures. We have stressed throughout this Preferred Approach Paper that the imposition of a preventive measure involves significant infringements on the rights of those subject to it. As Te Aka Matua o te Ture | Law Commission has observed previously:<sup>74</sup>
- The criminal law gives the state immense power over an individual's freedom. Access to criminal proceedings, to the charges, the evidence, the submissions, and the judgment of the court all contribute to providing a check on the deprivation of personal liberty.
- 12.58 We consider that openness of proceedings and the subsequent public scrutiny of decisions will play an important role in ensuring decisions are made appropriately and in line with human rights requirements.
- 12.59 A more significant change with this proposal would be that discussion of special conditions to be imposed as part of residential preventive supervision and community preventive supervision would be public, both in court and in hearings of the review panel.

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<sup>72</sup> *M v R* [2024] NZSC 29 at [44]; and *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

<sup>73</sup> See Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 24–25; and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ss 129–130.

<sup>74</sup> Te Aka Matua o te Ture | Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [2.1].

At present, special conditions for ESOs are set by the Parole Board, with Parole Board hearings conducted in private and not reported (although reports of decisions may be requested under the Official Information Act 1982). These hearings are held in private in order to engender “an atmosphere that encourages persons appearing before the Board to speak for themselves, and as freely and frankly as possible”.<sup>75</sup> This ensures that witnesses are able to give frank and honest evidence to inform accurate and effective decisions as to the risk someone poses. There is a risk this may be lost with the knowledge that decisions about preventive measures will be publicly available. We consider that, to the extent this is a concern, it could be addressed by allowing for particularly sensitive information to be redacted or suppressed in any subsequent reporting and that creating a process for closed proceedings to accommodate this concern may be disproportionate given the strong public interest in open proceedings. At the same time, we note that the court (as opposed to the Parole Board) set the conditions of an interim supervision order, so our proposal would be less of a significant shift. In these cases, the court is live to suppression considerations and has taken different approaches in different cases.<sup>76</sup>

- 12.60 In Chapter 18, we set out our proposals for a review panel that would have the power to vary special conditions — either to make them more or less restrictive — in between regular court reviews of preventive measures. Our proposal for proceedings concerning preventive measures to be open to the public extends to any proceedings conducted by the review panel. By this we intend that decisions, rather than the meetings themselves, should be publicly available.
- 12.61 The reason for this is that decisions taken by the review panel to vary special conditions can, as we observe in Chapter 18, significantly change the character of the preventive measure imposed on a person. We consider this to be of a similar public interest as decisions taken by the court in relation to preventive measures. Publication of decisions of the review panel would need to comply with any suppression order a court made when the conditions were initially imposed. The panel should also take a steer from the court’s original decision as to any further details that should not be released to the public. We consider that this approach would be more administratively convenient than adopting the approach currently applied to the Parole Board where decisions to release, publish or withhold must be taken on a case-by-case basis under the Official Information Act.
- 12.62 Finally, we note that, although the aim of our proposals is to mitigate the punitive nature of preventive measures, the open nature and reporting of proceedings may contribute to the perception of preventive measures being so. This could be because the naming of someone subject to a preventive measure is seen as serving a denunciative function or because the sharing of intimate and personal details as part of risk assessment causes feelings of shame or indignity. As we have noted above, we consider that concerns about the punitive effects of preventive measures should be focused on the substance of the measure rather than the process through which they are imposed.

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<sup>75</sup> Parole Act 2002, s 49(1).

<sup>76</sup> See, for example, *Chief Executive of the Department of Corrections v Cash* [2024] NZHC 1662 where the court redacted details of the residential restriction condition without any formal order for suppression, and *Chief Executive of the Department of Corrections v Anae* [2022] NZHC 1753 where the court published details of conditions in full.



**PROPOSAL**

- P44** The new Act should allow for the court to make an order forbidding publication of:
- a. the name or any other identifying details of a person who is the subject of an application for, or subject to, a preventive measure; and/or
  - b. the whole or any part of the evidence given or submissions made in the proceedings; and/or
  - c. any details of the measure imposed.

- 12.63 As with current criminal procedure, we acknowledge that the principle of open justice can be limited by other competing interests. As such, we propose that the new Act should continue to allow for the court to make an order forbidding publication of particular information.
- 12.64 Our proposal continues the approach of the CPA in allowing the court to forbid publication of the name or identifying details of anyone subject to an application for, or subject to, a preventive measure and any evidence given or submissions made during the proceedings. Additionally, we propose the inclusion of “any details of the measure imposed” as a basis on which a court may forbid publication. We think that details of a particular measure — for example, any special conditions attached to community preventive supervision or residential preventive supervision — may be capable of identifying, if already suppressed, the identity of a person on whom it is imposed. We also consider, for reasons we expand on below, that details of a measure imposed can be capable of meeting one of the threshold grounds for forbidding publication.
- 12.65 The CPA treats the suppression of the name and identifying details of a defendant and the suppression of evidence and submissions separately. For reasons we elaborate on below, we do not consider it necessary to maintain different threshold grounds for each basis. We also think it simplifies the approach to be taken by the court by containing the relevant considerations in a single provision of the new Act.
- 12.66 We do not propose any specific provisions in the new Act to govern the suppression of the identity of witnesses, victims and connected persons. Our view is that discussion of the identity of witnesses, victims and connected persons is unlikely to arise in proceedings relating to preventive measures as the details of the original offending are relevant only at a high level. In circumstances where more specific details are discussed in preventive measures proceedings, any suppression orders made as part of the original criminal proceedings for the offending would remain in place.

## PROPOSAL

P45

The court may make an order forbidding publication only if satisfied that publication would be likely to:

- a. cause undue hardship to the person who is the subject of an application for, or subject to, a preventive measure;
- b. unduly impede the person's ability to engage in rehabilitation and reintegration;
- c. cause undue hardship to any victim of the person's previous offending;
- d. endanger the safety of any person;
- e. lead to the identification of another person whose name is suppressed by order of law; or
- f. prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

12.67 Our proposal envisages a continuation of the two-stage tests currently applied by the courts under the CPA. This would require the court to first consider whether any of the threshold grounds for suppression have been met, and second, whether an order forbidding publication should in fact be made, weighing the competing interests of the relevant person for suppression and the public interest in open justice.

12.68 Rather than continuing to refer to the existing tests in the CPA (as is the approach currently with ESOs), we propose that the new Act should contain its own test. This is because there are some grounds included in the CPA that we consider are less relevant in the context of preventive measures and some additional grounds more relevant to preventive measures that should be included.

12.69 Our proposal retains the first ground under the existing tests in the CPA — that publication would cause some form of hardship to the person who is the subject of the application for, or to, a protective measure. This recognises the impact of publication on the person concerned. Under the CPA, the courts have found that “hardship” covers impacts on physical and mental health as well as other types of distress or disadvantage.<sup>77</sup>

12.70 This must be something beyond mere hardship, as any kind of publicity is likely to always adversely impact the person concerned. We propose a standard of “undue hardship” over the higher standard of “extreme hardship” currently contained in the CPA tests for hardship to a defendant.<sup>78</sup> “Extreme hardship” is a stringent standard that is appropriate in the context of ordinary criminal proceedings where there is a strong public interest in the openness of proceedings to determine guilt and see justice administered. This interest is less strong in the context of preventive measures, where guilt has already been

<sup>77</sup> Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA205.02(1)].

<sup>78</sup> The courts already apply a standard of “undue hardship” in the assessment of whether publication of evidence or submissions would cause “undue hardship” to a victim of an offence under s 205 of the Criminal Procedure Act 2011. The courts have interpreted it in a variety of statutory contexts, including serious hardship (*R v Wallace* (2001) 18 CRNZ 577 (CA)), excessive or greater hardship than the circumstances warrant (*Dalton v Auckland City* [1971] NZLR 548 (SC)) or something more than ordinary hardship (*Lyall v Solicitor-General* [1997] 2 NZLR 641 (CA)).

determined and the focus is not on punishment but on the assessment and management of risk. We consider this lower standard of “undue” is appropriate to avoid any connotation that the imposition of a preventive measure is punitive.

- 12.71 We envisage that the “undue hardship” ground would encompass consideration of any harm to the person concerned caused by the disclosure of any intimate personal or medical details as part of the proceedings.
- 12.72 We propose the addition of a new threshold grounds at (b) that would require the court to consider whether publication would affect a person’s ability to engage in rehabilitation and reintegration. The impact of publication on rehabilitation efforts is implicit in consideration of “hardship”, and the courts have recognised this in existing cases involving the imposition of an ESO or PPO and name suppression. In *Chief Executive, Department of Corrections v P*, the judge granted name suppression for a person subject to an ESO on the basis that publication would risk “jeopardising his rehabilitation which in turn would be contrary to the public interest. Rehabilitation efforts should be given a real chance to succeed.”<sup>79</sup> In contrast, in *Chief Executive, Department of Corrections v CJW*, the judge declined to grant name suppression for a person who was the subject of an application for an ESO and PPO because:<sup>80</sup>

During the period of most publicity following delivery of these decision, Mr W will be living in a controlled environment and under close supervision under the conditions of the ESO. In the circumstances I am unable to see that there would be a risk to his compliance with that order or to his reintegration into society at a level that could be said to be extreme hardship either.

- 12.73 We consider, however, given the focus of our proposals for a new Act on rehabilitation and reintegration, there is benefit to making this consideration explicit.
- 12.74 Our proposal retains existing grounds of causing undue hardship to any victim and endangering the safety of any person. As noted above, we consider that the identity of a victim or extensive detail of offending is unlikely to arise in preventive measure proceedings. However, to the extent that the identity of the offender or details of the qualifying offending could identify a victim, we consider suppression should be allowed. The requirement to consider the safety of any person includes the safety of victims but also includes the person themselves (for example, the potential for retaliatory or vigilante-style action if their identity or location was made public).<sup>81</sup>
- 12.75 We note that an argument may be made that publication could enhance the overall safety of the public either by allowing them to take steps to protect themselves or by providing reassurance that public safety measures are in place to prevent serious reoffending harm. We anticipate the courts would take this into consideration as part of its assessment of whether publication is in the public interest.
- 12.76 We further propose retaining the grounds that publication may lead to the identification of another person or prejudice the maintenance of the law. In the case of the former, we

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<sup>79</sup> *Chief Executive, Department of Corrections v P* [2017] NZHC 135 at [23].

<sup>80</sup> *Chief Executive of the Department of Corrections v CJW* [2016] NZHC 1082 at [81].

<sup>81</sup> See for example *Deputy Chief Executive of the Department of Corrections v McCorkindale* [2020] NZHC 2484. Mr McCorkindale was forced to move from his supported accommodation in Wellington to Christchurch “because of reactions from his surrounding community to his presence” (at [40]). See also *Miller v New Zealand Parole Board* [2010] NZCA 600. The co-appellant Mr Carroll’s identity and location were leaked to the news media with considerable publicity, which “made it practically impossible for him to stay” at his original address (at [85]).

note that it is not strictly required as any other order made to suppress identity automatically includes the suppression of any information that may lead to identification.<sup>82</sup> However, as with its current inclusion in sections 200 and 205 of the CPA, it may be desirable for this to be beyond any doubt. In the case of the latter, prejudice to the maintenance of the law is likely to arise where disclosure of information may lead to the identification of an informant or police tactics that might undermine future investigations or prejudice an ongoing investigation.<sup>83</sup> Again, we consider this is unlikely to arise in situations regarding a preventive measure where guilt has already been determined and details of the offence or investigation will not be revisited. However, for the avoidance of doubt and to cover rare cases where an offender may have been operating as part of a conspiracy that is still being investigated, we propose its retention.

- 12.77 We propose removing existing grounds under sections 200 and 205 of the CPA of creating a risk of prejudice to proceedings and prejudicing the security or defence of Aotearoa New Zealand. The risk of prejudice under the CPA refers to the need to protect the fair trial rights of the defendant — in particular, the presumption of innocence. This is less relevant where an offender has already been found guilty of the relevant offending and has served their prison sentence. We consider the risk of prejudice is also less of a concern in the context of a single, one-off hearing for the imposition of a preventive measure compared to an ongoing trial that may take place over a matter of weeks or months. In relation to the grounds of security and defence of New Zealand, we note this ground is “rarely relied upon” in ordinary criminal proceedings and struggle to see how it would be any more relevant in the context of proceedings for preventive measures.<sup>84</sup>
- 12.78 Our proposal does not include any additional grounds that would require the court to consider whether publication would inhibit free and frank discussion and sharing of evidence relevant to the assessment of risk (which, as we note above, is one of the rationales for Parole Board hearings taking place in private). This is for two reasons. First, we do not think it would have any practical effect. The evidence that this would likely be most relevant to is the health assessor reports that will already have been completed ahead of court proceedings. A decision to suppress made by the court at the time of a hearing to determine imposition would not affect what information is shared to inform those reports. Second, to the extent that information shared to inform those assessments or the information shared by family, whānau or kin groups would cause particular hardship to individuals, it remains open to the court under ground (a) to make a suppression order. We would welcome feedback from submitters, however, on any practical implications of this approach.

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<sup>82</sup> Simon France *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02(6)].

<sup>83</sup> Simon France *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02(4)].

<sup>84</sup> Simon France *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02(8)].

**PART FIVE:**

**ADMINISTRATION OF  
PREVENTIVE MEASURES**

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## CHAPTER 13

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# Overarching operational matters

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### IN THIS CHAPTER, WE CONSIDER:

- issues regarding the practical implementation of parole and extended supervision order conditions;
- proposals for who should be responsible for administering the new preventive measures;
- proposals for overarching guiding principles for the administration of the new preventive measures; and
- proposals regarding entitlements to rehabilitative treatment and reintegration support under the new Act.

## INTRODUCTION

13.1 In this chapter, we consider operational matters that are relevant to all three of the preventive measures we propose should continue under reformed law — community preventive supervision, residential preventive supervision and secure preventive detention. We discuss aspects that are particular to each measure in turn in Chapters 14, 15 and 16.

## CURRENT LAW

### Operational responsibility

13.2 Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) is the government department responsible for the administration of the current law concerning preventive

measures under the Corrections Act 2004, the Public Safety (Public Protection Orders) Act 2014 (PPO Act) and the relevant provisions of the Parole Act 2002.<sup>1</sup>

- 13.3 In some instances, the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) may delegate tasks to external contractors. Subject to ministerial approval, the chief executive may enter into a “prison management contract” to delegate the task of managing a prison.<sup>2</sup> This includes prisons where people subject to preventive detention are detained. The chief executive may also task contractors with the operation of public protection order (PPO) facilities by entering into a “residence management contract”.<sup>3</sup>
- 13.4 Prison and residence management contracts must satisfy several requirements.<sup>4</sup> Among other things, they must require the contractor to comply with all requirements of the relevant legislation as well as any guidelines and instructions given by the chief executive.<sup>5</sup> The New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) applies as if the prison or the residence were managed by Ara Poutama.<sup>6</sup>
- 13.5 A manager of a contract prison has the same powers as a manager of a prison run by Ara Poutama. Likewise, a manager of a contracted PPO residence has the same powers as a manager of a PPO residence run by Ara Poutama.
- 13.6 The Parole Act does not detail how facilities for people subject to extended supervision orders (ESOs) should be run or by whom. Rather, the requirements arise from the standard and special conditions to which people are subject. Particularly relevant are programme conditions that involve the placement of the offender in the care of any appropriate person or agency.<sup>7</sup> Currently, some facilities for people subject to ESOs are run by Ara Poutama and others by external contractors.<sup>8</sup>

## Guiding principles

- 13.7 The statutes currently governing preventive measures have provisions setting out guiding principles for decision making. The Corrections Act sets out a range of broad principles to guide persons who exercise powers and duties under the Act.<sup>9</sup> The PPO Act’s principles section applies to “[e]very person or court exercising a power” under the Act.<sup>10</sup>
- 13.8 The Parole Act’s principles are different — they guide the New Zealand Parole Board’s (Parole Board) decisions that relate to the release of an offender.<sup>11</sup> They do not apply to

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<sup>1</sup> Ara Poutama Aotearoa | Department of Corrections and te Tāhū o te Ture | Ministry of Justice are jointly responsible for the administration of the Parole Act 2002.

<sup>2</sup> Corrections Act 2004, s 198.

<sup>3</sup> Public Safety (Public Protection Orders) Act 2014, s 130.

<sup>4</sup> Corrections Act 2004, s 199; and Public Safety (Public Protection Orders) Act 2014, s 131.

<sup>5</sup> Corrections Act 2004, s 199(2); and Public Safety (Public Protection Orders) Act 2014, s 131(2).

<sup>6</sup> Corrections Act 2004, s 199(2)(b); and Public Safety (Public Protection Orders) Act 2014, s 131(2)(b).

<sup>7</sup> Parole Act 2002, ss 15(3)(b), 16(c) and 107K(3)(bb)(i).

<sup>8</sup> Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Assessment: Programme conditions for Extended Supervision Orders* (2 August 2023) at [31]–[38].

<sup>9</sup> Corrections Act 2004, s 6.

<sup>10</sup> Public Safety (Public Protection Orders) Act 2014, s 5.

<sup>11</sup> Parole Act 2002, s 7.

probation officers exercising their powers under the Parole Act to activate or relax parole or ESO conditions granted to them.<sup>12</sup> However, the NZ Bill of Rights applies to probation officers where they exercise their powers in relation to standard or special conditions.<sup>13</sup>

### Rehabilitative treatment and reintegration support

13.9 The Corrections Act provides that offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community.<sup>14</sup> Section 52 is intended to give effect to this guiding principle:<sup>15</sup>

The chief executive must ensure that, to the extent consistent with the resources available ... rehabilitative programmes are provided to those prisoners sentenced to imprisonment who, in the opinion of the chief executive, will benefit from those programmes.

13.10 The Parole Act contains no provision that entitles people subject to parole or ESOs to rehabilitative treatment or reintegration support. However, participation in rehabilitative and reintegrative programmes can be made compulsory for the offender through a special condition.<sup>16</sup>

13.11 People subject to PPOs are only entitled to receive rehabilitative treatment “if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident”.<sup>17</sup>

## ISSUES

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

13.12 As we explain in more detail in Chapter 6, responses grounded in tikanga should work to restore a person’s mana, protect their tapu and achieve ea by restoring the offender’s relationship with their community. Conversely, isolating a person from their community may undermine and disrupt whakapapa and whanaungatanga.

13.13 In Chapter 6, we propose reforms to enable the placement of a person who is subject to a preventive measure into the care of a Māori group to better enable Māori to live in accordance with tikanga. The proposals we make below in relation to facility management contracts and the powers and duties of facility managers would apply to those placements.

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<sup>12</sup> For example, an offender must take part in a rehabilitative and reintegrative needs assessment only “if and when directed to do so by a probation officer”: Parole Act 2002, s 107JA(1)(h).

<sup>13</sup> See for example *McGreevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [20]–[21]; *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [83]; and *Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [42].

<sup>14</sup> Corrections Act 2004, s 6(1)(h).

<sup>15</sup> At the time of the publication of this Preferred Approach Paper, Parliament is considering the Corrections Amendment Bill, which would insert a special provision concerning rehabilitative programmes for remand prisoners with the same qualifications as the current section 52: Corrections Amendment Bill 264-2, cl 11A.

<sup>16</sup> Parole Act 2002, s 15(3)(b).

<sup>17</sup> Public Safety (Public Protection Orders) Act 2014, s 36.



## The law should better ensure that probation officers' implementation of conditions is consistent with the New Zealand Bill of Rights Act 1990

- 13.14 In relation to how parole and ESO conditions are implemented in practice, both standard and special conditions are, for the most part, framed to confer broad discretion on a probation officer. This broad discretion allows probation officers to take into account a person's individual circumstances and respond to changes in their needs or risk. However, it means the rights consistency of standard and special conditions can depend on individual implementation by the probation officer.
- 13.15 Probation officers are bound by the NZ Bill of Rights in how they implement standard and special conditions of parole or ESOs. The courts have clarified this in several cases in relation to both standard and special conditions.<sup>18</sup> In the case of *Te Whatu v Department of Corrections*, te Kōti Matua | High Court found that the probation officer's exercise of discretion in relation to a standard condition was in breach of the NZ Bill of Rights.<sup>19</sup> Mr Te Whatu was subject to the standard condition of non-association with anyone specified by the probation officer. Even though Mr Te Whatu had offended only against children, the probation officer directed him to refrain from associating with or contacting his adult partner of then seven years. This was, in part, because of a suspicion that his partner was grooming a potential victim on Mr Te Whatu's behalf. The Court found, however, that these concerns were addressed by the special condition prohibiting contact with children. The direction not to associate with his adult partner was, the Court found, "too broad and blunt" and "a disproportionate response to the problem".<sup>20</sup>
- 13.16 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.

## Insufficient provision of rehabilitative treatment and reintegration support

- 13.17 As we detail in Chapter 5, the provision of rehabilitative treatment and reintegration support under the current law has been criticised as being insufficient. We briefly restate these issues here.
- 13.18 First, treatment for people imprisoned on preventive detention is deferred until they are eligible for parole. Ara Poutama will refer prisoners to rehabilitative programmes only when it considers their release to be imminent — either because the sentence will expire or because the Parole Board may direct the release of the prisoner on parole. The reasons

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<sup>18</sup> Te Kōti Matua | High Court held in *Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [42], when assessing the lawfulness of a special condition for Mr Wilson to attend church only with his probation officer's approval, that "the probation officer will be aware that the New Zealand Bill of Rights Act 1990 applies to his actions including Mr Wilson's right to freedom of religious practice". Te Kōti Pira | Court of Appeal noted in *McGreevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [20]–[21], in the context of an intensive monitoring condition for Mr McGreevy, that the implementation of special conditions by Ara Poutama must be consistent with his freedoms of movement and residence. Finally, te Kōti Matua | High Court noted in *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [83] that standard conditions activated by probation officers "engage the same considerations" as imposing special conditions — they must not be unreasonable and should reflect NZ Bill of Rights considerations.

<sup>19</sup> *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362.

<sup>20</sup> *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362 at [33].

offered for the deferral of treatment are that resources are limited and that treatment is considered most effective the closer it is provided to a person's release. The courts have accepted that Ara Poutama may prioritise people on preventive detention for treatment when their parole eligibility approaches.<sup>21</sup>

- 13.19 Second, the duties to provide treatment to people subject to PPOs or preventive detention are heavily qualified. Under the PPO Act, people are only entitled to receive rehabilitative treatment “if the treatment has a reasonable prospect of reducing the risk to public safety posed by the resident”.<sup>22</sup> Te Kōti Pira | Court of Appeal has found that, overall, treatment and rehabilitation are not a “central focus” of the PPO regime because of this qualification (among other factors).<sup>23</sup> The relevant provision under the Corrections Act is similarly qualified. Rehabilitative programmes must be provided to prisoners but subject to resource considerations and the opinion of the chief executive that the person in question will benefit from the programme.<sup>24</sup> As we discuss below, the provision of rehabilitative treatment and reintegration support is crucial to ensuring preventive measures are compliant with domestic and international human rights obligations.

## RESULTS OF CONSULTATION

- 13.20 In the Issues Paper, we asked submitters whether preventive regimes should have a stronger focus on therapeutic and rehabilitative treatment and whether people detained should have stronger rights to treatment. Related to this question, we asked for feedback on our proposals that rehabilitation and reintegration could be central objectives of the new law and that people detained could be entitled to “therapeutic and rehabilitative interventions”.
- 13.21 There was strong support among submitters for a greater focus on therapeutic and rehabilitative treatment. Several submitters agreed that the focus on therapeutic and rehabilitative treatment should be stronger and that people detained should have stronger rights to treatment.<sup>25</sup> Fewer submitters addressed our specific proposals, but those who did — the Chief Ombudsman and Te Kāhui Tika Tangata | Human Rights Commission — agreed that rehabilitation and reintegration should be central objectives.
- 13.22 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service submitted that treatment programmes during a sentence should start immediately. The Chief Ombudsman noted that, in his inspection reports, he has commented on the negative impacts on mental health and wellbeing of prolonged and potentially indefinite detention in closed settings. He added that he has highlighted the need to mitigate the risks of deteriorating mental wellbeing, including through facilitating rehabilitation and reintegration wherever possible.

<sup>21</sup> See for example *Smith v Attorney-General* [2020] NZHC 1848 at [122].

<sup>22</sup> Public Safety (Public Protection Orders) Act 2014, s 36.

<sup>23</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [175].

<sup>24</sup> Corrections Act 2004, s 52.

<sup>25</sup> Chief Ombudsman, Criminal Bar Association, Te Kāhui Tika Tangata | Human Rights Commission, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association and several people subject to preventive measures who we interviewed.

13.23 Most of the people we interviewed who were subject to preventive measures spoke highly of the rehabilitative treatment they had received and expressed how helpful it had been. However, several interviewees expressed frustration that they were not able to participate in rehabilitation programmes earlier in their sentence. Two interviewees said they had been ineligible for rehabilitative programmes because they denied their offending. Several interviewees thought that Ara Poutama did not prioritise people on preventive detention for treatment compared to prisoners on determinate sentences.

## PREFERRED APPROACH

### Operational responsibility

#### *Responsible department*

#### PROPOSAL

P46

Ara Poutama Aotearoa | Department of Corrections should be responsible for the operation of preventive measures under the new Act.

13.24 We consider Ara Poutama should be the government department responsible for the operation of the new preventive measures. Ara Poutama currently holds primary responsibility for the operation of preventive detention, ESOs and PPOs. It has institutional knowledge and experience in detaining and supervising people considered at risk of reoffending, which, in our view, should be retained. All comparable jurisdictions we have analysed run preventive measures through the same agency that operates their wider corrections system.

13.25 In a 2023 report, the Chief Ombudsman noted some concerns about Ara Poutama’s performance in managing prisoners. He stated that “the legal rights and interests of prisoners have been too easily and unreasonably overlooked” and that Ara Poutama “has not sufficiently had the fair, safe, and humane treatment of prisoners at the centre of its decision making”.<sup>26</sup>

13.26 We acknowledge that these concerns are valid, and we consider them relevant to the question who should be responsible for the operation of preventive measures under the new Act. However, we consider they should be addressed within the existing institutional framework rather than by creating new administrative bodies. Our proposals for guiding principles and greater entitlements to rehabilitative treatment and reintegration support should help in addressing some of the concerns about the treatment of prisoners. As we go on to detail below, these principles and entitlements are intended to ensure that the day-to-day operation of preventive measures focuses on rehabilitation and reintegration and on the fair, safe and humane treatment of people subject to preventive measures. Conversely, the costs and other efforts required to establish a new agency are likely to be significant.

<sup>26</sup> Peter Boshier *Kia Whaitake | Making a Difference* (June 2023, Office of the Ombudsman) at [14].

13.27 We have considered proposing that a health agency should operate the preventive measures to help shift the focus of the regime towards rehabilitative treatment. While we propose that preventive measures should have a central focus on rehabilitation and reintegration, there is still a need to manage the risks people subject to preventive measures present. Health agencies may not have the institutional skills and experience for this work. Ara Poutama, in our view, is better suited to addressing the diverse range of issues people subject to preventive measures present with. Also, we do not think sharing operational responsibility is necessary to ensure appropriate input from a health agency or any other agency. Rather, we think it is preferable to designate one responsible department while providing for ways in which other agencies can assist (see our proposals further below). Lastly, none of the comparable jurisdictions we examined have adopted models where two or more agencies jointly operate preventive measures.

### Facility managers

#### PROPOSALS

P47

The new Act should provide for the appointment of facility managers by the chief executive of Ara Poutama Aotearoa | Department of Corrections or, in case of facilities operated pursuant to a facility management contract, by the contractor.

P48

The new Act should require all facility managers to comply with guidelines and/or instructions from the chief executive of Ara Poutama Aotearoa | Department of Corrections.

13.28 As is currently the case with prison managers under the Corrections Act and residence managers under the PPO Act, we propose that the chief executive should appoint managers for residential preventive supervision and secure preventive detention facilities.<sup>27</sup> The appointment process should differ in relation to facilities run by an external entity through a management contract (see below). In that case, the contractor should be responsible for appointing the facility manager.<sup>28</sup>

13.29 Facility managers should have primary responsibility for the management of facilities. In turn, they should be accountable to the chief executive. The chief executive should be able to issue guidelines and instructions in relation to the management of a facility under the new Act. This is in line with the current provisions on guidance and instructions from the chief executive to prison managers under the Corrections Act and residence managers under the PPO Act.<sup>29</sup>

13.30 As we detail in Chapters 15 and 16, facilities should be subject to periodic inspections, and facility managers should be responsible for correcting any deficiencies identified by

<sup>27</sup> Corrections Act 2004, s 11(1)(a); and Public Safety (Public Protection Orders) Act 2014, s 115(1)(a).

<sup>28</sup> Corrections Act 2004, s 11(2)(a); and Public Safety (Public Protection Orders) Act 2014, s 115(2)(a).

<sup>29</sup> Corrections Act 2004, s 196; and Public Safety (Public Protection Orders) Act 2014, s 120.

inspectors. We anticipate that decisions made by facility managers would be subject to judicial review.

### Facility management contracts

#### PROPOSALS

P49

The new Act should provide that the chief executive of Ara Poutama Aotearoa | Department of Corrections may enter into a contract with an appropriate external entity for the management of a residential facility (under residential preventive supervision) or a secure facility (under secure preventive detention).

P50

The new Act should require that every facility management contract must:

- a. provide for objectives and performance standards no lower than those of Ara Poutama Aotearoa | Department of Corrections;
- b. provide for the appointment of a suitable person as facility manager, whose appointment must be subject to approval by the chief executive of Ara Poutama, as well as suitable staff members; and
- c. impose on the contracted entity a duty to comply with the new Act (including instructions and guidelines issued by the chief executive of Ara Poutama), the New Zealand Bill of Rights Act 1990, the Public Records Act 2005, sections 73 and 74(2) of the Public Service Act 2020 and all relevant international obligations and standards as if the facility were run by Ara Poutama.

P51

The new Act should provide for the ability of the chief executive of Ara Poutama Aotearoa | Department of Corrections to take control of externally administered facilities in emergencies.

13.31 We consider that facility management contracts should continue to be available under the new Act. As noted above, the ability to task other organisations with the operations of facilities for people subject to preventive measures already exists.<sup>30</sup> We have not heard criticism of this approach in relation to the current operation of preventive measures. External organisations may bring different skills and expertise than Ara Poutama. They may be better placed to cater to the different cultural needs that persons subject to secure preventive detention or residential preventive supervision may have. For example, iwi organisations or charitable trusts may be better suited than Ara Poutama to create an environment that is informed by te ao Māori and tikanga.

13.32 The operation of a detention facility by an entity other than a government agency is, however, a sensitive issue. In the context of prison management, concerns have been raised that a prison operator holds considerable power over those detained there and

<sup>30</sup> Corrections Act 2004, s 198; Public Safety (Public Protection Orders) Act 2014, s 130; and Parole Act 2002, ss 15(3)(b) and 16.

that delegating this power to a contractor risks lowering the standard of government accountability.<sup>31</sup>

- 13.33 We consider, however, that any risks arising from delegating the operation of residential or secure facilities to external organisations can be mitigated by requiring all operators to adhere to the law and be subject to the same review and monitoring mechanisms as Ara Poutama. There are no substantive protections or transparency obligations that can be applied to Ara Poutama but not to an external provider. To this effect, we propose that the contracting entities must achieve at least the same performance standards and must comply with the same requirements that would apply to a facility managed directly by Ara Poutama. The wording of our proposal replicates the current relevant provisions for residence management contracts under the PPO Act.<sup>32</sup> The chief executive's approval is required for an external entity to appoint a facility manager.
- 13.34 It may be appropriate for a facility management contract to define circumstances under which the chief executive is entitled to take over control of the facility or of certain aspects of the administration ("step-in rights"). We also consider that, in line with current provisions under the Corrections Act and the PPO Act, safeguards should be put in place so that the chief executive can take over control of facilities in emergencies (as defined in section 134 of the PPO Act).<sup>33</sup> These safeguards should be written directly into the statute rather than management contracts to clarify that they apply despite any provision made in the management contract.
- 13.35 In contrast to instances of delegating prison operations to private companies to reduce costs, the purpose of facility management contracts under the new Act would be to diversify the approaches to effective rehabilitation and reintegration and to meet te Tiriti o Waitangi | Treaty of Waitangi obligations rather than to maximise cost efficiency. That is why our proposal broadly refers to "appropriate external entities" rather than implying a commercial nature by referring to "private companies" or a similar term.

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<sup>31</sup> See for example Rebecca Kennedy "Much Obligated: An Assessment of Governmental Accountability for Prisoners' Rights in New Zealand's Private Prisons" (2016) 22 Auckland U L Rev 207.

<sup>32</sup> Public Safety (Public Protection Orders) Act 2014, s 131. Compare s 199 of the Corrections Act 2004, which provides for further requirements in relation to prison management contracts.

<sup>33</sup> Corrections Act 2004, s 199H; and Public Safety (Public Protection Orders) Act 2014, s 134.

## Guiding principles

### PROPOSAL

P52

The new Act should provide that probation officers, as well as facility managers and their staff, must have regard to the following guiding principles when exercising their powers under the new Act:

- a. People subject to community preventive supervision should not be subjected to any more restrictions of their rights and freedoms than are necessary to ensure the safety of the community.
- b. People subject to residential preventive supervision or secure preventive detention should have as much autonomy and quality of life as is consistent with the safety of the community and the orderly functioning and safety of the facility.
- c. People subject to any preventive measure should, to the extent compatible with the safety of the community, be given appropriate opportunities to demonstrate rehabilitative progress and be prepared for moving to a less restrictive preventive measure or unrestricted life in the community.

### The need for guiding principles

13.36 We propose that the part of the new Act governing the administration of the preventive measures should contain a provision stating overarching guiding principles. The provision would guide people who are exercising powers in relation to people subject to preventive measures.

13.37 In a case involving the former three strikes regime (which was introduced in 2010 and repealed in 2022), judges of te Kōti Mana Nui | 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.<sup>34</sup> We consider such safeguards in the form of guiding principles are needed for the exercise of probation officers' and facility managers' powers.

13.38 The Legislation Design and Advisory Committee's *Legislation Guidelines* state that "In most cases, statements of principle will guide and limit the exercise of powers and duties

<sup>34</sup> To meet concerns about the possible overreach of the former three strikes regime, Cabinet relied on an administrative requirement that the local Crown Solicitor review all stage three charges. The expectation was that prosecutorial discretion would be exercised to avoid unjust or disproportionately severe outcomes. In *Fitzgerald v R*, te Kōti Mana Nui | 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 New Zealand Bill of Rights Act 1990. The administrative safeguard had failed to prevent a breach of the New Zealand Bill of Rights Act 1990. 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.

under the legislation.”<sup>35</sup> In the context of the new Act specifically, the guiding principles provision would help to give effect to the reorientation of preventive measures towards rehabilitation and reintegration that we propose in Chapter 5. It would also help to ensure that decision-makers on the ground exercise their powers in a human rights-compliant way, for example, where probation officers implement supervision conditions.

- 13.39 Our aim is to give effect throughout the new Act to the purposes outlined in Chapter 5. Some areas such as the legislative tests for imposing and reviewing measures and the conditions of residential and secure facilities can be designed to directly give effect to the purposes. This is not the case for how probation officers and facility managers and their staff go about their daily operations. Their conduct has a significant impact on the people subject to preventive measures but should not be regulated too prescriptively because it is impossible for legislation to anticipate all eventualities that staff on the ground may encounter. This is why we have opted for guiding principles that connect the daily operational decisions to the overarching aims of the Act without inhibiting the ability of decision-makers to respond to situations quickly and flexibly.

### *Scope of application*

- 13.40 In our view, the guiding principles for those who exercise powers under the new Act should apply where:

- (a) probation officers exercise powers to implement standard or special conditions under community preventive supervision;
- (b) residential facility managers and their staff exercise powers to implement standard or special conditions under residential preventive supervision;<sup>36</sup> and
- (c) secure facility managers and their staff exercise powers under the Act relating to the running of a secure facility.

- 13.41 Contrary to the Parole Act, we do not propose that the guiding principles should inform the imposition of a preventive measure or special conditions. They should only apply to the operation of preventive measures once they have been adopted. We consider that introducing guiding principles to be read alongside the legislative tests proposed in Chapter 10 would introduce elements of uncertainty and diminish the clarity of the legislative test. Similarly, a decision to transfer a person to a less restrictive preventive measure or to terminate a preventive measure should be made by the courts in accordance with the review mechanisms we propose in Chapter 18.

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<sup>35</sup> See Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines (2021 edition): Designing purpose provisions and statements of principle* (29 May 2024) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 66. Other examples of guiding principles provisions include s 12 of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 28 of the Standards and Accreditation Act 2015 and s 10 of the Veterans' Support Act 2014.

<sup>36</sup> Note that, for residential preventive supervision, the new Act would grant to facility managers and their staff no powers other than those granted through a person's standard and special residential preventive supervision conditions. We explain residential preventive supervision conditions in more detail in Chapter 15.



### Content and wording

- 13.42 The wording of the proposed guiding principles is based on one of the PPO Act's principles and on a similar provision under German law to which the Court of Appeal referred in *Chisnall v Attorney-General*.<sup>37</sup>
- 13.43 The guiding principles we propose are intended to give effect to the policy of the new Act as expressed in the purpose provision proposed in Chapter 5. The first two principles give effect to the purpose that limits on a person's freedoms should be the least restrictive and proportionate to address the risks of reoffending. These principles respond to the issue we have identified above that the law could better ensure that probation officers' implementation of conditions is consistent with human rights.
- 13.44 The third principle is linked to the purpose of supporting someone to live a safe and unrestricted life in the community. This principle responds to concerns raised to us that people subject to preventive measures often lack opportunities to demonstrate that they have made rehabilitative progress. Examples of appropriate opportunities to demonstrate rehabilitative progress and of preparations for a less restrictive setting are:
- (a) easing any standard or special conditions where the probation officer or facility manager has that discretion for people subject to community preventive supervision or residential preventive supervision; and
  - (b) regular supervised outings into the community or being moved to less intensely supervised self-contained living units within a facility for people subject to secure preventive detention.
- 13.45 Unlike the Corrections Act and Parole Act, we do not propose to elevate a public safety principle above other principles. We have received feedback that this may create a narrow focus on short-term community safety and be used to rationalise declining to grant supervised leave or exercise. This focus can compromise long-term community safety because it harms rehabilitation and reintegration prospects for the person concerned. We also consider that the purpose provision proposed in Chapter 5 already clarifies that community safety is one of the three overall aims of the new Act.
- 13.46 We have not included in our proposal a principle that detention or other conditions must not be more onerous, or last longer, than is consistent with the safety of the community. We consider that this principle is inherent to the legislative tests proposed in Chapter 10. The legislative tests should guarantee that any preventive measure imposed is the least restrictive measure necessary to protect the community from serious reoffending.

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<sup>37</sup> German Criminal Code (Strafgesetzbuch – StGB), s 66c.

## Rehabilitative treatment and reintegration support

### PROPOSAL

P53

The new Act should provide that:

- a. people subject to a preventive measure are entitled to receive rehabilitative treatment and reintegration support; and
- b. Ara Poutama Aotearoa | Department of Corrections must ensure sufficient rehabilitative treatment and reintegration support is available to people subject to a preventive measure in order to keep the duration of the preventive measure as short as possible while protecting the community from serious reoffending.

13.47 We use the term “rehabilitative treatment and reintegration support” to distinguish those duties that serve the objective of freeing a person from a preventive measure at the earliest opportunity from duties to provide other therapeutic treatment.<sup>38</sup> We understand that the term “rehabilitation” is commonly used to refer to activities that directly address someone’s reoffending risk whereas reintegration refers to training practical life skills needed for life in the community.<sup>39</sup> We also understand that rehabilitation activities, other than reintegration activities, may include therapeutic treatment, which is why we refer to “rehabilitative treatment” but to “reintegration support”.

### *Reorientation of preventive measures through rehabilitative treatment and reintegration support*

13.48 To give effect to our broader aim to reorient preventive measures towards rehabilitation and reintegration, people subject to preventive measures should have a stronger entitlement to rehabilitative treatment and reintegration support than under the current law. The proposal also corresponds to the overall purposes of the new Act to support a person considered at high risk of serious reoffending to be restored to safe and unrestricted life in the community.

13.49 The extent of the duty to provide rehabilitative treatment and reintegration support should be based on the need to release people from a preventive measure at the earliest opportunity. This dimension of the proposal corresponds to the Act’s proposed purpose that limits on a person’s freedoms are the least restrictive available and proportionate to the reoffending risk. This approach reverses the way in which section 52 of the Corrections Act is framed. Rather than providing treatment to a person to the extent that resources allow, it requires that resources be devoted to the extent there is a need to

<sup>38</sup> The terminology under the current law varies between different statutes. The Parole Act 2002 and the Corrections Act 2004 refer to “rehabilitative or reintegrative programmes”. The Corrections Act also mentions “activities that may contribute to their rehabilitation and reintegration into the community”, whereas the Public Protection (Public Protection Orders) Act 2014 refers to “rehabilitative treatment” in some provisions but to “rehabilitation and reintegration” in others. Te Kōti Pira | Court of Appeal refers to “therapeutic and rehabilitative interventions in *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [176].

<sup>39</sup> *Reintegration Services: Evidence Brief* (New Zealand Government, April 2016) at 1.

support the person to safe and unrestricted life in the community at the earliest reasonable opportunity. We acknowledge that there may be cases where rehabilitative efforts come to no fruition, but we consider that decision-makers must nevertheless make every reasonable effort to provide people subject to preventive measures with adequate treatment and support.

### Relevant human rights jurisprudence

- 13.50 Our proposal to provide entitlements to rehabilitation treatment and reintegration support takes into account domestic and international human rights jurisprudence on the right not to be subject to second punishment and the right to be free from arbitrary detention.
- 13.51 The Court of Appeal in *Chisnall v Attorney-General* was critical of the qualifications on the provision of rehabilitation treatment and reintegration support under the PPO Act because it meant that, in some cases, treatment might never be provided. It concluded that the legislative scheme must guarantee therapeutic and rehabilitative interventions by the state in order to avoid the conclusion that it is a penalty for the purposes of human rights law.<sup>40</sup> Although our proposal aims to give the new Act the least punitive effect possible, we consider the new measures may nevertheless be found to be penalties for the purposes of human rights law. Entitlements to rehabilitative treatment and reintegration support will, however, contribute to justifying limitations on human rights (of the right not to be subject to second punishment in particular).
- 13.52 The provision of rehabilitative treatment and reintegration support is also relevant to whether preventive detention is arbitrary under article 9 of the International Covenant on Civil and Political Rights (ICCPR). The United Nations Human Rights Committee's (UNHRC) view is that preventive detention should be aimed at the person's rehabilitation and reintegration into the community.<sup>41</sup> In *Miller v New Zealand*, two people subject to preventive detention argued that Aotearoa New Zealand had failed to provide adequate rehabilitative treatment in order to release them into society as soon as possible in breach of article 9 of the ICCPR.<sup>42</sup> The UNHRC noted that, in cases of preventive detention, the state has a duty to provide the necessary assistance to enable people to be released as soon as possible.<sup>43</sup> In that specific case, however, the UNHRC found that Aotearoa New Zealand had provided the people subject to preventive detention with sufficient treatment and rehabilitation programmes and found no breach of article 9.
- 13.53 Following *Miller*, the UNHRC considered another case of preventive detention — *Isherwood v New Zealand*.<sup>44</sup> Mr Isherwood argued that he had been provided with insufficient rehabilitative treatment in breach of article 9. The UNHRC noted he had been provided several opportunities to attend further programmes after becoming eligible for parole but had failed drug tests, which made him ineligible for the programmes. The

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<sup>40</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [176].

<sup>41</sup> 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].

<sup>42</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

<sup>43</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2] citing *Dean v New Zealand* CCPR/C/95/D/1512/2006 (2009) at [7.5].

<sup>44</sup> *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC).

UNHRC also noted the treatment he had received — being employed in the prison, receiving pastoral care and psychological assistance and completing two rehabilitation programmes.

- 13.54 Domestic courts have, however, emphasised that detention conditions such as whether adequate treatment had been provided or not cannot make a detention arbitrary for the purposes of section 22 of the NZ Bill of Rights.<sup>45</sup> The High Court explained that New Zealand law adheres to the common law view that the appropriate relief for arbitrary detention is release from that detention. As long as that link between arbitrariness and release as appropriate relief remains, the domestic courts' scope of arbitrariness will remain narrower than that of the UNHRC in interpreting the ICCPR.<sup>46</sup> In *Smith v Attorney-General*, the High Court did, however, acknowledge that it:<sup>47</sup>

should be more open to exercising greater scrutiny of decisions made by Corrections concerning the availability of rehabilitation programmes, particularly when they are effectively necessary prerequisites to release for a prisoner is facing a sentence of preventive detention.

- 13.55 In summary, we consider that a stronger entitlement to rehabilitative treatment and reintegration support is crucial to ensure that limitations of the right not to be subject to second punishment are justified. Although it is also relevant to ensuring compliance with the right to be free from arbitrary detention, domestic courts do not currently hold Ara Poutama to this standard.

### Comparative considerations

- 13.56 None of the Australian jurisdictions we have looked at articulate an entitlement to rehabilitative treatment, which has led to some criticism of inadequate rehabilitative programmes in Australia.<sup>48</sup> German law on preventive detention, which the Court of Appeal referred to in the case of *Chisnall v Attorney-General*, grants an entitlement to rehabilitative treatment and reintegration support.<sup>49</sup> Under German law, the authorities must offer support to a person subject to preventive detention based on a “comprehensive treatment examination” and a regularly updated individualised detention plan.<sup>50</sup>
- 13.57 The aim of this support is “to minimise the detainee’s dangerousness to the public to a degree that the measure may be suspended on probation or declared disposed of as soon as possible”. The relevant provision expressly refers to the requirement to develop tailored treatment options if “standardised” treatment options “do not appear promising”. In the judgment that prompted the reform, the German Federal Constitutional Court emphasised that suitable therapeutic treatment may not be denied solely on the grounds

<sup>45</sup> *Miller v Attorney-General* [2022] NZHC 1832 at [82].

<sup>46</sup> *Miller v Attorney-General* [2022] NZHC 1832 at [82]–[83].

<sup>47</sup> *Smith v Attorney-General* [2020] NZHC 1848 at [118]; and *Wilson v The Department of Corrections* [2018] NZHC 2977 at [33].

<sup>48</sup> See for example Patrick Keyzer and Darren O’Doman “Australia’s expanding jurisprudence of risk: A critical analysis of Australian preventive detention and post-sentence supervision systems” in Sonja Meijer, Harry Annison and Ailbhe O’Loughlin (eds) *Fundamental rights and legal consequences of criminal conviction* (Hart Publishing, 2019) 227 at 240–241.

<sup>49</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [165]–[172].

<sup>50</sup> German Criminal Code (Strafgesetzbuch – StGB), s 66c.

that efforts and cost would exceed standardised treatment options the facility in question offers.<sup>51</sup>

- 13.58 Decisions from the European Court of Human Rights, subsequently adopted by the Supreme Court of the United Kingdom, address the required standard of treatment but set it lower than that under German law. They established that “a certain friction between available and required treatment and facilities is inevitable and must be regarded as acceptable”.<sup>52</sup> Consequently, there need to be “exceptional circumstances warranting the conclusion that the prisoner’s continued detention had become arbitrary”.<sup>53</sup> We regard the European position as broadly consistent with the position taken by the UNHRC in respect of article 9 of the ICCPR.

### Measures to support overall wellbeing

#### PROPOSALS

P54

The new Act should provide that people subject to residential preventive supervision or secure preventive detention are entitled to participate in therapeutic, recreational, cultural and religious activities to the extent compatible with the safety of the community and the orderly functioning and safety of the facility.

P55

The new Act should provide that people subject to residential preventive supervision or secure preventive detention are entitled to medical treatment and other healthcare appropriate to their conditions. The standard of healthcare available to them should be reasonably equivalent to the standard of healthcare available to the public.

- 13.59 Some activities in support of the wellbeing of people subject to preventive measures may not directly target someone’s risk of reoffending but instead aim to improve the person’s overall wellbeing. A person’s improved wellbeing, for example, through participation in meaningful activities, has been shown to help reduce their reoffending risk.<sup>54</sup> Likewise, the provision of healthcare is likely to have an impact on a person’s wellbeing and reoffending risk. Treatment for mental health and addiction issues, for example, is likely to be particularly significant.<sup>55</sup>

<sup>51</sup> B v R 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011 at [111].

<sup>52</sup> *James v United Kingdom* (2013) 56 EHRR 12 (ECtHR) at [194].

<sup>53</sup> *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1 at [45].

<sup>54</sup> Yvonne HA Bouman, Aart H Schene and Corine de Ruiter “Subjective Well-Being and Recidivism in Forensic Psychiatric Outpatients” (2009) 8 *International Journal of Forensic Mental Health* 225; Katherine M Auty and Alison Liebling “Exploring the Relationship between Prison Social Climate and Reoffending” (2020) 37 *Justice Quarterly* 358; Danielle Wallace and Xia Wang “Does in-prison physical and mental health impact recidivism?” (2020) 11 *SSM — Population Health* 100569; and Esther FJC van Ginneken and Hanneke Palmen “Is There a Relationship Between Prison Conditions and Recidivism?” (2023) 40 *Justice Quarterly* 106.

<sup>55</sup> See for example Erkmen G Aslim and others “The Effect of Public Health Insurance on Criminal Recidivism” (2022) 41 *Journal of Policy Analysis and Management* 45, which found that access to healthcare through the availability of public health insurance reduces recidivism among offenders convicted of violent and public order crimes in the United States of America.

13.60 The Office of the Ombudsman has formulated expectations for the conditions and the treatment of people in the custody of Ara Poutama. Among other expectations in the context of health, care and wellbeing, the Office of the Ombudsman expects that:<sup>56</sup>

People in custody have the opportunity to participate in recreational, sporting, religious, and cultural activities to support wellbeing, including tikanga Māori, te reo Māori, and principles relating to Māori health practice. They have a say in the activities offered.

13.61 Our proposal echoes these expectations. It is directed specifically at people subject to residential preventive supervision or secure preventive detention. People subject to these measures will be detained and unable to access activities and healthcare without provision from the manager of the facility. People who are subject to community preventive supervision will be living in the community and will usually have access to these types of activities without the need for Ara Poutama to facilitate their provision.

13.62 For people subject to residential preventive supervision or secure preventive detention, there should also be a focus on opportunities to engage with life in the community. People we interviewed who were or had been subject to a PPO said they benefited from the supervised visits they made into the community. Opportunities to engage with the community need to be balanced with the aim of ensuring community safety.

13.63 There is also the possibility that certain facilities could specialise in the care and treatment of people with particular conditions. In Chapter 5, we describe the prevalence of people subject to preventive measures who are disabled, have mental health issues or have other complex behavioural conditions. In accordance with our proposal to provide healthcare to a standard available to the public, Ara Poutama could consider whether people subject to preventive measures could access the care they need through residential or secure facilities offering particular treatment and support.<sup>57</sup>

13.64 Our proposal specifies that the standard of healthcare available to people subject to residential preventive supervision or secure preventive detention should be reasonably equivalent to the standard of healthcare available to the public. Although we acknowledge there are practical limitations to the standard of healthcare available — even to the public — detainees cannot access healthcare without facilitation by facility staff. That is why the new Act should impose a duty on the staff and state what standard of healthcare for detainees must be guaranteed.

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<sup>56</sup> Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman *OPCAT Expectations Corrections: Expectations for conditions and treatment of people in custody in prisons and otherwise in the custody of the Department of Corrections, and residents in residences established under section 114 of the Public Safety (Public Protection Orders) Act 2014* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at 19.

<sup>57</sup> For comparison, we note initiatives such as the proposed Hikitia mental health and addiction service within the redevelopment of Waikeria Prison to deliver targeted mental health and addiction care services to prisoners.

*Initial assessment and treatment and supervision plan***PROPOSALS****P56**

The new Act should require that each person subject to a preventive measure must have their needs assessed as soon as practicable after the measure is imposed. The assessment should identify any:

- a. medical requirements;
- b. mental health needs;
- c. needs related to any disability;
- d. educational needs;
- e. needs related to therapeutic, recreational, cultural and religious activities;
- f. needs related to building relationships with the person's family, whānau, hapū or iwi or other people with whom the person has a shared sense of whānau identity;
- g. steps to be taken to facilitate the person's rehabilitation and reintegration into the community; and
- h. other matters relating to the person's wellbeing and humane treatment.

**P57**

The new Act should provide that each person subject to a preventive measure should have a treatment and supervision plan developed with them. The treatment and supervision plan should set out:

- a. the reasonable needs of the person based on the completed needs assessment;
- b. the steps to be taken to work towards the person's restoration to safe and unrestricted life in the community;
- c. if applicable, the steps to be taken to work towards the person's transfer to a less restrictive measure;
- d. the rehabilitative treatment and reintegration support a person is to receive;
- e. for people subject to residential preventive supervision or secure preventive detention, opportunities to engage with life in the community;
- f. any matters relating to the nature and extent of the person's supervision required to ensure the safety of the person, other residents of a facility, staff of the facility and the community; and
- g. any other relevant matters.

## PROPOSAL

P58

Under the new Act, the person responsible for assessing the person's needs and developing and administering the treatment and supervision plan should be:

- a. in the case of community preventive supervision, the probation officer responsible for supervising the person; or
- b. in the case of residential preventive supervision and secure preventive detention, the facility manager into whose care the person is placed.

13.65 We consider that the success of an entitlement to receive adequate rehabilitative treatment and reintegration support depends on detailed provisions on initial needs assessments and coordinated plans to respond to the needs identified in a structured, consistent and methodical manner.

13.66 There is precedent for such measures in the PPO Act, which provides for needs assessments and management plans.<sup>58</sup> The PPO Act's provision on needs assessments serves as the basis for our proposal, but we have expanded the list of matters to be assessed to include other factors we consider important such as mental health needs and needs to build positive relationships. Although the PPO Act's provision on management plans has informed our proposal on a treatment and supervision plan, our proposal differs significantly from the current law. It is tailored to give effect to the reorientation of the new Act and contains fewer qualifications.

13.67 The initial needs assessment serves as a starting point for a person's rehabilitative treatment and reintegration support and other activities designed to improve their wellbeing. It is intended to give a detailed account of the person's physical and mental state and to indicate from which activities they may benefit. The needs assessment, once completed, should inform the process of creating a treatment and supervision plan tailored to the person's needs as previously identified.

13.68 The key function of the treatment and supervision plan, in turn, is to keep the progress of the person to safe and unrestricted life in the community under consideration. It should set out the steps to be taken to work towards the person's restoration to safe and unrestricted life in the community. In the case of residential preventive supervision or secure preventive detention, the plan should also set out the steps to be taken to move a person to a less restrictive preventive measure.

13.69 The treatment and supervision plan can — and in some circumstances must — be reviewed both by a court and the review panel (see Chapter 18). It should be understood as a living document that can be adapted to the progress of the person in question.

13.70 For people subject to community preventive supervision, we suggest that the probation officer who supervises the person should be responsible for the needs assessment and the development of the plan. For people subject to residential preventive supervision or

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<sup>58</sup> Public Safety (Public Protection Orders) Act 2014, ss 41–44. See also *Chief Executive, Department of Corrections v Waiti* [2024] NZHC 1682, in which te Kōti Matua | High Court highlighted the importance of therapeutic interventions and the value of an adequately funded management plan to advance opportunities for rehabilitative progress (at [128]–[129]).



secure preventive detention, the responsible person should be the manager of the facility. This reflects the legal position that the manager will be the person who has legal care and custody of the person. It also mirrors the current provision within the PPO Act that the residence manager has responsibility for needs assessment and the development of management plans.<sup>59</sup>

- 13.71 When a person's risk has reduced to the point where the court orders that a less restrictive preventive measure be imposed (for example, a person might move from residential preventive supervision to community preventive supervision), the responsibility for needs assessment and the development of a treatment and supervision plan should shift.
- 13.72 When undertaking a needs assessment or developing a treatment and supervision plan, the responsible person should be under a duty to consult with the person subject to the preventive measure as to their needs and aspirations.<sup>60</sup> The responsible person should take their views into account.
- 13.73 It is likely that the person undertaking a needs assessment and developing a treatment and supervision plan will need input from other relevant agencies. A person may have several treatment and supervision needs that require specialist assistance to assess and support beyond what a secure or residential detention facility or a probation officer can provide. For example, a person may require additional support in respect of a disability, complex behavioural needs, housing needs or educational needs.
- 13.74 We suggest that Ara Poutama should work with relevant agencies to obtain the information and cooperation it requires. We are aware, however, that, in some comparable jurisdictions, the agency administering preventive measures has legislative powers to require the cooperation of other agencies. For example, legislation in Victoria, which makes provision for "coordinated services plans", and the multi-agency public protection arrangements in England and Wales.<sup>61</sup> In both instances, legislation empowers the agencies responsible for supervising high-risk individuals to require the cooperation of other government agencies to meet the needs of the person under supervision.
- 13.75 Lastly, we would expect the person responsible for undertaking needs assessments and developing treatment and supervision plans would obtain cultural advice appropriate to the person subject to the preventive measure. In particular, if the person identifies as Māori, we would expect the person responsible would obtain advice from people with knowledge of mātauranga Māori.

### ***Implications for rehabilitative treatment and reintegration support during determinate prison sentences***

- 13.76 We propose in Chapter 4 that all preventive measures should be imposed as post-sentence orders. A question remains to what extent rehabilitative treatment and reintegration support should be provided to people while they are serving a determinate prison sentence prior to the imposition of a preventive measure. As discussed above, there are concerns that the treatment currently provided to prisoners is insufficient. We

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<sup>59</sup> Public Safety (Public Protection Orders) Act 2014, ss 41–42.

<sup>60</sup> See Public Safety (Public Protection Orders) Act 2014, s 41(3).

<sup>61</sup> Serious Offenders Act 2018 (Vic), ss 331–336; and Criminal Justice Act 2003 (England and Wales), ss 325–327B.

recognise, however, that the provision of treatment and support to people in prison has implications beyond the preventive regimes that are the subject of this review. Consequently, we share our thinking on this issue without making firm proposals for reform.

- 13.77 In our view, if it appears likely to the chief executive that a person subject to a determinate prison sentence will be made subject to a post-sentence preventive measure, rehabilitation treatment and reintegration support should be made available as soon as possible to help the person in question avoid the need for a preventive measure altogether (or reduce the restrictiveness of any preventive measure imposed). In assessing the likelihood that a person will be made subject to a preventive measure, the chief executive could have regard to the sentencing judgment and any notification given by the sentencing court about the possibility the person may be made subject to a post-sentence preventive measure (see Chapter 4).
- 13.78 This approach is modelled on the German approach to preventive detention. The relevant provision in the German Criminal Code requires that the person must be provided with the same level of treatment during their prison sentence as they would receive while on preventive detention post-sentence.<sup>62</sup>
- 13.79 We note that this approach goes beyond the human rights requirements under the ICCPR and the European Convention on Human Rights. The European Court of Human Rights has held that there is no requirement to provide a real opportunity for rehabilitation during the punitive period itself.<sup>63</sup> In *Isherwood v New Zealand*, the UNHRC was satisfied that Mr Isherwood's preventive detention was not arbitrary because, since becoming eligible for parole, he had received more rehabilitation treatment.<sup>64</sup> This suggests that the lack of treatment earlier in the sentence had no bearing on whether the detention was arbitrary. However, given that the aim of the new Act is to release the person from a preventive measure at the earliest opportunity, we consider that the same degree of treatment and support ought to be provided during the person's sentence to avoid the need for a post-sentence measure altogether.

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<sup>62</sup> German Criminal Code (Strafgesetzbuch – StGB), s 66c.

<sup>63</sup> *Kaiyam v United Kingdom* (2016) 62 EHRR SE13 (ECtHR) at [67].

<sup>64</sup> *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.5]–[8.6].

**CHAPTER 14**

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# Community preventive supervision

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**IN THIS CHAPTER, WE CONSIDER:**

- issues with the standard and special conditions of extended supervision orders and parole (where a person sentenced to preventive detention has been released from imprisonment); and
- proposals for how those issues should be addressed through the introduction of community preventive supervision.

**INTRODUCTION**

- 14.1 In Part 1 of this Preferred Approach Paper, we propose that preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) should be repealed. In their place, we propose that a new statute should be enacted to provide for a range of preventive measures. Community preventive supervision would be the least restrictive of those measures. It would enable a person to live, subject to supervisory restrictions, within the community. Community preventive supervision would be similar to the current law governing ESOs and parole for people sentenced to preventive detention and released from imprisonment.
- 14.2 This chapter sets out our proposals for how community preventive supervision should be administered, including how it can address the issues with the current law regarding parole and ESOs.

**CURRENT LAW**

- 14.3 There are currently three regimes for managing people subject to preventive measures in the community, which are:
- (a) parole for people on preventive detention;
  - (b) ESOs; and

- (c) protective supervision orders.

### Preventive detention

- 14.4 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).
- 14.5 If a person subject to preventive detention is released on parole, that person is automatically subject to the following standard release conditions for the rest of their life (unless the Parole Board varies or discharges the conditions). They must:<sup>1</sup>
- (a) 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 (or after moving to a new probation area);
  - (b) report to a probation officer and notify the probation officer of their residential address and their employment when the probation officer directs it;
  - (c) not move to a new residential address in another probation area without the prior written consent of the probation officer;
  - (d) give the probation officer reasonable notice before moving from their residential address and must advise the probation officer of the new address;
  - (e) not reside at any address at which a probation officer has directed the offender not to reside;
  - (f) not leave or attempt to leave New Zealand without the prior written consent of a probation officer;
  - (g) if a probation officer directs, allow the collection of biometric information;
  - (h) 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;
  - (i) 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; and
  - (j) take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.
- 14.6 The person may also be subject to any special conditions imposed by the Parole Board. The Parole Board may impose any special condition that is designed to:<sup>2</sup>
- (a) reduce the risk of reoffending by the offender;
  - (b) facilitate or promote the rehabilitation and reintegration of the offender; or
  - (c) provide for the reasonable concerns of victims of the offender.

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<sup>1</sup> Parole Act 2002, s 14.

<sup>2</sup> Parole Act 2002, s 15(2)(a)–(c).

- 14.7 The Parole Act 2002 provides a non-exhaustive list of the kinds of special conditions that may be imposed. They include conditions relating to:<sup>3</sup>
- (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;<sup>4</sup>
  - (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.
- 14.8 Special conditions that amount to the detention of the individual are explained in more detail in Chapter 15 in the context of residential preventive supervision.
- 14.9 People subject to preventive detention who are released from prison are on parole for the rest of their lives, which means they can always be recalled to prison.<sup>5</sup> Breaching any parole condition is an offence punishable by imprisonment of up to one year.<sup>6</sup>

### Extended supervision orders

- 14.10 ESOs are post-sentence orders that provide for a person to live in the community subject to conditions to minimise the risk they will commit further serious offences. A sentencing court may impose an ESO upon the application of the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive).<sup>7</sup> It can last for a term of up to 10 years.<sup>8</sup> Before an ESO expires, the chief executive may apply for a new ESO.<sup>9</sup>
- 14.11 People on ESOs are subject to standard conditions, which include all standard release conditions for parole and two additional conditions:<sup>10</sup>
- (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

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<sup>3</sup> Parole Act 2002, s 15(3).

<sup>4</sup> 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).

<sup>5</sup> Parole Act 2002, s 60(1).

<sup>6</sup> Parole Act 2002, s 71(1).

<sup>7</sup> Parole Act 2002, ss 107F and 107I. Section 107D of the Parole Act 2002 defines “sentencing court” as te Kōti Matua | High Court unless every relevant offence for which the offender was most recently subject to a sentence of imprisonment was imposed by te Kōti-a-Rohe | District Court or any court on appeal from the District Court, in which case the sentencing court is the District Court.

<sup>8</sup> Parole Act 2002, s 107I(4).

<sup>9</sup> This is implied in section 107C(1)(a)(iii) of the Parole Act 2002.

<sup>10</sup> Parole Act 2002, s 107JA(1)(i)–(j). Note, too, that s 14(1)(h) and s 107JA(1)(k) of the Parole Act are not identical.

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.
- 14.12 As with standard parole release conditions, standard extended supervision conditions apply automatically when an ESO is imposed. However, standard extended supervision conditions can be varied or discharged by the Parole Board upon application by the person subject to the ESO or a probation officer.<sup>11</sup>
- 14.13 People subject to ESOs may also be subject to special conditions, which the Parole Board may add to the standard conditions on a case-by-case basis. The Parole Board may impose special conditions at any time before the end of an ESO upon application either by the chief executive or a probation officer.<sup>12</sup> It must notify the person concerned and every victim if it is considering imposing any special conditions.<sup>13</sup>
- 14.14 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, and imposing them is subject to the same test.<sup>14</sup> An intensive monitoring (IM) condition may, however, only be imposed as part of an ESO, not as part of parole. An IM condition, unlike other conditions, must be ordered by a court.<sup>15</sup> We cover IM conditions in more detail in Chapter 15.
- 14.15 The Parole Board must specify the duration of any special conditions imposed. Some particularly restrictive or invasive special conditions (such as IM) may not be imposed for longer than 12 months.<sup>16</sup>
- 14.16 Breaching any ESO condition is an offence punishable by up to two years' imprisonment.<sup>17</sup>

### Protective supervision orders

- 14.17 If a PPO is cancelled, the court must impose a protective supervision order on the person concerned.<sup>18</sup> A protective supervision order allows the court to impose conditions similar to parole conditions. As far as we are aware, no protective supervision orders have been imposed to date.

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<sup>11</sup> Parole Act 2002, s 107O(1).

<sup>12</sup> Parole Act 2002, s 107K(1).

<sup>13</sup> Parole Act 2002, s 107K(6).

<sup>14</sup> Parole Act 2002, s 107K(1).

<sup>15</sup> Parole Act 2002, s 107IAC.

<sup>16</sup> Parole Act 2002, s 107K(3)(b) and (ba).

<sup>17</sup> Parole Act 2002, ss 107T–107TA.

<sup>18</sup> Public Safety (Public Protection Orders) Act 2014, s 93(1).

## Monitoring compliance

- 14.18 Probation officers are responsible for, among other things, supervising people subject to parole, ESOs or protective supervision orders. Probation officers are appointed by the chief executive.<sup>19</sup> Their main functions in relation to preventive measures include:<sup>20</sup>
- (a) supervising all people subject to ESOs and ensuring that the conditions of the orders are complied with;
  - (b) supervising all offenders released on parole and ensuring that the conditions of parole are complied with;
  - (c) supervising persons released subject to a protective supervision order under the Public Safety (Public Protection Orders) Act 2014 and ensuring that the requirements included in the order are complied with;
  - (d) arranging, providing and monitoring rehabilitative and reintegrative programmes; and
  - (e) providing reports and information required by the courts and the Parole Board.
- 14.19 Probation officers may also apply for the variation or discharge of any parole or ESO condition.<sup>21</sup>
- 14.20 The Parole Board may monitor the offender's compliance with release conditions by asking Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) for a progress report on the offender's compliance or by requiring the offender to attend a hearing.<sup>22</sup>

## ISSUES

### The jurisdictions for making orders and for imposing special conditions are divided between the courts and the Parole Board

- 14.21 The sentencing court is currently responsible for making an ESO and for setting its duration, whereas the Parole Board is responsible for imposing special conditions. We explore potential problems arising from this division of jurisdictions in Chapter 10.

### The relationship between the Parole Act's guiding principles, its test for imposing special conditions and the New Zealand Bill of Rights Act 1990 is unclear

- 14.22 There is some uncertainty as to which tests the Parole Board should apply when imposing special conditions on a person subject to preventive detention or an ESO. We explain this issue in Chapter 10.

### The standard condition not to associate with persons under 16 may not be justified in every case

- 14.23 While the standard conditions of an ESO include a wide range of restrictions, one in particular has attracted criticism in our engagement and consultation. As noted above, it

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<sup>19</sup> Corrections Act 2004, s 24.

<sup>20</sup> Corrections Act 2004, s 25.

<sup>21</sup> Parole Act 2002, ss 56(2) and 107O(1).

<sup>22</sup> Parole Act 2002, s 29B.

is currently a standard ESO condition that the person subject to an ESO must not associate with, or contact, a person under the age of 16 except with prior written approval from their probation officer and under an approved person's supervision. Originally, this was an appropriate standard condition because, until 2014, the ESO regime applied only to child sex offenders who were likely to commit a sexual offence against a child or young person (under 16) when released.

- 14.24 Because of the expansion of the scope of ESOs beyond child sex offenders in 2014, the condition may result in a person not being able to associate with their own children even if the risks they pose is unrelated to sexual violence against children or young people.
- 14.25 In the recent case *Pengelly v New Zealand Parole Board*, te Kōti Matua | High Court considered whether the Parole Board should have discharged the standard condition of non-association with people under 16 because “the ESO was predicated on violent offending which had nothing to do with children”.<sup>23</sup> The Court dismissed Mr Pengelly’s application for judicial review. It confirmed that the condition could, under the current law, be imposed even if there is no established nexus between a non-association condition and the risk a particular offender poses.<sup>24</sup> The High Court stated that Parliament intended the non-association condition to apply to all offenders subject to an ESO because children under 16 years are particularly vulnerable to any offending that would make one eligible for an ESO.<sup>25</sup>

## RESULTS OF CONSULTATION

- 14.26 In the Issues Paper, we asked submitters questions in relation to each issue identified above and invited feedback on any other related issues. Chapter 10 discusses the results of consultation in relation to the first two issues we identified, whereas this chapter covers the third issue as well as responses to our question whether submitters could think of any other relevant issues concerning ESO conditions.
- 14.27 We asked submitters for their opinions on the condition that offenders must not to associate with persons under 16 and for their feedback on our proposal to remove it as a standard condition but to keep it as a special condition. All submitters who addressed this matter agreed with our proposal.<sup>26</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) added that improving whānau relationships can be “a pro-social change” and can protect against the risk of further offending.
- 14.28 More generally, several interviewees we spoke with who were subject to ESOs thought their ESO conditions were unduly restrictive. Interviewees commonly noted that ESO conditions, IM in particular, limited the opportunities to work, study, travel or connect with their whānau. More generally, interviewees raised the need for greater flexibility. They said there needed to be greater ability and more willingness for probation officers to relax

<sup>23</sup> *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [6].

<sup>24</sup> *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [82]–[84].

<sup>25</sup> *C v New Zealand Parole Board* [2021] NZHC 2567 at [159]; and *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [67] and [78].

<sup>26</sup> Bond Trust, Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, Dr Tony Ellis, Te Kāhui Tika Tangata | Human Rights Commission, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association.



conditions. Some interviewees said they would willingly submit to greater surveillance if it meant they could have more freedoms and opportunities.

14.29 We also invited feedback on any other issues relating to the conditions imposed on people who are subject to ESOs. Submitters raised the following points:

- (a) The Chief Ombudsman noted in his submission that he received “a range of complaints” from people on ESOs who considered their conditions were “unnecessarily and disproportionately restrictive” and “impinging on their relationships and family life, their ability to work, and their ability to access medical care”.
- (b) Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service submitted that relationships between people on ESOs and their supervisors needed to be managed responsibly, for example, that handovers to new probation officers should be handled with care. It expressed support for rehabilitative programmes and therapeutic treatment as ESO conditions. Finally, it cautioned that conditions in ESOs were often worded vaguely, which increases the risk of unintended breaches of conditions.
- (c) The South Auckland Bar Association and The Law Association noted there were instances of problematic ESO conditions where conditions restricting sexual relationships were imposed even if the sexual offending did not occur in a relationship context. More generally, they submitted that some conditions relating to employment, association and restrictions on movement were detrimental to the reintegration of people subject to ESOs.
- (d) Lara Caris referred to the case of *Te Whatu v Department of Corrections* in her submission, stating that the case “arguably demonstrates the practical lack of recognition by the Department of Corrections of the basic human rights of persons subject to ESOs”.<sup>27</sup>
- (e) The Criminal Bar Association submitted that orders should not be made without legal counsel, that only the High Court should impose orders and that two health assessors should independently assess not only the risks but also how the proposed conditions address the risks. It further submitted that psychologists instead of probation officers should be tasked with monitoring people on ESOs. Finally, it submitted that ESOs should be imposed for no longer than one year but appeared to imply that this period could be extended after a review.
- (f) Te Tari Ture o te Karauna | Crown Law Office submitted that there could be merit in providing for curfew conditions that are not tied to a specific residential address. This, it submitted, would provide for more flexibility when finding an address for an offender and could therefore provide for less restrictive outcomes where appropriate.

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<sup>27</sup> *Te Whatu v Department of Corrections* [2017] NZHC 3233.

## PREFERRED APPROACH

### Community preventive supervision as a stand-alone preventive measure

- 14.30 In Chapter 3, we proposed that the new Act should continue a regime whereby a person with high risk of reoffending lives in the community subject to conditions.
- 14.31 The preventive measure of community preventive supervision will provide a means of monitoring and supervising a person in the community to address the reoffending risks they present, similar to ESOs. We also expect it will serve as an important transitional step for people who have been subject to the more restrictive preventive measures of secure preventive detention or residential preventive supervision. It will enable them to live in the community subject to safeguards.
- 14.32 All comparable jurisdictions we have examined provide for some form of supervision in the community as a preventive measure.

### Standard conditions

#### PROPOSAL

##### P59

Community preventive supervision should comprise of standard conditions, and any additional special conditions imposed by the court. The new Act should provide that, when te Kōti-a-Rohe | District Court imposes community preventive supervision, the following standard conditions should automatically apply. The person subject to community preventive supervision must:

- a. report in person to a probation officer in the probation area in which the person resides as soon as practicable, and not later than 72 hours, after commencement of the extended supervision order;
- b. report to a probation officer as and when required to do so by a probation officer, and notify the probation officer of their residential address and the nature and place of their employment when asked to do so;
- c. obtain the prior written consent of a probation officer before moving to a new residential address;
- d. report in person to a probation officer in the new probation area in which the person is to reside as soon as practicable, and not later than 72 hours, after the person's arrival in the new area if consent is given under paragraph (c) and the person is moving to a new probation area;
- e. not reside at any address at which a probation officer has directed the person not to reside;
- f. not leave or attempt to leave Aotearoa New Zealand without the prior written consent of a probation officer;
- g. if a probation officer directs, allow the collection of biometric information;

- h. obtain the prior written consent of a probation officer before changing their employment;
- i. not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the person not to engage or continue to engage;
- j. take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer;
- k. not associate with, or contact, a victim of their offending without the prior written approval of a probation officer; and
- l. not associate with, or contact, any specified person, or with people of any specified class, with whom the probation officer has, in writing, directed the person not to associate, unless the probation officer has defined conditions under which association or contact is permissible.

14.33 Like the parole and ESO regimes, the new Act should provide a core set of standard conditions for community preventive supervision (as well as residential preventive supervision). This approach should simplify the Kōti-a-Rohe | District Court's task of imposing community preventive supervision. If all conditions were imposed by discretion, the Court would have to undertake a possibly cumbersome proportionality analysis for each individual condition. Providing for standard conditions, on the other hand, signals to the Court that Parliament deems certain conditions to be automatically justified if the legislative tests for imposing the order are met.<sup>28</sup>

14.34 Most comparable jurisdictions we have analysed provide for a mix of standard and special conditions.<sup>29</sup> We found fewer examples of supervision orders where all conditions were imposed by discretion.<sup>30</sup>

### **Standard conditions maintained**

14.35 We propose a catalogue of standard conditions modelled, with some exceptions, on the standard parole release conditions and the standard ESO conditions listed in sections 14 and 107JA of the Parole Act.

14.36 In short, we propose maintaining all reporting, notification and prior approval requirements. We also propose maintaining the condition not to associate with a victim and the requirement to take part in a rehabilitative and reintegrative needs assessment if

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<sup>28</sup> *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [78].

<sup>29</sup> See for example Sex Offenders Act 2001 (Ireland), s 16(4) and (7), in conjunction with pt 2; Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 16; Sentence Administration Act 2003 (WA), ss 74F–74G; Crimes (High Risk Offenders) Act 2006 (NSW), s 11 (note that only one condition specified in subsection 2 is compulsory); Serious Sex Offenders Act 2013 (NT), ss 18–19; Serious Criminal Law (High Risk Offenders) Act 2015 (SA), ss 10–11; Offenders Act 2018 (Vic), s 15; High Risk Serious Offenders Act 2020 (WA), s 30; and Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 38.

<sup>30</sup> Corrections and Conditional Release Act SC 1992 c 20, s 134.1(1), in conjunction with Corrections and Conditional Release Regulations SOR/2019-299, cl 161(1); Criminal Code Act 1995 (Cth), s 105A.7B(1); Sexual Offences Act 2003 (UK), s 107(2); and Sentencing Act 2020 (UK), s 343(2).

and when directed to do so by a probation officer. We have not identified particular problems that have arisen from these standard conditions. We therefore see no reason to depart from them or interfere with the current practice that parole officers have developed in administering them.

### **Standard non-association condition adapted**

- 14.37 We also propose maintaining an adapted version of the standard condition not to associate with people with whom the probation officer has, in writing, directed the person subject to the order not to associate.
- 14.38 In contrast to the standard conditions we propose to maintain unchanged, some problems have in the past arisen from this type of condition. The case of *Te Whatu* (discussed in more detail in Chapter 13) illustrates that giving probation officers broad discretion over non-association conditions can be problematic.<sup>31</sup>
- 14.39 A standard non-association condition fulfils an important function, however, as it allows probation officers to make quick decisions in response to dynamic changes in someone's behaviour or circumstances. It would be difficult for the District Court to anticipate such developments when imposing special conditions.
- 14.40 We also think there would be sufficient safeguards in place, including the guiding principles set out in Chapter 13, to which probation officers would be bound, and the annual reviews of conditions by the independent review panel set out in Chapter 18.
- 14.41 We therefore propose maintaining the non-association standard condition. To facilitate a more nuanced approach, however, we propose rephrasing the condition to the effect that the probation officer can define conditions for contacting or associating with specified people (or classes of people). Enabling a probation officer to allow for contact on a conditional basis may provide greater freedoms and flexibility than if they only had power to make a binary decision to allow contact or not. For example, it may not be safe to allow a person subject to community preventive supervision to have unsupervised contact with a person under the age of 16. It could, however, be safe to allow the person to have contact — for example, with their own child — if the contact is supervised.

### **Conditions not included as standard conditions**

#### **A condition not to associate with people under the age of 16**

- 14.42 The proposed list of standard conditions does not include a condition that prior approval and monitoring of associating with or contacting people under the age of 16 is required.
- 14.43 This condition is currently a standard ESO condition.<sup>32</sup> Unlike the generic non-association condition, which we propose should remain a standard condition, the current condition not to associate with people under the age of 16 applies without needing to be activated by the probation officer. It is imposed on offenders even if their reoffending risk has no connection to children or young people. This was intended by Parliament, as the High

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<sup>31</sup> *Te Whatu v Department of Corrections* [2017] NZHC 3233.

<sup>32</sup> Parole Act 2002, s 107JA(1)(i).

Court clarified in both *C v New Zealand Parole Board* and *Pengelly v New Zealand Parole Board*.<sup>33</sup>

- 14.44 Our view is that there ought to be a rational connection between someone’s risk and the conditions imposed to address that risk. All submitters who responded to this issue supported our position.
- 14.45 None of the comparable jurisdictions we have examined provide for a standard supervision condition that restricts contact with children under 16.
- 14.46 There are alternative options for restricting someone’s contact and/or association with people under 16. If the Court considers that a person’s reoffending risk concerns children, it may, for example, impose a special condition requiring the probation officer’s approval for such a meeting and direct that supervision by a suitable person during the meeting is necessary. Even without such a special condition, a probation officer, if they consider it necessary, may activate the proposed standard non-association condition and tailor it to contact with people under the age of 16 in accordance with the guiding principles outlined in Chapter 13.

### **A condition to comply with lawful directions**

- 14.47 Comparable jurisdictions often include requirements for the person subject to a supervision order to comply with lawful directions given by a corrections or probation officer as a standard condition.<sup>34</sup> We have not included such a standard condition. In our view, it is preferable to define the specific instances where a binding direction can be issued or where consent can be refused. This is in line with our attempt to design community preventive supervision as the least restrictive measure available where freedom of movement and association is the rule rather than the exception.

### **A condition not to commit an offence**

- 14.48 We have not included a condition prohibiting the commission of a specified offence or any offence, which is another common standard condition of supervision orders in comparable jurisdictions.<sup>35</sup>
- 14.49 The Parole Act currently does not provide for such a standard condition, and we do not think it necessary under the new Act either. If a person commits an offence (other than a breach of conditions) while subject to an ESO, there are adequate existing mechanisms to respond to the offence and to mitigate the risk if necessary. The person may be charged and dealt with under the usual rules of criminal procedure.<sup>36</sup> If the offending is sufficiently serious or the risk of reoffending cannot be mitigated by bail conditions, they

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<sup>33</sup> *C v New Zealand Parole Board* [2021] NZHC 2567 at [159]; and *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [67] and [78].

<sup>34</sup> For example Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 16(1); Serious Sex Offenders Act 2013 (NT), s 18(1)(f); Criminal Law (High Risk Offenders) Act 2015 (SA), s 10(1)(d); Serious Offenders Act 2018 (Vic), s 31; and High Risk Serious Offenders Act 2020 (WA), s 30(2).

<sup>35</sup> Serious Sex Offenders Act 2013 (NT), s 18(1)(a); Criminal Law (High Risk Offenders) Act 2015 (SA), ss 10(1)(a) and 10(1)(f); Serious Offenders Act 2018 (Vic), s 31; and Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 38(1)(a).

<sup>36</sup> They may be arrested and taken into custody or summonsed to court. See Crimes Act 1961, s 315; and Criminal Procedure Act 2011, ss 28 and 34–34A.

may be remanded in custody pending resolution of the charge.<sup>37</sup> Preparatory behaviour for reoffending would be covered by other conditions (for example, not to enter certain places) or by existing offences.<sup>38</sup>

### Special conditions

- 14.50 In addition to the standard conditions, it should be possible for the District Court to add special conditions when imposing community preventive supervision. As we explain in further detail in Chapter 10, we think that the special conditions should be imposed by the Court rather than the Parole Board.
- 14.51 Enabling the Court to impose special conditions in this way should allow the community preventive supervision regime to be tailored to the particular offending risks of each person in each case and so allow consideration of whether each special condition is rationally connected to the specific risk a person poses. An approach with greater reliance on standard conditions risks imposing unnecessary conditions or omitting conditions that might be needed.

### List of examples for special conditions

#### PROPOSAL

P60

The new Act should provide for a non-exhaustive list of example special conditions. This list should include conditions:

- a. to reside at a particular place;
- b. to be at the place of residence for up to 12 hours per day;
- c. to take part in a rehabilitative and reintegrative programme if and when directed to do so by a probation officer;
- d. not to use a controlled drug or a psychoactive substance and/or consume alcohol;
- e. not to associate with any person, persons or class of persons;
- f. to take prescription medication, provided they have given their informed consent;
- g. not to enter, or remain in, specified places or areas at specified times or at all times;
- h. not to 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 has been approved in writing by a probation officer as suitable to undertake the role of supervision;

<sup>37</sup> Bail Act 2000, s 7.

<sup>38</sup> For example offences under the Summary Offences Act 1981 such as: disorderly behaviour, wilful damage, possession of knives, intimidation, indecent exposure, being found in a public place preparing to commit an offence, being found on property without reasonable excuse, peeping or peering into a dwellinghouse.

- i. to submit to the electronic monitoring of compliance with any conditions that relate to the whereabouts of the person; and
- j. not to use any electronic device capable of accessing the internet without supervision.

14.52 We propose that the new Act should include a list of example special conditions to provide guidance for the court on what types of special conditions are common. This approach is similar to the Parole Act's current list of examples in section 107K, which appears to have guided the Parole Board in formulating special conditions in numerous decisions.

14.53 In our view, the Parole Act's list of possible special conditions for ESOs is broadly satisfactory for the purposes of community preventive supervision. The legislation in comparable jurisdictions also points to similar examples of possible special conditions: to reside at an approved address; to participate in treatment and rehabilitation programmes; to wear electronic monitoring equipment; or to be present at a specified place and time (including curfews).<sup>39</sup> We therefore propose maintaining most of the examples listed in section 107K of the Parole Act.

14.54 A condition to participate in a rehabilitative programme may engage the right to refuse to undergo medical treatment (including psychological treatment) affirmed by section 11 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).<sup>40</sup> In *Wilson v New Zealand Parole Board*, the High Court discussed a condition that required the plaintiff Mr Wilson "to attend sessions with a Department Psychologist for the purpose of developing a safety plan". It held that the right to refuse medical treatment was not engaged because the condition only required Mr Wilson's attendance at, not his participation in, these sessions.<sup>41</sup> The Court did not comment on whether a condition to "undertake, engage in and complete a reintegration programme" engaged the same protection, because the plaintiff had not advanced that argument.

14.55 Although the case law does not suggest it is likely, it cannot be ruled out that some rehabilitative programmes or some aspects of programmes under the new Act would engage the right to refuse to undergo medical treatment. We expect that any limitations

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<sup>39</sup> Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), ss 16A–16B; Sentence Administration Act 2003 (WA), s 74G; Crimes (High Risk Offenders) Act 2006 (NSW), s 11; Criminal Law (High Risk Offenders) Act 2015 (SA), ss 10–11; Serious Offenders Act 2018 (Vic), ss 33–38; High Risk Serious Offenders Act 2020 (WA), ss 30(6) and 32; and Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 38(2).

<sup>40</sup> In the case of *Philip Smith v the Attorney-General*, te Kōti Matua | High Court noted that a psychological screening test that was carried out on a prisoner in a therapeutic context constituted medical treatment under section 11 of the New Zealand Bill of Rights Act 1990 but noted that a test done for risk assessment purposes or "on the papers" may not qualify as medical treatment: *Philip Smith v the Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [100]. In *M (CA677/2017) v Attorney-General (in respect of the Ministry of Health)* [2020] NZCA 311, te Kōti Pira | Court of Appeal partially confirmed this caveat in a different context, holding that a forensic assessment of a compulsory treatment order under mental health legislation did not qualify as medical treatment. See also Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ 2015) at 11.9.4 and 11.9.8.

<sup>41</sup> *Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [43].

of the right to refuse medical treatment would be taken into account by the court when determining whether imposing a programme condition is justified.

- 14.56 A programme attendance condition must serve a genuine rehabilitative or reintegrative purpose. It must not be misused to extend monitoring or impose detention. We also understand that, for most people, successful reintegration to the community will be achieved through stable employment and other routines. Attendance at a programme may be disruptive. We would expect the court and probation officers to be mindful of this factor when imposing or administering this condition. We discuss in which situations a programme condition would constitute detention in more detail in Chapter 15.
- 14.57 The list also includes conditions to take prescription medication. This type of condition is subject to the person's consent in line with their right to refuse medical treatment.<sup>42</sup> Withdrawing their consent should not result in a breach of conditions. The main reason for its inclusion in the scope of special conditions is to provide grounds for the Court or the review panel to add other special conditions or consider imposing a more restrictive preventive measure if a person withdraws their consent to continuing the prescribed medication. This would be required if the lack of medication resulted in an increased reoffending risk.
- 14.58 We propose adding two examples to the list:
- (a) As discussed above, we consider that a condition that prohibits contact with people under the age of 16 should not be a standard condition but available as a special condition instead. We proposed this in the Issues Paper, and submitters supported the proposal.<sup>43</sup>
  - (b) We also propose adding the condition that a person must not use any electronic device capable of accessing the internet without supervision. This is to reflect the Parole Board's common practice of imposing such conditions on sex offenders.<sup>44</sup> It is also intended to modernise the list of special condition examples given that internet-capable devices were not nearly as widespread when the Parole Act 2002 was adopted as they are today.
- 14.59 We propose omitting conditions relating to a person's finances or earnings in the list of examples, which are currently listed as an example of a special condition under the Parole Act.<sup>45</sup> Our understanding is that the Parole Board sets this type of condition typically when the index offending is related to finance, for example, fraud.<sup>46</sup> Given that the scope of the new Act would be restricted to serious sexual and violent offending, it is unnecessary to include this type of condition as an example. At the same time, we do not

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<sup>42</sup> Parole Act 2002, s 15(4) and (5); and New Zealand Bill of Rights Act 1990, s 11.

<sup>43</sup> Te Aka Matua o te Ture | Law Commission *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* (NLZC IP51, 2023) (Issues Paper) at [10.118]–[10.122].

<sup>44</sup> See for example *Parole Board decision concerning Nikola MARINOVICH* (16 June 2022); *Parole Board decision concerning Geordy Peter Brian JOHNSTONE* (4 May 2022); and *Parole Board decision concerning Sumit Shayamal NARAYAN* (14 March 2022).

<sup>45</sup> This is currently included in section 15(3)(a) of the Parole Act 2002.

<sup>46</sup> For example *Parole Board decision concerning Christopher George WRIGHT* (21 October 2021); and *Parole Board decision concerning Shaun Joseph KEENAN* (2 June 2021).



think this type of condition should be prohibited either as there may be individual cases where such a condition would be justified, for example, where a person may have a financial income from proceeds of serious sexual or violent crime. As stated above, the proposed list of examples of special conditions is intended as guidance only.

### List of prohibited conditions

#### PROPOSAL

##### P61

The new Act should provide that the following conditions cannot be imposed as part of community preventive supervision:

- a. Any kind of detention, except conditions to be at a residence for up to 12 hours per day.
- b. An intensive monitoring condition (in-person, line-of-sight monitoring).

14.60 We consider there should be a list of conditions that cannot be imposed as part of community preventive supervision.

14.61 It is important to clearly distinguish between residential preventive supervision, which would typically amount to detention, and community preventive supervision, which would not. As identified by the Court of Appeal in *Chisnall*, the potential to impose detention on people is one of the key factors that make ESOs a penalty.<sup>47</sup> We therefore think that conditions that amount to detention should not be available for community preventive supervision. The only exception we consider to be appropriate is the imposition of a curfew not exceeding 12 hours per day at the approved residential address. As we explain in further detail in Chapter 15, a 12-hour curfew will typically amount to detention.<sup>48</sup> We think, however, that it fits with the overall aim of community preventive supervision to allow life within the community while imposing certain routines and structure that help minimise reoffending risk.

14.62 The other type of condition that would not be available is intensive monitoring. This is in line with our proposal to restrict person-to-person monitoring to outings for people subject to residential preventive supervision (Chapter 15).

<sup>47</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [115], referring to *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507, (2006) 22 CRNZ 787 (CA) at [47].

<sup>48</sup> *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [61]; *Coleman v Chief Executive of the Department of Corrections* [2020] NZCA 210 at [24]–[32]; and *C v New Zealand Parole Board* [2021] NZHC 2567 at [65]–[68]. It is not clear from the case law whether a curfew short of 12 hours would amount to detention as well.

### Period of special conditions

#### PROPOSAL

P62

The new Act should provide that special conditions should, by default, be imposed for the same period as the preventive measure. Te Kōti-a-Rohe | District Court, may, however, specify a shorter period for individual special conditions where the full period would not be the least restrictive measure.

- 14.63 We do not think that any special conditions should be limited to a specific period that differs from the period of the measure itself. Such a time restriction can lead to unintended consequences such as having to impose a more restrictive measure because certain community preventive supervision conditions can no longer apply.<sup>49</sup> Escalations to more restrictive measures are counter-productive for rehabilitation and reintegration.
- 14.64 At the same time, we do not wish to limit the District Court’s ability to make more tailored preventive measures by imposing some conditions for a shorter time than others. Given that most conditions of a community preventive supervision would limit the freedoms of movement, association and peaceful assembly, this would help the Court to make the least restrictive measure possible.
- 14.65 Relatedly, we do not consider that different review periods should apply to different types of special conditions as is the case under the current law. The Parole Act requires the Parole Board to review “high-impact conditions” (residential restrictions for more than 70 hours per week and electronic monitoring conditions) as well as programme conditions and residential restrictions if imposed concurrently — but not any other special conditions — every two years.<sup>50</sup> We consider that the review obligations we propose in Chapter 18 are sufficient for all types of special conditions available under the new Act.

### Monitoring compliance

#### PROPOSAL

P63

The new Act should provide that probation officers should be responsible for monitoring people’s compliance with conditions of community preventive supervision.

<sup>49</sup> An insightful illustration of this problem was the (later quashed) judgment *Deputy Chief Executive of the Department of Corrections v McCorkindale* [2017] NZHC 2536, in which a PPO was granted because the less restrictive measure of an ESO with an IM condition was no longer available due to the maximum IM duration of 12 months.

<sup>50</sup> Parole Act 2002, ss 107RB–107RC. Other special conditions would be reviewed by a court as part of the general court review if the person in question has not ceased to be subject to an ESO for 15 years: Parole Act 2002, s 107RA.

14.66 We consider that probation officers should continue to be the people responsible for supervising those on community supervision orders and to monitor their compliance with the conditions of their orders. The main reasons are the following:

- (a) Probation officers are currently responsible for all types of community supervision, be it in the context of community sentences, parole conditions or ESO conditions. Ara Poutama, which employs the probation officers, has thus built considerable experience in managing people with reoffending risks in the community.
- (b) We have not come across any other groups of officials or decision-makers that would be better equipped to monitor supervision conditions than probation officers. The Criminal Bar Association proposed in its submission that psychologists should replace probation officers with regard to supervision orders. We do not agree with this proposition. The job profile for monitoring condition compliance covers a range of administrative and social tasks for which psychological expertise is not required, and there is already a shortage of available psychologists for the functions that do require their expertise.
- (c) Most comparable jurisdictions we have assessed assign compliance monitoring to people with roles equivalent to probation officers in Aotearoa New Zealand.<sup>51</sup>

14.67 As we explain in more detail in Chapter 13, we propose that probation officers should exercise their powers in relation to community preventive supervision in accordance with the guiding principles for the administration of the new preventive measures.



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<sup>51</sup> See for example Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 16; Crimes (High Risk Offenders) Act 2006 (NSW), s 11 (note that only one condition specified in subsection 2 is compulsory); Serious Sex Offenders Act 2013 (NT), ss 18–19; Criminal Law (High Risk Offenders) Act 2015 (SA), ss 10–11; Serious Offenders Act 2018 (Vic), s 209; High Risk Serious Offenders Act 2020 (WA), s 30; and Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 38.

**CHAPTER 15**

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# Residential preventive supervision

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**IN THIS CHAPTER, WE CONSIDER:**

- issues with release and extended supervision order conditions relating to residential restrictions, programme conditions and intensive monitoring; and
- proposals for how those issues should be addressed through the introduction of residential preventive supervision.

**INTRODUCTION**

- 15.1 In Part 1 of this Preferred Approach Paper we propose that preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) should be repealed. In their place, a new statute should be enacted to provide for a range of preventive measures. We propose residential preventive supervision as a middle-tier preventive measure — more restrictive than community preventive supervision but less restrictive than secure preventive detention.
- 15.2 Residential preventive supervision is intended for those people at serious reoffending risk who do not need to be made subject to secure preventive detention but cannot be safely placed into the community without residing in the controlled environment of a residential facility. As part of its risk management function, residential preventive supervision could also serve as a reintegrative bridge between secure preventive detention and community preventive supervision and as a closely monitored environment that can offer effective rehabilitative and reintegrative interventions and other support to residents.
- 15.3 Residential preventive supervision would require a person to remain at a residential facility but, unlike secure preventive detention, which we discuss in Chapter 16, the facility would not have features to physically prevent the person from leaving.
- 15.4 This chapter sets out our proposals for how residential preventive supervision should be administered, including how it can address the issues with the current law regarding ESOs.

## CURRENT LAW

### Overview

- 15.5 People can be managed in the community subject to a preventive measure if:
- (a) they are subject to preventive detention and granted release from imprisonment on parole by direction of the New Zealand Parole Board (Parole Board); or
  - (b) they are subject to an ESO.<sup>1</sup>
- 15.6 People sentenced to preventive detention who are released on parole are subject to standard parole release conditions. People on ESOs are subject to standard ESO conditions. Both groups of people may also be subject to special conditions that the Parole Board may add to the standard conditions on a case-by-case basis.
- 15.7 This chapter focuses on three of the most restrictive special conditions:<sup>2</sup>
- (a) Residential restrictions (which require the person to stay at the place of residence at specified or all times).
  - (b) Conditions requiring the person to participate in a programme to reduce the reoffending risk through rehabilitation and reintegration.
  - (c) Intensive monitoring (IM) conditions (which, unlike the other special conditions, are only available for ESOs and can only be imposed following a court order).
- 15.8 Other standard conditions and special conditions of parole and ESOs are discussed in more detail in Chapter 14.

### Residential restrictions

- 15.9 Residential restrictions require a person subject to parole or an ESO:<sup>3</sup>
- (a) to stay at a specified residence;
  - (b) to be under the supervision of a probation officer and to cooperate with, and comply with, any lawful direction given by that probation officer;
  - (c) to be at the residence at times specified by the Parole Board or at all times;
  - (d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with their residential restrictions; and
  - (e) to keep in their possession a licence that sets out the residential restrictions (among other information).
- 15.10 In addition to general requirements for imposing special conditions, the Parole Board may impose residential restrictions on a person only if it is satisfied that the residence is suitable and that other occupants at the residence have been informed of the person's

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<sup>1</sup> Protective supervision orders are also available for managing people on preventive measures in the community but have, to our knowledge, not been imposed to date.

<sup>2</sup> Parole Act 2002, s 15(3)(ab), (b) and (g).

<sup>3</sup> Parole Act 2002, s 33(2).

restrictions and consent to them residing there.<sup>4</sup> The requirement to be at their residence at all times (as opposed to specified times) may apply no longer than 12 months — for an ESO, this must be within the first 12 months of the term of the order.<sup>5</sup>

- 15.11 A person may leave their residence despite a residential restriction:<sup>6</sup>
- (a) to seek urgent medical or dental treatment;
  - (b) to avoid or minimise a serious risk of death or injury to themselves or any other person; or
  - (c) for humanitarian reasons approved by a probation officer.
- 15.12 Further grounds to leave a residence apply if the residential restriction is in place for 24 hours per day.<sup>7</sup>

### Programme conditions

- 15.13 The Parole Board may impose a special condition that requires a person to participate in a programme to reduce their reoffending risk through rehabilitation and reintegration.<sup>8</sup> Some programmes involve the person's placement in the care of an appropriate person or agency approved by the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) such as an iwi, hapū or whānau, a marae, an ethnic or cultural group or a religious group such as a church or religious order.<sup>9</sup>
- 15.14 Section 107K(3)(bb)(i) of the Parole Act 2002 provides that a programme condition imposed under an ESO must not result in the person being supervised, monitored or subject to other restrictions for longer each day than is necessary to ensure the offender's attendance at classes or participation in other activities associated with the programme.
- 15.15 Until recently, the Parole Act had also stipulated that an ESO programme condition must not "require the offender to reside with, or result in the offender residing with, any person, persons, or agency in whose care the offender is placed".<sup>10</sup> This provision was, however, repealed in 2023 after the publication of the Issues Paper.<sup>11</sup> The purpose of the repeal was to allow the Parole Board to continue its practice of placing offenders on a combination of programme conditions and residential restrictions, thus effectively directing their detention at a residential facility for up to 24 hours per day. We discuss this practice in more detail below.

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<sup>4</sup> Parole Act 2002, s 35. Note that the requirement of section 35(c) does not apply to residential restrictions as ESO conditions: s 107K(1A).

<sup>5</sup> Parole Act 2002, ss 33(3) and 107K(3)(b).

<sup>6</sup> Parole Act 2002, s 33(4).

<sup>7</sup> For example, to comply with any special conditions, to seek or engage in employment or to attend training or other rehabilitative or reintegrative activities or programmes: Parole Act 2002, s 33(5).

<sup>8</sup> Parole Act 2002, ss 15(3) and 107K(1).

<sup>9</sup> Parole Act 2002, s 16(c).

<sup>10</sup> Parole Act 2002, s 107K(3)(bb)(ii) (now repealed).

<sup>11</sup> Parole Amendment Act 2023, s 4.

## Intensive monitoring

15.16 IM is a special ESO condition that the Parole Board may only impose if ordered to do so by a court.<sup>12</sup> It is defined as:<sup>13</sup>

... 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.

15.17 Te Kōti Matua | High Court has explained that it “allows for ‘line of sight’, person-to-person, monitoring, for example, when a defendant leaves a facility, and goes into town”.<sup>14</sup> IM is distinct from monitoring conditions that are imposed to “ensure the offender’s attendance at classes or participation in other activities associated with the programme”.<sup>15</sup>

15.18 IM can only be ordered for the first 12 months of an ESO and only once, even if subsequent ESOs are imposed later.<sup>16</sup>

## ISSUES

### Programme conditions should not be used to expand residential restrictions

15.19 As mentioned above, the Parole Board has been placing several people subject to ESOs on a combination of programme conditions and residential restrictions. During certain hours, the person in question is required to take part in a programme, and in the remaining hours, the person is required to be at the accommodation provided by the programme provider. At the extreme end, this approach imposes a requirement to be at a specified residence for 24 hours per day beyond the maximum period of 12 months that normally applies to an “at all times” residential restriction.

15.20 The High Court, in *New Zealand Parole Board v Attorney-General*, found the Parole Board’s practice to be unlawful.<sup>17</sup> The Court held the practice was in breach of a Parole Act provision that prohibited ESO conditions that require a person to reside at a facility that is run by the same entity that also provides the programme that the person must attend.<sup>18</sup> The High Court emphasised that the purpose of prohibiting programme conditions that require the person affected to reside with the programme provider was “to prevent a residential restriction — whether at all times or otherwise — in the guise of a programme condition”.<sup>19</sup> The Court concluded: “The provision creates distance between

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<sup>12</sup> Parole Act 2002, s 107IAC(1).

<sup>13</sup> Parole Act 2002, s 107IAC(2). The term “intensive monitoring” was introduced by the Parole (Extended Supervision Orders) Amendment Act 2014, which decoupled IM from “at all times” residential restrictions: Parole (Extended Supervision Orders) Amendment Act 2014, ss 16 and 18.

<sup>14</sup> *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 at [39].

<sup>15</sup> Parole Act 2002, s 107K(3)(bb)(i).

<sup>16</sup> Parole Act 2002, ss 107IAC(3) and (5) and 107K(3)(ba).

<sup>17</sup> *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611.

<sup>18</sup> *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [104]. The relevant provision was s 107K(3)(bb)(ii) of the Parole Act 2002 (now repealed).

<sup>19</sup> *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [74].

ESOs and something necessarily custodial in nature, in circumstances where ESOs already represent a second penalty.”<sup>20</sup>

- 15.21 Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) expressed concern that this judgment would jeopardise the ongoing extended supervision of 26 offenders who were subject to a combination of residential restrictions and programme conditions.<sup>21</sup> Most of those 26 people were staying in residences outside prison land, operated by external contractors (the Salisbury Street Foundation in Christchurch and the Pact Group in Dunedin) or in residences on prison land (Kaainga Taupua at Springhill Prison, Tōruatanga at Christchurch Men’s Prison and Te Korowai at Rimutaka Prison). Kaainga Taupua is managed by Anglican Action, whereas Tōruatanga and Te Korowai are run by Ara Poutama.<sup>22</sup>
- 15.22 In response to Ara Poutama’s concerns, Parliament repealed the provision in the Parole Act that prohibited being required to reside with a programme provider.<sup>23</sup> The repeal enables the practice of requiring people to remain at certain facilities through a combination of residential restrictions and programme conditions. This arrangement can extend beyond the 12-month period that otherwise applies to an “at all times” residential restriction.<sup>24</sup> The 2023 amendments also introduced a requirement that the Parole Board must review, at least once every two years, a person subject to these types of residential restrictions and programme conditions.<sup>25</sup>
- 15.23 The courts have found combinations of programme conditions and residential restrictions amount to detention for the purpose of human rights law.<sup>26</sup> Programme conditions during the day and residential restrictions during the night each amount to detention on their own. In most of the relevant cases, however, the respective offender was subject to both components, which likely influenced the decisions.<sup>27</sup> In other words, because of the 2023 amendments, the Parole Board may effectively impose detention on people subject to ESOs through programme conditions and residential restrictions.
- 15.24 We consider that such a significant intrusion on liberty should be its own type of preventive measure, not a combination of special conditions. It is not clear that rehabilitative and reintegrative programmes, as they are currently run, are an appropriate

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<sup>20</sup> *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [83].

<sup>21</sup> Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Programme conditions for Extended Supervision Orders* (2 August 2023) at [64]–[66].

<sup>22</sup> Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Programme conditions for Extended Supervision Orders* (2 August 2023) at [31]–[38].

<sup>23</sup> Parole Amendment Act 2023, s 4.

<sup>24</sup> Parole Act 2002, ss 33(2) and 107K(3)(b).

<sup>25</sup> Parole Act 2002, s 107RC.

<sup>26</sup> In *C v New Zealand Parole Board* [2021] NZHC 2567 at [65]–[68], te Kōti Matua | High Court found that a parole residence condition that required the offender to remain at his residence for “24 hours a day for at least three to four days every week and for several hours before his curfew began on other days” for approximately two years amounted to (arbitrary) detention. In *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [61], te Kōti Mana Nui | Supreme Court commented that the combination of a 12-hour curfew reinforced by electronic monitoring and a 12-hour programme condition “certainly” amounted to detention for the purposes of habeas corpus and the New Zealand Bill of Rights Act 1990.

<sup>27</sup> In *Coleman v Chief Executive of the Department of Corrections* [2020] NZCA 210 at [32], te Kōti Pira | Court of Appeal held that a 12-hour curfew constituted “detention” for the purposes of habeas corpus. It further held that a 12-hour programme condition may amount to detention depending on the restrictions on the freedom of movement.



basis for detaining and monitoring a person for significant portions of the day. The programmes may include extended periods of free time and mundane daily routines (for example, “exercise”, “rest” or “dinner/hobbies/interests” and so on).<sup>28</sup> These parts of a programme may or may not have rehabilitative or reintegrative value. It is necessary, in our view, to justify extended detention or monitoring on the basis of the risks of reoffending a person presents.

- 15.25 The possibility of effectively extending a detention to 24 hours per day by combining programme conditions and residential restrictions also lacks safeguards that are typically required for long-term detention. We consider that long-term detention should be imposed by a court and subject to full appeal rights, whereas under the current law, the Parole Board is authorised to impose combinations of programme conditions and residential restrictions (if a court has imposed an ESO), and its decisions are not subject to full appeal rights.

### Residential restrictions not clearly defined in legislation

- 15.26 The Parole Act does not clearly define “residential restrictions”. In the Issues Paper, we said defining the term in the legislation may make it easier for the courts to assess whether a person is subject to residential restrictions.<sup>29</sup>
- 15.27 There are special procedural and eligibility requirements for imposing residential restrictions:
- (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.<sup>30</sup>
  - (b) Residential restrictions may only be imposed if the occupants of the relevant residence consent.<sup>31</sup>
  - (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.<sup>32</sup>

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<sup>28</sup> *Coleman v Chief Executive of the Department of Corrections* [2020] NZCA 210 at [41]. Note that te Kōti Pira | Court of Appeal did not make a finding in relation to Mr Coleman’s particular “programme”. It accepted in principle, however, that Mr Coleman could not be detained during hours that did not involve legitimate rehabilitation programme activities at [44]. See also *C v New Zealand Parole Board* [2021] NZHC 2567 at [113]–[115], where counsel for C raised similar concerns.

<sup>29</sup> Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, May 2023) (Issues Paper) at [10.70].

<sup>30</sup> Parole Act 2002, s 34.

<sup>31</sup> Parole Act 2002, s 35(b).

<sup>32</sup> Parole Act 2002, ss 35(c) and 107K(1A).

- (d) A requirement to be at the residence at all times may be imposed for no longer than 12 months — for an ESO, this must be within the first 12 months of the term of the order.<sup>33</sup>
- 15.28 It is important to clearly define residential restrictions to know when these further requirements apply. In *Woods v Police*, te Kōti Mana Nui | Supreme Court considered this issue in the context of sentencing and commented that “[d]esirably, there should be greater legislative clarity”.<sup>34</sup>
- 15.29 An additional issue has come to our attention since the publication of the Issues Paper. We understand there may be some uncertainty about the relationship between IM and residential restrictions. We understand that, in some cases, the Parole Board imposes residential restrictions to commence upon the expiry of an IM condition. This is on the understanding that IM, on its own, has the effect of restricting a person’s movements. However, it is not clear whether IM restricts where a person can go or whether it merely authorises that the person be monitored and accompanied.<sup>35</sup>

## Issues relating to intensive monitoring

### *No legislative test for imposing intensive monitoring conditions*

- 15.30 There is no test or statutory guidance on the criteria to be considered when an order requiring the Parole Board to impose an IM condition is sought.
- 15.31 The courts have applied a high threshold when imposing this condition. They generally use the test formulated in *Department of Corrections v Miller*:<sup>36</sup>
- 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.
- 15.32 In effect, this requires the condition to be reasonably necessary to address a high risk. Nevertheless, we stated in the Issues Paper that it would be desirable for the legislation to provide for a test due to the restrictiveness of IM conditions.<sup>37</sup>

### *Inability to add an intensive monitoring condition after extended supervision order is ordered*

- 15.33 The Parole Act does not permit an IM condition to be added after an ESO is ordered. The sentencing court may make an order requiring the Parole Board to impose an IM condition only “at the same time” as making the ESO itself.<sup>38</sup>

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<sup>33</sup> Parole Act 2002, ss 33(3) and 107K(3)(b).

<sup>34</sup> *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [29]. Te Kōti Mana Nui | Supreme Court made this comment in relation to a number of provisions of the Parole Act 2002 and their interaction with provisions of the Sentencing Act 2002.

<sup>35</sup> Te Kōti Matua | High Court in *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [64] pointed out that residential restrictions and IM were one combined condition when first introduced.

<sup>36</sup> *Department of Corrections v Miller* [2017] NZHC 2527 at [16]. Te Kōti Matua | High Court followed this test for example in *Chief Executive of the Department of Corrections v Narayan* [2022] NZHC 1535 at [38]; and *Chief Executive of the Department of Corrections v Tullioa* [2021] NZHC 745 at [51].

<sup>37</sup> Issues Paper at [10.99].

<sup>38</sup> Parole Act 2002, s 107IAC(1).

- 15.34 Problems with this were demonstrated in *Chief Executive of the Department of Corrections v Kerr*.<sup>39</sup> Ara Poutama had made an application for a PPO and an interim detention order in respect of Mr Kerr, who was subject to an existing ESO. The parties had agreed that, pending the hearing of the PPO and interim detention order, the Court should impose an IM condition on Mr Kerr. However, the Court held that it did not have jurisdiction to add an IM condition to the existing ESO.<sup>40</sup>
- 15.35 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.<sup>41</sup>
- 15.36 We stated in the Issues Paper that there can be a legitimate need to impose an IM condition after an ESO has been made.<sup>42</sup> It would therefore be more efficient if an application could be made solely to impose an IM condition rather than requiring a new ESO application.

**Maximum period of an intensive monitoring condition can result in a more restrictive order being made**

- 15.37 An IM condition can only be imposed for the first 12 months of an ESO and may not be ordered more than once even if the person is subject to repeated ESOs.<sup>43</sup> It appears from the relevant parliamentary materials that Parliament intended IM to be an additional, temporary safeguard for a 12-month period during which Ara Poutama can assess whether a person can be appropriately managed under an ESO or whether a PPO is necessary.<sup>44</sup>
- 15.38 The 12-month limit was also enacted for cost-saving reasons. Ara Poutama noted that, because IM is expensive, limiting its use would significantly reduce the costs of managing those people subject to ESOs. Unrestricted use of IM conditions, Ara Poutama said, “would have significant cost implications for Corrections (approximately \$20 million over ten years)”.<sup>45</sup>
- 15.39 The 12-month limitation of IM means that a person whose risk is being managed effectively by an ESO with an IM condition may, after the maximum time for IM has ended, instead be placed on a more restrictive setting. This could be through a PPO or through the courts tailoring conditions to provide for maximum monitoring without meeting the definition of an IM condition. Problems have arisen in some cases in which the High Court had to go to

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<sup>39</sup> *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139.

<sup>40</sup> *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139 at [12]–[14].

<sup>41</sup> For example *Chief Executive of the Department of Corrections v Clements* [2021] NZHC 1383.

<sup>42</sup> Issues Paper at [10.104].

<sup>43</sup> Parole Act 2002, ss 107IAC(3) and (5) and 107K(3)(ba).

<sup>44</sup> Letter from Jo Field (Deputy Chief Executive, Service Development, Ara Poutama Aotearoa | 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].

<sup>45</sup> Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Enhanced Extended Supervision Orders* (3 November 2014) at 16.

some lengths to find appropriate arrangements after the 12-month period for IM had ended.<sup>46</sup>

- 15.40 In the Issues Paper, we expressed our preliminary view that an IM condition should be allowed to extend beyond 12 months, subject to safeguards against overuse.<sup>47</sup>

### **Discrepancy between the law and the practical implementation of intensive monitoring conditions**

- 15.41 An IM condition allows for “line of sight” person-to-person monitoring for up to 24 hours per day.<sup>48</sup> The practice of IM in residential facilities, however, is usually much less invasive. Ara Poutama officials have explained that, at the Tōruatanga and the Kaainga Taupua residential facilities, the approach of 24-hour line-of-sight monitoring “is *not* taken with residents currently subject to such orders at either of those locations”.<sup>49</sup> Although staff are always aware of the location of residents, line-of-sight monitoring is only undertaken during outings into the community.
- 15.42 Relatedly, the courts have in the past justified ordering IM conditions with reference to the need for supervision during outings into the community rather than the need for 24-hour line-of-sight monitoring. For example, in *Chief Executive, Department of Corrections v Chisnall*, the High Court considered that an IM condition was necessary “to ensure Mr Chisnall has oversight when he leaves the facility”.<sup>50</sup> Similarly, in *Chief Executive of the Department of Corrections v Narayan*, the High Court noted that Kaainga Taupua’s policy to escort residents when they are in the community did not offer the same certainty as an IM condition and that Mr Narayan’s reoffending risk made IM necessary.<sup>51</sup>

## **RESULTS OF CONSULTATION**

- 15.43 In the Issues Paper, we asked submitters whether they thought the prohibition on requiring a person to reside with a programme provider should be removed. Parliament has since removed the prohibition, but submitters’ views have informed our discussion whether this prohibition should feature under the new Act.
- 15.44 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Te Tari Ture o te Karauna | Crown Law Office thought that the prohibition should be removed. The Public Defence Service argued that removing it would help with utilising residential programmes. The NZLS suggested that a court should impose a residential programme condition only if it is satisfied that the programme would otherwise not be effective. The Crown Law Office stated that there are instances where it could be appropriate to have offenders reside with programme providers but agreed that the current wording of the legislation has created uncertainty.

<sup>46</sup> *Deputy Chief Executive of the Department of Corrections v McCorkindale* [2020] NZHC 2484 at [4]–[6], [56] and [92]; and *Chief Executive of the Department of Corrections v R (No 2)* [2018] NZHC 3455 at [48]–[51].

<sup>47</sup> Issues Paper at [10.111].

<sup>48</sup> See for example *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 at [39].

<sup>49</sup> *Chisnall v Chief Executive of Department of Corrections* [2022] NZCA 402 at [30] (emphasis added).

<sup>50</sup> *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 at [44].

<sup>51</sup> *Chief Executive of the Department of Corrections v Narayan* [2022] NZHC 1535 at [41].

- 15.45 The Law Association, on the other hand, submitted the prohibition should remain, citing the case of *C v New Zealand Parole Board* in support. The Criminal Bar Association did not clearly argue for or against the prohibition but stated that the issue was complex and that a review of the relevant case law would aid the law reform process.
- 15.46 We also asked submitters whether the term “residential restrictions” should be defined in the legislation. Almost all submitters who addressed this question stated that the term should be defined.<sup>52</sup> Only the New Zealand Council for Civil Liberties was opposed, stating that “residential restrictions” should be “abolished” not “codified”.
- 15.47 The Public Defence Service, while generally in favour of a legislative definition, noted that a new definition of residential restrictions should be designed in a way that prevents the imposition of new orders to bypass the statutory time limit for residential restrictions. The Crown Law Office noted that it is unclear whether all the requirements in section 33(2) of the Parole Act are cumulative features of residential restrictions and whether it is possible to impose a curfew without imposing residential restrictions. Dr Jordan Anderson added that the lack of a definition leaves offenders vulnerable to broad interpretations by the relevant decision-making bodies.
- 15.48 Regarding IM conditions, we asked whether there should be a legislative test or guidance for imposing an IM condition, whether it should be possible to impose an IM condition after an ESO was already made and whether IM conditions should be allowed to extend beyond 12 months:
- (a) Some submitters indicated that there should be a test or guidance for imposing IM under the new Act.<sup>53</sup> Among those, The Law Association and the Criminal Bar Association specified that it should be a test rather than guidance. The NZLS stated a statutory test seemed unnecessary but could provide for greater clarity and transparency.
  - (b) Submitters were split in their views on whether it should be possible to impose an IM condition after an ESO was already made. The Bond Trust, the Public Defence Service, the NZLS and the Crown Law Office thought that the new Act should allow an IM condition to be imposed after an ESO has been ordered. The Bond Trust specified that imposing an IM condition should be “supported by independent risk and need analysis and always subject to independent review”. The South Auckland Bar Association, The Law Association and the Criminal Bar Association, on the other hand, thought that it should not be possible to impose an IM condition after an ESO has been issued.<sup>54</sup> They did not elaborate on their reasoning, however.
  - (c) Submissions were also split on whether an IM condition should be allowed to extend beyond 12 months. The Bond Trust and the Public Defence Service thought this should be the case – but only subject to conditions. The Bond Trust said it should be permitted provided the measure is appropriate for the risk and needs profile of the person concerned. The Public Defence Service supported it only to the extent it

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<sup>52</sup> Dr Jordan Anderson, Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, Dr Tony Ellis, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>53</sup> Bond Trust, Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>54</sup> The South Auckland Bar Association noted this was only their “preliminary view”.

would avoid the need for a PPO or preventive detention. Although the NZLS agreed that an IM condition should be allowed to extend beyond 12 months, it warned about the high costs of IM. The South Auckland Bar Association, The Law Association and the Criminal Bar Association thought IM conditions should not be allowed to extend beyond 12 months.

## PREFERRED APPROACH

### Residential preventive supervision as a stand-alone preventive measure

15.49 We consider that residential preventive supervision is needed to provide for a preventive measure that is less restrictive than secure preventive detention but allows for more safeguards than community preventive supervision. We consider that the current, problematic practice of using programme conditions and residential restrictions to impose 24-hour detention through ESOs has arisen from a legitimate need to fill the gap of appropriate risk management between PPOs and supervision in the community through ESOs.

15.50 There are, in our view, additional benefits to residential programmes for rehabilitation and reintegration that residential preventive supervision would allow. The literature we have reviewed suggests the following:

- (a) Detention allows for responsive interventions. For some people, their dynamic risk factors can change rapidly such as acute mental health needs, drug and alcohol issues, relationship break-downs and so on.<sup>55</sup> Change will often depend on immediate situations (such as spending time with drug users) and immediate emotional states (such as anger and desires for revenge).<sup>56</sup> These dynamic risk factors can be difficult to monitor and respond to if the person is in the community. Relatedly, people considered at risk of offending may lack prosocial connections who are aware of the person's deterioration and are able to notify the appropriate services. In contrast, a confined and monitored environment enables greater responsivity to these factors.<sup>57</sup>
- (b) Detention can better provide opportunities for intensive treatment and targeted support. Research suggests that treatment programmes can be most effective when they are "intensive" (that is, they take up a significant portion of a person's day in

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<sup>55</sup> James Bonta and DA Andrews *The Psychology of Criminal Conduct* (7th ed, Routledge, Abingdon (UK), 2023) at 18–20.

<sup>56</sup> James Bonta and DA Andrews *The Psychology of Criminal Conduct* (7th ed, Routledge, Abingdon (UK), 2023) at 18–20.

<sup>57</sup> See the comments of the majority te Kōti Mana Nui | Supreme Court in *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412. Mr Van Hemert had been convicted of murder. He had murdered a stranger during a severe psychotic episode following a deterioration in his mental health and high consumption of alcohol and cannabis. The majority concluded that a sentence of life imprisonment would not be manifestly unjust because, among other things, it would provide better public protection than a determinate sentence. The majority reasoned (at [74]) that custody would provide the most intense behavioural oversight, which was particularly material given Mr Van Hemert's mental health could deteriorate at a rapid pace. While noting the mental health services provided to people in prison are sometimes limited and that some rehabilitation services might not be available until an offender is eligible for parole, the majority reasoned that the time in prison would enable Mr Van Hemert to receive treatment from mental health services (at [77]).

structured and supervised programme activities)<sup>58</sup> and are implemented in a therapeutic residential environment.<sup>59</sup> Institutional settings that might amount to detention provide an opportunity to deliver these types of programmes.<sup>60</sup> As we note in Chapter 5, many people who are currently subject to preventive measures have complex needs that may require a range of interventions.<sup>61</sup> Residential settings appear to be a prerequisite for more intensive interventions.<sup>62</sup> These observations and recommendations are consistent with the views put to us in preliminary engagement and consultation. Several people subject to preventive detention, ESOs or PPOs who we interviewed during consultation explained how they benefited from supported accommodation for everyday tasks.

- (c) Detention in a residential facility can provide supported reintegration. People who are considered at high risk of reoffending may have limited prosocial support in the community.<sup>63</sup> They may not have people to rely on for emotional, social and practical support. Long periods in prison can further damage the links to whatever limited social resources they may have had before. People released from long-term prison sentences can therefore experience social isolation and have challenges developing relationships.<sup>64</sup> This was the experience of several people we interviewed who had been released from prison. They described feeling ostracised, feeling overwhelmed by everyday tasks and life in the community and feeling anxious that the community might “find out” about them. An absence of a prosocial environment in which people are supported where they live, work and socialise may mean people revert to

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<sup>58</sup> See David Harper, Paul Mullen and Bernadette McSherry *Complex Adult Victim Sex Offender Management Review Panel: Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Corrections Victoria, 27 November 2015) at [5.275]; *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at [5.4] citing Guy Bourgon and Barbara Armstrong “Transferring the Principles of Effective Treatment into a ‘Real World’ Prison Setting” (2005) 32 *Criminal Justice and Behavior* 3; and Devon L L Polaschek “Many sizes fit all: A preliminary framework for conceptualizing the development and provision of cognitive-behavioral rehabilitation programs for offenders” (2011) 16 *Aggression and Violent Behavior* 20.

<sup>59</sup> Jan Lees, Nick Manning and Barbara Rawlings, “A culture of enquiry: research evidence and the therapeutic community” (2004) 75 *Psychiatric Quarterly* 279; and *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at [5.13] citing Richard Shuker “Treating Offenders in a Therapeutic Community” in Leam A Craig, Louise Dixon and Theresa A Gannon (eds) *What Works in Offender Rehabilitation: An Evidence-Based Approach to Assessment and Treatment* (Wiley-Blackwell, Chichester (UK), 2013) 340.

<sup>60</sup> Jennifer L Skeem and Devon L L Polaschek “High Risk, Not Hopeless: Correctional Interventions For People At Risk For Violence” (2020) 103 *Marq L Rev* 1129 at 1147; and D L L Polaschek and others “Intensive psychological treatment of high-risk violent offenders: Outcomes and pre-release mechanisms” (2016) 22 *Psychology, Crime & Law* 344.

<sup>61</sup> David Harper, Paul Mullen and Bernadette McSherry *Complex Adult Victim Sex Offender Management Review Panel: Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Corrections Victoria, 27 November 2015) at [5.276].

<sup>62</sup> David Harper, Paul Mullen and Bernadette McSherry *Complex Adult Victim Sex Offender Management Review Panel: Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Corrections Victoria, 27 November 2015) at [5.275] and [5.293].

<sup>63</sup> See generally the expert comments of Professor Devon Polaschek in *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at [6.1]–[6.15].

<sup>64</sup> *Initial Insights into Experiences of Release, Community Integration and Recall for Individuals on the Order for Lifelong Restriction* (Risk Management Authority, July 2023) at 22–23 and 30.

habitual antisocial behaviour.<sup>65</sup> Conversely, a stable and supportive environment in the form of a residential facility in the community can provide a graded and supported return to participation in the wider community. A facility that provides a supported and controlled environment can operate as a “bridge” between prison and the community.<sup>66</sup>

- 15.51 Most submitters were in favour of allowing residential facility operators to provide both accommodation and rehabilitative programmes.
- 15.52 Several comparable jurisdictions provide for supervision orders that implicitly allow for the detention of offenders in residential facilities.<sup>67</sup> Two of the jurisdictions we assessed expressly provide for supervision in residential facilities:
- (a) In Victoria, a court may require an offender to reside at a residential treatment facility. The offender must not leave the residential treatment facility unless expressly permitted and must constantly be electronically monitored.<sup>68</sup> Alternatively, a court may require an offender to reside at a residential facility that offers an environment similar to that of a residential treatment facility but is not designed to provide treatment to the offender.<sup>69</sup>
  - (b) In Canada, the Parole Board or another authority may require an offender to reside at facilities such as “community correctional centres”.<sup>70</sup> Community correctional centres are designed to provide for a “structured transition period from full custody to a more independent community living environment”.<sup>71</sup>
- 15.53 Overall, we consider that residential preventive supervision should be a stand-alone measure that carries over the advantages of residential programmes to the new Act while also providing safeguards appropriate for a measure that will, in most cases, constitute detention. Those safeguards are, in particular:
- (a) residential preventive supervision should be imposed by the High Court (Chapter 10);
  - (b) the new Act should contain guiding principles to ensure that a person’s freedoms are not restricted any more than necessary (Chapter 13);
  - (c) both the High Court and an independent review panel should review a resident’s residential preventive supervision periodically (Chapter 18); and
  - (d) residential facilities should be periodically inspected (see below).

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<sup>65</sup> *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at [6.4]–[6.5].

<sup>66</sup> *Department of Corrections: Managing offenders to manage reoffending* (Controller and Auditor-General | Tumuaki o te Mana Arotake, December 2013) at [5.21]; and *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at [6.6].

<sup>67</sup> We looked at the Australian jurisdictions, Canada, England and Wales, Ireland, Scotland and Northern Ireland.

<sup>68</sup> Serious Offenders Act 2018 (Vic), s 32.

<sup>69</sup> Serious Offenders Act 2018 (Vic), ss 34(1)(a) and 179.

<sup>70</sup> Corrections and Conditional Release Act SC 1992 c 20, s 133(4)–(4.2).

<sup>71</sup> *Overcoming Barriers to Reintegration: An Investigation of Federal Community Correctional Centres* (Office of the Correctional Investigator, 8 October 2014) at 5.



## Standard conditions

### PROPOSAL

P64

Residential preventive supervision should comprise of standard conditions and any additional special conditions imposed by the court. The new Act should provide for the following standard conditions of residential preventive supervision. The person subject to residential preventive supervision must:

- a. reside at the residential facility specified by the court;
- b. stay at that facility at all times unless leave is permitted by the facility manager;
- c. be subject to electronic monitoring for ensuring compliance with other standard or special conditions unless the facility manager directs otherwise;
- d. be subject to in-person, line-of-sight monitoring during outings unless the facility manager directs otherwise;
- e. not have in their possession any prohibited items;
- f. submit to rub-down searches and to searches of their room if the facility manager has reasonable grounds to believe that the resident has in their possession a prohibited item;
- g. hand over any prohibited items discovered in their possession;
- h. not associate with, or contact, a victim of the resident's offending without the prior written approval of the facility manager; and
- i. not associate with, or contact, any specified person or people of any specified class with whom the facility manager has, in writing, directed the resident not to associate unless the facility manager has defined conditions under which association or contact is permissible.

15.54 We propose that residential preventive supervision, like community preventive supervision, should be implemented through a set of standard conditions supplemented by special conditions (see below). We also propose that, through the design of the standard conditions, some discretion be given to the managers of residential facilities for day-to-day operations.

15.55 We do not propose a set of coercive powers for residential facility managers that stand independently from powers derived from standard and special conditions. This maintains the status quo that managers of facilities that house people subject to ESOs with residential restrictions and programme conditions do not have any coercive powers other than those derived from standard and special conditions. The absence of additional coercive powers also demarcates residential facilities from secure facilities (which we propose in Chapter 16).

### *Residential conditions*

15.56 We propose that the resident should be required to reside at a specified residential facility and that they must stay at the facility unless leave is permitted. These two residential conditions are a defining feature of residential preventive supervision and should

therefore be standard conditions. We avoid the term “residential restrictions” to prevent ongoing confusion arising from this term.

- 15.57 If a person absconded from the facility, they would be in breach of this standard condition and committing an offence. This would allow police to arrest the person concerned.
- 15.58 We understand that establishing residential facilities may be difficult because of neighbourhood opposition. Nevertheless, we consider efforts should be taken to embed residential facilities within communities rather than locating them in rural areas with low-density housing or on prison grounds. Current examples of facilities that house people subject to ESOs in the community are residences provided by the Pact Group in Dunedin and the Salisbury Street Foundation in Christchurch.

### *Electronic monitoring*

- 15.59 Given that a residential facility would not physically prevent people from leaving, it should be possible for staff to track residents’ whereabouts at all times through an electronic monitoring condition. We consider that the new Act should provide for electronic monitoring in the same way as under section 15A of the Parole Act. It should, however, be within the facility manager’s discretion to relax electronic monitoring. This could be, for example, to make progress with rehabilitation and build trust between staff and the resident in question. To ensure that a person does not leave a residential facility without approval, other monitoring systems such as motion sensors and CCTV could be used.
- 15.60 Electronic monitoring could also be used to monitor compliance with other conditions such as conditions not to enter or to remain in certain areas.

### *In-person, line-of-sight monitoring*

- 15.61 Our preferred approach is to require line-of-sight monitoring only for the time that a resident spends outside the residential facility and to allow the facility manager to relax this requirement. This would mean a repeal of IM in its current form.
- 15.62 Twenty-four hour line-of-sight monitoring is a severe limitation on the resident’s right to privacy and liberty. We consider that, given the availability of other means of monitoring at and around the facility such as CCTV and motion sensors, the degree of invasiveness inherent to IM is not justified. It also appears to be the current practice at residential facilities to limit in-person, line-of-sight monitoring to outings into the community.
- 15.63 We consider that, if a person could only be safely managed through 24-hour line-of-sight monitoring, residential preventive supervision should not be considered as a suitable preventive measure to address their reoffending risk. In such cases, it would be necessary to impose a secure preventive detention order instead.
- 15.64 Submitters’ views were split about whether it should be possible to impose an IM condition after the ESO was already made and whether IM conditions should be allowed to extend beyond 12 months. We consider that limiting line-of-sight monitoring to time spent outside a facility while allowing the facility manager to exercise more discretion and extending the duration of monitoring beyond 12 months best addresses the feedback submitters gave us.

### *Compliance with lawful directions in relation to prohibited items*

- 15.65 To maintain the orderly functioning and safety of a residential facility, the new Act should provide that residents must comply with directions issued by the facility managers in relation to prohibited items.
- 15.66 Standard conditions should require residents to submit to searches and confiscations of prohibited items in their possession. We propose that residents should only be required to submit to searches of their person that are rub-down searches.<sup>72</sup>
- 15.67 The facility manager should not be able to use force to search a person or confiscate an item. Rather, by not complying, the resident would be in breach of a standard condition, thus committing an offence. The consequences of condition breaches are discussed in detail in Chapter 17.

### *Non-association conditions*

- 15.68 In continuation of the current law on ESOs, we propose maintaining as a standard condition that residents must not associate with people with whom the facility manager has, in writing, directed the resident not to associate.
- 15.69 We propose that facility managers should be able to define conditions for contacting or associating with specified people to facilitate a more nuanced approach. We make a similar proposal in Chapter 14 in the context of special conditions of community preventive supervision and explain our reasoning in more detail there.

### **Legal custody and care responsibility**

#### **PROPOSAL**

##### **P65**

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should have legal custody of the residents, while the facility manager should be entrusted with the residents' care and be responsible for the day-to-day operation of the facility.

- 15.70 Under the Corrections Act 2004 and the Public Safety (Public Protection Orders) Act 2014 (PPO Act), people subject to preventive detention or PPOs are in the custody of the chief executive. We are not aware of any issues in this regard and propose to maintain this rule under the new Act in relation to the custody of people subject to residential preventive supervision.
- 15.71 The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 entrusts care recipients to a care manager, and the Parole Act provides for rehabilitative and reintegrative programmes that involve placing people in the care of an appropriate person or institution. We consider that, in relation to residential preventive supervision, similar responsibility should lie with the facility manager who would typically be on site and have the ability to delegate tasks to staff.

<sup>72</sup> As defined in s 89 of the Corrections Act 2004.

## Special conditions

- 15.72 In addition to the standard conditions, it should be possible for the High Court to add special conditions to the residential preventive supervision order as needed on a case-by-case basis. As we explain in further detail in Chapter 10, we think that the special conditions should be imposed by the responsible court (which is the High Court for residential preventive supervision) rather than the Parole Board.
- 15.73 Special conditions allow the residential preventive supervision regime to be tailored to the particular offending risks of each person and so allow for consideration of whether particular conditions are rationally connected to the specific risk posed by a person.
- 15.74 Another function of special conditions is to equip facility managers with legal grounds to monitor or restrict a particular person. For example, a special condition imposed on a child sex offender could require they must not access the internet without monitoring by or on behalf of the facility manager.
- 15.75 Because the facility manager may relax restrictions to a point where residents may leave the facility unaccompanied, we consider it is also necessary to provide special conditions that address potential risks during outings into the community.
- 15.76 One of the purposes of residential preventive supervision is to provide an environment where people can complete residential programmes for rehabilitation and reintegration. Participation in these programmes may be a relevant special condition.
- 15.77 As discussed in Chapter 14, it cannot be ruled out that some rehabilitative programmes or some aspects of programmes under the new Act would engage the right to refuse to undergo medical treatment (including psychological treatment) affirmed by section 11 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).<sup>73</sup> As we mention in that chapter, we expect that any limitations of the right to refuse medical treatment will be taken into account by the court when determining whether imposing a programme condition is justified.
- 15.78 We propose in Chapter 14 in the context of community preventive supervision that special conditions should, by default, be imposed for the same duration as the community preventive supervision order itself (although the court may define a shorter period). We think the same should apply for special conditions for residential preventive supervision.
- 15.79 In Chapter 14, we also discuss example special conditions that should be set out in the new Act in relation to community preventive supervision. We consider those examples should likewise be set out in relation to residential preventive supervision.

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<sup>73</sup> In the case of *Philip Smith v the Attorney-General*, te Kōti Matua | High Court noted that a psychological screening test that was carried out on a prisoner in a therapeutic context constituted medical treatment under section 11 of the New Zealand Bill of Rights Act 1990 but noted that a test done for risk assessment purposes or “on the papers” may not qualify as medical treatment: *Philip Smith v the Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [100]. In *M (CA677/2017) v Attorney-General (in respect of the Ministry of Health)* [2020] NZCA 311, te Kōti Pira | Court of Appeal partially confirmed this caveat in a different context, holding that a forensic assessment of a compulsory treatment order under mental health legislation did not qualify as medical treatment. See also Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ 2015) at 11.9.4 and 11.9.8.

## Designation and inspections of facilities

### PROPOSAL

**P66**

The new Act should set out a procedure for the responsible Minister to designate a residential facility by New Zealand Gazette notice.

15.80 The Parole Act currently provides no procedure under which the responsible Minister designates a facility where people subject to high-end ESOs reside. There are no uniform suitability criteria as there are under the PPO Act.<sup>74</sup>

15.81 Under the new Act, we consider it should be made clear which facilities are being used as residential facilities and what the minimum suitability criteria are. This is to ensure that all residential facilities are fit for purpose and that a comprehensive record of all residential facilities exists.

### PROPOSAL

**P67**

The new Act should provide for residential facilities to be subject to examination by a National Preventive Mechanism under the Crimes of Torture Act 1989 and to periodic inspections every six months by specialised inspectors.

15.82 As “places of detention”, residential facilities should be subject to National Preventive Mechanism examination under the Crimes of Torture Act 1989. A National Preventive Mechanism would need to be designated for this purpose by the Minister of Justice. Other than the Matawhāiti Residence for people subject to PPOs, residences currently used to house people on high-end ESOs have not been subject to inspections by the National Preventive Mechanism under the Crimes of Torture Act.

15.83 The Crimes of Torture Act is geared specifically towards the prevention of torture and ill-treatment. To provide for an additional, broader inspection mandate, the chief executive should also be required to appoint inspectors to periodically inspect residential facilities. The ambit of review should be to address compliance with all requirements concerning residential preventive supervision under the new Act.

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<sup>74</sup> Section 114(2) of the Public Safety (Public Protection Orders) Act 2014 requires the Minister to be satisfied that the proposed residence will be “separate and secure”.

15.84 The PPO Act provides for the appointment of independent inspectors and provides them powers to conduct periodic inspections, hear complaints and conduct investigations and inquiries.<sup>75</sup> Similar powers should be provided for in relation to residential facilities under the new Act. The new Act should require that inspections occur at least every six months.<sup>76</sup> The chief executive should be required to appoint an appropriate number of inspectors.<sup>77</sup> Inspectors should report to the chief executive and the facility manager in question.<sup>78</sup> Accountability for correcting any deficiencies identified by inspectors should lie with the facility manager.<sup>79</sup>

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<sup>75</sup> Public Safety (Public Protection Orders) Act 2014, ss 78–84 and 127.

<sup>76</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 78(2).

<sup>77</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 127(2).

<sup>78</sup> Compare Public Safety (Public Protection Orders) Act 2014, ss 81(3)(b), 81(4) and 83(4)(a).

<sup>79</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 84.

**CHAPTER 16**

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# Secure preventive detention

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**IN THIS CHAPTER, WE CONSIDER:**

- issues with the detention conditions for people subject to preventive detention or public protection orders; and
- proposals for how those issues should be addressed through secure preventive detention.

**INTRODUCTION**

- 16.1 In Part 1 of this Preferred Approach Paper, we propose that preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) should be repealed. In their place, a new statute should be enacted to provide for a range of preventive measures. Secure preventive detention is the most restrictive of the three proposed preventive measures under the new Act and should be imposed only when no less restrictive measure would provide adequate protection for the community. Secure facilities should be designed to physically prevent people detained there from leaving.
- 16.2 This chapter sets out proposals for how secure preventive detention should be administered, including how this new measure can address the issues with the current law regarding detention for preventive purposes.

**CURRENT LAW****Preventive detention**

- 16.3 People subject to preventive detention are detained in prison unless they are released on parole. The conditions for prisoners subject to preventive detention are the same conditions prescribed for prisoners on determinate sentences under the Corrections Act 2004 and the Corrections Regulations 2005. People subject to preventive detention are,

like other prisoners, in the legal custody of the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive).<sup>1</sup>

- 16.4 Corrections officers and staff have several coercive powers in relation to prisoners, including the powers to use physical force, non-lethal weapons and mechanical restraint in specific situations. They also have powers to conduct searches, carry out drug or alcohol tests and monitor communications.<sup>2</sup>
- 16.5 A prisoner may be accommodated in an individual cell, a shared cell or a self-care unit (“accommodation of a residential style”).<sup>3</sup> Prisoners have minimum statutory entitlements in relation to basic health and wellbeing needs, access to visitors and legal advisers, certain forms of communications and access to information and education.<sup>4</sup>
- 16.6 Prisoners may be denied any of these entitlements for a reasonable period if there is an emergency in the prison, the security of the prison is threatened or the health or safety of any person is threatened.<sup>5</sup>
- 16.7 Prisoners may be denied entitlements in relation to visitors, communications and access to information and education if they are undergoing a penalty of cell confinement.<sup>6</sup> Their access to information and education may also be restricted if they are segregated from other prisoners by direction of the prison manager and the prison manager considers that the prisoner is likely to damage prison property.<sup>7</sup>

### Public protection orders

- 16.8 People subject to a PPO must be detained at a “separate and secure” residence on prison grounds.<sup>8</sup> Like prisoners under the Corrections Act, residents at a PPO facility are in the legal custody of the chief executive.<sup>9</sup> The only place currently declared to be a PPO residence is Matawhāiti Residence.<sup>10</sup> It is run by Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) and located in the precincts of Christchurch Men’s Prison but situated outside the prison itself.

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<sup>1</sup> Corrections Act 2004, s 38(1).

<sup>2</sup> Corrections Act 2004, pt 2 subpt 4.

<sup>3</sup> Corrections Act 2004, ss 3 definition of “self-care unit”, 82A.

<sup>4</sup> Corrections Act 2004, s 69. More detailed rules appear in ss 70–82B.

<sup>5</sup> Corrections Act 2004, s 69(2).

<sup>6</sup> Corrections Act 2004, s 69(4)(a).

<sup>7</sup> Corrections Act 2004, s 69(4)(b).

<sup>8</sup> Public Safety (Public Protection Orders) Act 2014, ss 20 and 114.

<sup>9</sup> Public Safety (Public Protection Orders) Act 2014, s 21(1).

<sup>10</sup> “Establishment and Revocation of Residences Under the Public Safety (Public Protection Orders) Act 2014” (19 January 2017) *New Zealand Gazette* No 2016-go2684.



- 16.9 PPO residence managers have several coercive powers in relation to residents, including to restrain and seclude residents, to conduct searches and to monitor communications.<sup>11</sup> The residence manager may delegate most of their powers to a suitable person.<sup>12</sup>
- 16.10 In a security emergency, the residence manager may call on corrections officers to apply any physical force that is reasonably necessary to prevent residents from harming or continuing to harm themselves or others or damaging or continuing to damage property.<sup>13</sup> The corrections officers may also detain a resident and take them to a prison in an emergency if the resident cannot be safely managed in the residence.<sup>14</sup>
- 16.11 PPO residents have all the rights of a person who is not subject to a PPO except to the extent that those rights are limited under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).<sup>15</sup> Without limiting the scope of rights, the PPO Act lists several rights of residents, including in relation to basic health needs, legal advice, voting in elections, participation in activities and access to information.<sup>16</sup>
- 16.12 The residence manager may, however, limit the rights of a resident to the extent reasonably necessary to prevent the resident from harming themselves or any other person or from disrupting the orderly functioning of the residence.<sup>17</sup> In making a decision that affects a resident (for example, to restrict any rights of a resident), the manager must be guided by the following principles:
- (a) A resident must be given as much autonomy and quality of life as is compatible with the health and safety and wellbeing of the resident and other persons and the orderly functioning of the residence.<sup>18</sup>
  - (b) A decision that adversely affects a resident must be reasonable and proportionate to the objective sought to be achieved.

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<sup>11</sup> Public Safety (Public Protection Orders) Act 2014, pt 1 subpt 4. The types of searches are defined in ss 89–92 of the Corrections Act 2004: Public Safety (Public Protection Orders) Act 2014, s 3 definitions of “rub-down search”, “scanner search”, “strip search” and “x-ray search”.

<sup>12</sup> Exceptions are the powers to delegate and to make rules: Public Safety (Public Protection Orders) Act 2014, s 117(1).

<sup>13</sup> Public Safety (Public Protection Orders) Act 2014, s 74(2)(a).

<sup>14</sup> Public Safety (Public Protection Orders) Act 2014, s 74(2)(b).

<sup>15</sup> The provision specifies that rights may also be limited by “any rules, guidelines or instructions, or regulations made under this Act” or “a decision of the manager” taken in accordance with s 27 of the Act: Public Safety (Public Protection Orders) Act 2014, s 27(1).

<sup>16</sup> Public Safety (Public Protection Orders) Act 2014, ss 28–40.

<sup>17</sup> Public Safety (Public Protection Orders) Act 2014, s 27(3).

<sup>18</sup> This is also reflected in one of the principles of the Act: Public Safety (Public Protection Orders) Act 2014, s 5(d).

## ISSUES

### Concerns that preventive detention breaches the right to be free from arbitrary detention

- 16.13 As discussed in Chapter 4, preventive detention engages the right to be free from arbitrary detention.<sup>19</sup>
- 16.14 Even though preventive detention is imposed as a single sentence, the United Nations Human Rights Committee (UNHRC) views preventive detention as comprising two periods — a punitive and a preventive period. During the preventive period, the UNHRC has stated, the detention conditions “must be distinct from the treatment of convicted prisoners serving a punitive sentence and be aimed at the detainees’ rehabilitation and reintegration into society”.<sup>20</sup>
- 16.15 In *Miller v New Zealand*, two people complained to the UNHRC that their preventive detention constituted arbitrary detention.<sup>21</sup> 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. Mr Miller, the first complainant, was transferred to a less restrictive self-care unit nine years after the punitive term of detention (the minimum period of imprisonment) had ended. Mr Miller was offered “various forms of counselling and psychological care”.<sup>22</sup> The second complainant, Mr Carroll, was released from custody five years after his minimum period of imprisonment had ended. He did not receive “significant treatment” to address his behaviour prior to his release.<sup>23</sup> Shortly after being released, he was recalled to prison and transferred to a self-care unit.
- 16.16 The UNHRC noted the “protracted length” of the sentences and that the two complainants had been kept in the same prison conditions as people serving punitive sentences. It found that the complainants’ terms of preventive detention had not been sufficiently distinct from their terms of imprisonment during the punitive part of their sentence (the minimum period of imprisonment) and had not been aimed, predominantly, at their rehabilitation and reintegration into society.<sup>24</sup> Accordingly, the UNHRC found a violation of article 9(1) of the International Covenant on Civil and Political Rights.<sup>25</sup>
- 16.17 In contrast, the UNHRC found in the later decision of *Isherwood v New Zealand* that the complainant’s preventive detention conditions were sufficiently distinct from the conditions during the punitive period of the sentence.<sup>26</sup> The UNHRC noted that, just before becoming eligible to be considered for parole, the complainant had received

<sup>19</sup> We have also discussed this in *Te Aka Matua o te Ture | Law Commission 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* (NZLC, May 2023) (Issues Paper) at [3.5]–[3.12].

<sup>20</sup> 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].

<sup>21</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

<sup>22</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.6].

<sup>23</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [2.5].

<sup>24</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

<sup>25</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.6].

<sup>26</sup> *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC).

counselling and psychological care under a drug treatment programme. He was transferred to a low-security unit in prison a little more than three years after becoming eligible for parole. He then completed a high-risk personality programme, a drug treatment programme and a sex offender treatment programme. The UNHRC was satisfied that, in this case, the preventive period of the detention was sufficiently distinct from the punitive period because it was aimed at his rehabilitation and reintegration into society.<sup>27</sup>

- 16.18 To date, the New Zealand courts have not applied the two-period approach taken by the UNHRC when considering whether preventive detention is arbitrary for the purposes of section 22 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). The courts have continued to hold that preventive detention is not arbitrary if imposed by a sentencing court in accordance with the Sentencing Act 2002 and if the ongoing justification on the grounds of public safety is regularly reviewed by the New Zealand Parole Board (Parole Board).<sup>28</sup> In particular, the New Zealand courts have not adopted the UNHRC's requirement that, during the preventive period of preventive detention, a person must be managed in conditions distinct from people serving punitive sentences. Rather, the *Kōti Matua* | 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.<sup>29</sup>

### Public protection orders have been found to be inconsistent with the right not to be subjected to second penalties

- 16.19 As discussed in Chapter 4, the *Kōti Pira* | Court of Appeal found in *Chisnall v Attorney-General* that PPOs were inconsistent with the right not to be subject to second punishment.<sup>30</sup> The Court of Appeal first held that ESOs were penalties and, consequently, the more restrictive PPOs were also penalties.<sup>31</sup>
- 16.20 The Court of Appeal concluded that PPOs were penalties for the purposes of human rights law because of the power of the residence manager to restrict the rights of residents, the extensive powers of search, seizure and surveillance and the qualified nature of the right to receive rehabilitative treatment.<sup>32</sup> The Court emphasised that the use of the High Court's civil procedure for PPO proceedings did not change the fact that the substance of PPOs was punitive.<sup>33</sup> Furthermore, like with ESOs, the Court held that, just because one of the Act's objectives is the protection of the public, this does not automatically mean that PPOs are not penalties.

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<sup>27</sup> *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.5]–[8.6].

<sup>28</sup> *Miller v New Zealand Parole Board* [2010] NZCA 600 at [70].

<sup>29</sup> *Miller v Attorney-General* [2022] NZHC 1832 at [82] citing *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [101].

<sup>30</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [224]. We have also discussed this in the Issues Paper at [3.13]–[3.22].

<sup>31</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [155] and [177].

<sup>32</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [161]–[162], [164] and [224].

<sup>33</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [155].

16.21 Because PPOs were found to be penalties, the right not to be subject to second punishment was engaged. The Court found that the limitations that PPOs put on the right not to be subject to second punishment had not been demonstrably justified on the material before the Court and were therefore inconsistent with the NZ Bill of Rights.<sup>34</sup>

## RESULTS OF CONSULTATION

16.22 We proposed in the Issues Paper that people detained should have as much autonomy and quality of life as reasonably possible and that they should be managed in conditions that are separate and distinct from the conditions in which people serve determinate prison sentences.

16.23 We then asked submitters whether they thought people who are detained after completing what may be regarded as their punitive prison sentence should be managed in different conditions to prison.

16.24 Most submitters agreed without reservation that the preventive period of the detention should be more clearly distinguished from the punitive prison sentence and that people should be managed under substantially different conditions.<sup>35</sup>

16.25 Some submitters were more cautious. Manaaki Tāngata | Victim Support stated that the safety of victims must always be prioritised when it comes to the conditions of preventive measures. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) said it agreed “in principle, provided public safety is not jeopardised”.

16.26 Finally, some submitters agreed with our proposals but thought they did not go far enough. Dr Jordan Anderson said all preventive measures should be repealed. The New Zealand Council for Civil Liberties emphasised that conditions of all prisoners should be improved, not just of those subject to preventive measures.

## PREFERRED APPROACH

### Secure preventive detention as a stand-alone preventive measure

#### PROPOSAL

P68

The new Act should provide for the following core features of secure preventive detention:

- a. People subject to secure preventive detention are detained in secure facilities.
- b. Detainees must not leave the facility without permission of the facility manager.
- c. Detainees are in the custody of the chief executive of Ara Poutama Aotearoa | Department of Corrections.

<sup>34</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [224]–[226].

<sup>35</sup> Bond Trust, Lara Caris, Chief Ombudsman, Criminal Bar Association, Dr Tony Ellis, Te Kāhui Tika Tangata | Human Rights Commission, Te Roopū Tauria Ture o Aotearoa | New Zealand Law Students' Association, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

- 16.27 As we explain in Chapter 3, the new Act should continue to enable the detention of a person in a secure facility when no less restrictive preventive measure would provide adequate community protection.
- 16.28 We consider that, subject to the proposals set out in this chapter and elsewhere in this Preferred Approach Paper, secure preventive detention should operate in a similar way to PPOs. The conditions of secure preventive detention are intended to reduce the punitive nature of it as far as possible consistent with the need to keep the community safe. However, it will still involve severe restrictions on detainees' rights to liberty and, as such, will likely be regarded as a penalty for the purposes of human rights law despite better conditions and a stronger focus on treatment and rehabilitation. Because we propose that secure preventive detention should be imposed after sentencing, the right not to be subject to second punishment will likely be engaged (see Chapter 4). We consider that the conditions of secure preventive detention outlined below will contribute to justifying limitations of rights affirmed by the NZ Bill of Rights and New Zealand's obligations under international human rights law.

## Detention facilities

### PROPOSALS

P69

The new Act should provide that secure preventive detention is administered in secure facilities separate from prisons.

P70

The new Act should set out a procedure for the responsible Minister to designate a secure facility by *New Zealand Gazette* notice.

- 16.29 We consider that secure facilities separate from prisons are the most effective way to make secure preventive detention distinct from custodial prison sentences. This would be a way to achieve compliance with the requirement of article 9(1) of the International Covenant on Civil and Political Rights (the right not to be arbitrarily detained) to make the conditions of secure preventive detention distinct from prison.<sup>36</sup> It would also be an important element of justifying limitations on the right not to be subject to second punishment, because facilities that are run independently from prisons would allow for restrictions on detainees' quality of living to be minimised and for the creation of an environment with a special focus on rehabilitation and reintegration. For example, specialised secure facilities could be designed to better support and accommodate detainees with mental health conditions than would be possible in a prison. Submitters were very supportive of our proposals to make detention as a preventive measure substantially different from imprisonment.

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<sup>36</sup> 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].

- 16.30 Germany is an example of an overseas jurisdiction that successfully implemented reforms in 2012 requiring preventive detention to be administered in separate, specialised detention centres.<sup>37</sup> Under German law, there is an express requirement that preventive detention “burdens the detainee as little as possible” and, subject to security interests, is adapted to general conditions of life. The European Court of Human Rights has expressly welcomed these new German detention centres as improvements and even qualified them as non-punitive in relation to mental health patients.<sup>38</sup> In *Chisnall*, the Court of Appeal expressly referred to the German example in holding that PPOs were penalties.<sup>39</sup>
- 16.31 An alternative option we have considered is to administer secure preventive detention in a separate area or unit within a prison. Most comparable jurisdictions that we have assessed administer preventive detention in this way.<sup>40</sup> Advantages of this approach are that no new facilities would have to be built and the security infrastructure required for secure preventive detention would already be in place.
- 16.32 However, situating secure facilities within prison complexes would complicate making the conditions of secure preventive detention materially distinct from those under custodial prison sentences. They would likely feel part of the prison. The people we interviewed during consultation who were subject to indeterminate sentences described a range of negative experiences during their time in prison. This ranged from feelings of boredom, poor food and inadequate healthcare through to being bullied, assaulted and segregated. One interviewee said prison had left him traumatised. He has recurring dreams of being confined in a small place.
- 16.33 We consider that separate and secure facilities, too, could be established without undue effort if they are located on prison grounds while not being part of the main prison complex. The Matawhāiti Residence, for example, could be repurposed as a secure facility.
- 16.34 As is currently the case under the PPO Act, we consider that a secure facility should be declared by the responsible Minister by *Gazette* notice.<sup>41</sup>

## PROPOSAL

### P71

The new Act should provide that people subject to secure preventive detention should have rooms or separate, self-contained units to themselves. The rooms or units should be materially different from prison cells and provide the detainee with privacy and a reasonable level of comfort.

<sup>37</sup> German Criminal Code (Strafgesetzbuch – StGB), s 66c(1)(2)(b).

<sup>38</sup> *Inseher v Germany* [2018] ECHR 991 (Grand Chamber) at [81], [167]–[168]; and *Bergmann v Germany* (2016) 63 EHRR 21 at [118]–[128].

<sup>39</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [165]–[172].

<sup>40</sup> See for example Criminal Code RSC 1985 c 46, s 753(4)(a); Crimes (Administration of Sentences) Act 1999 (NSW), s 225; Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), ss 13(5)(a); Crimes (High Risk Offenders) Act 2006 (NSW), s 20(1); High Risk Serious Offenders Act 2020 (WA), ss 26(1) and 87; and Dangerous Criminals and High Risk Offenders Act 2021 (Tas), ss 7 and 9.

<sup>41</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 114.

- 16.35 In line with the guiding principles set out in Chapter 13, we propose that the living spaces of detainees should resemble life in the community as much as is consistent with the orderly functioning and safety of the facility. This includes a room or unit with a separate bathroom and, where reasonably practical, a kitchenette that detainees do not need to share with others.

## Rights of detainees

### PROPOSALS

P72

The new Act should state that detainees' rights are only restricted to the extent they are limited by the new Act.

P73

The new Act should carry over the rights of detainees expressed in sections 27–39 of the Public Safety (Public Protection Orders) Act 2014.

- 16.36 Ordering a person to be detained in a secure facility is a significant restriction of that person's rights. This restriction would only be lawful if it is imposed by the High Court in accordance with the legislative tests set out in Chapter 10. In other words, the restriction would need to be necessary and justified to prevent the person in question from serious reoffending.
- 16.37 Implicit in secure preventive detention are some rights restrictions that are necessary to secure a person's detention and prevent them from serious reoffending. For example, a secure facility can only be run if the facility manager has the authority to restrict detainees' rights to the extent necessary to prevent them from harming themselves or another person, escaping custody or otherwise disrupting the orderly functioning of the facility.
- 16.38 At the same time, there should not be any rights restrictions arising from secure preventive detention that are neither inherent to the measure nor necessary to administer it. That is why we propose in Chapter 13 that the new Act should make it clear that people subject to secure preventive detention should have as much autonomy and quality of life as is consistent with the orderly functioning and safety of the facility.
- 16.39 To specify this guiding principle, the new Act should include a list of affirmed statutory entitlements and the circumstances under which they may be limited. We have not identified any issues with the list of "rights of residents" under the PPO Act. We therefore propose that the new Act's list of detainees' entitlements should carry over those currently affirmed by the PPO Act.<sup>42</sup>

<sup>42</sup> Public Safety (Public Protection Orders) Act 2014, ss 27–39.

## PROPOSAL

P74

The new Act should clarify that, subject to reasonably necessary restrictions, detainees are entitled to:

- a. cook their own food;
- b. wear their own clothes;
- c. use their own linen;
- d. have regular supervised outings; and
- e. access the internet.

16.40 In addition to the entitlements already affirmed by the PPO Act, we consider that entitlements concerning food, clothing, linen, outings and internet access should also be expressly provided for in the new Act. More generally, the conditions of secure preventive detention should, at the very least, comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Mandela Rules). The Mandela Rules provide for minimum requirements in relation to accommodation, personal hygiene, clothing and bedding, food, exercise, healthcare and contact with the outside world, among other aspects.<sup>43</sup>

16.41 As we discuss in Chapter 13, people subject to secure preventive detention (or residential preventive supervision) should also be entitled to participate in therapeutic, recreational, cultural and religious activities, because people on these orders depend on facility managers providing access to such activities.<sup>44</sup>

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<sup>43</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA res 70/175 (2015).

<sup>44</sup> The wording of our proposal goes beyond the current phrasing in s 31 of the Public Safety (Public Protection Orders) Act 2014 (“participate in recreational, educational, and cultural activities within the residence”).



## Coercive powers

### PROPOSALS

**P75**

Under the new Act, to ensure the orderly functioning of the facility, the manager of a secure facility should have powers to:

- a. check and withhold certain written communications;
- b. inspect delivered items;
- c. monitor and restrict phone calls and internet use;
- d. restrict contact with certain people outside a facility;
- e. conduct searches;
- f. inspect and take prohibited items;
- g. carry out drug or alcohol tests;
- h. seclude detainees;
- i. restrain detainees; and
- j. call on corrections officers to use physical force in a security emergency.

**P76**

The new Act should provide for a facility manager to have the power to make appropriate rules for the management of the facility and for the conduct and safe custody of the detainees.

**P77**

Under the new Act, the manager of a secure facility should have the ability to delegate any of their powers to suitably qualified staff, except the powers to make rules and to delegate.

16.42 As we propose in Chapter 13, Ara Poutama should be the agency responsible for operating secure facilities but may enter into facility management contracts with appropriate entities for the operation of specified facilities. Regardless of who runs a given facility, the manager should have a set of coercive powers at their disposal appropriate to ensure the orderly functioning of the secure facility.

16.43 This list of powers reflects those currently available to facility managers under the PPO Act.<sup>45</sup> The coercive powers may only be exercised in accordance with the principles set out in Chapter 13. Most importantly, any restriction of detainees' autonomy and quality of life must not be more severe than necessary to ensure the orderly functioning and safety of the secure facility.<sup>46</sup>

<sup>45</sup> Compare Public Safety (Public Protection Orders) Act 2014, ss 45–74.

<sup>46</sup> This principle corresponds to several relevant Mandela Rules concerning powers to restrain, search or seclude: *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA res 70/175 (2015), rr 44–45, 48 and 50–52.

- 16.44 The use of force in secure facilities should be restricted along the same lines as the use of force under the PPO Act. If authorised to do so by the chief executive, facility managers should be able to make rules for the management of the facility and for the conduct and safe custody of the detainees.<sup>47</sup> This allows a facility manager to address all detainees through one set of house rules instead of having to direct each detainee individually. However, these rules may not be used to confer any additional coercive powers on the manager.
- 16.45 Facility managers should be able to delegate their powers to suitably qualified staff, as is currently the case under the PPO Act.<sup>48</sup>

## Inspections

### PROPOSAL

P78

The new Act should provide for secure facilities to be subject to examination by a National Preventive Mechanism under the Crimes of Torture Act 1989 and to periodic inspections at least every six months by specialised inspectors.

- 16.46 As “places of detention”, secure facilities should be subject to National Preventive Mechanism examination under the Crimes of Torture Act 1989.<sup>49</sup> A National Preventive Mechanism would need to be designated for this purpose by the Minister of Justice. The Ombudsman is currently the designated National Preventive Mechanism for persons detained in prisons or otherwise in the custody of Ara Poutama as well as for Matawhāiti Residence, which was established under the PPO Act.<sup>50</sup>
- 16.47 The Crimes of Torture Act is geared specifically towards the prevention of torture and ill-treatment. To provide for an additional, broader inspection mandate, the chief executive should also be required to appoint inspectors to periodically inspect secure facilities. The ambit of review should be to address compliance with all requirements concerning secure preventive detention under the new Act.
- 16.48 As we mention in Chapter 15, the PPO Act provides for the appointment of independent inspectors and provides them powers to conduct periodic inspections, hear complaints and conduct investigations and inquiries.<sup>51</sup> We suggest similar powers should be provided for secure preventive detention under the new Act.

<sup>47</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 119.

<sup>48</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 117.

<sup>49</sup> One of the purposes of the Crimes of Torture Act 1989 is to enable Aotearoa New Zealand to meet its international obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 4 February 2003, entered into force 22 June 2006).

<sup>50</sup> “Designation of National Preventive Mechanisms” (22 June 2023) *New Zealand Gazette* No 2023-go2676.

<sup>51</sup> Public Safety (Public Protection Orders) Act 2014, ss 78–84 and 127.

16.49 As we proposed for residential preventive supervision in Chapter 15, the new Act should require that inspections occur at least every six months.<sup>52</sup> The chief executive should be required to appoint an appropriate number of inspectors, who report to the chief executive and the facility manager in question.<sup>53</sup> Accountability for correcting any deficiencies identified by inspectors should lie with the facility manager.<sup>54</sup>

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<sup>52</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 78(2).

<sup>53</sup> Compare Public Safety (Public Protection Orders) Act 2014, ss 81(3)(b), 81(4), 83(4) and 127(2).

<sup>54</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 84.

**CHAPTER 17**

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# Non-compliance and escalation

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**IN THIS CHAPTER, WE CONSIDER:**

- the consequences for not complying with the conditions of a preventive measure; and
- the ability to escalate the preventive measure to which a person is subject to a more restrictive measure.

**INTRODUCTION**

- 17.1 When a person fails to comply with the conditions of a preventive measure or the preventive measure is otherwise considered inadequate to manage the risk they will commit further serious offences, the law should respond. This chapter considers what that response should be.
- 17.2 We use the term “non-compliance” in this chapter to refer to situations where a person breaches the conditions of a preventive measure to which they are subject. We use the term “escalation” as the response for when a preventive measure is considered inadequate to address the person’s risk and greater restrictions are needed.
- 17.3 There is potential for non-compliance and escalation to overlap. For instance, persistent non-compliance may demonstrate a need for escalation. In addition, both non-compliance and escalation may result in the imposition of new or greater restrictions. For the purposes of this chapter, we distinguish between restrictions imposed as a penalty for non-compliance and restrictions imposed as escalation to deal with heightened risk.

## CURRENT LAW

### Preventive detention

- 17.4 Non-compliance and escalation are mainly relevant to preventive detention when a person is released from prison on parole.<sup>1</sup> When released on parole, the person is required to comply with the standard release conditions and any other special release conditions imposed by the New Zealand Parole Board (Parole Board).<sup>2</sup>
- 17.5 There are two main consequences for non-compliance with those conditions:
- (a) 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.<sup>3</sup>
  - (b) Breaching standard or special conditions can result in a person being recalled to prison.<sup>4</sup> Recall to prison does not require the person to be charged and convicted, but rather it can be ordered by the Parole Board pursuant to a procedure set out in the Parole Act 2002.<sup>5</sup>
- 17.6 Recall to prison is also the main means of escalation for people subject to preventive detention. The grounds for recall are:<sup>6</sup>
- (a) the person:
    - (i) poses an undue risk to the safety of the community or any other class of person;
    - (ii) has breached their release conditions; or
    - (iii) has committed an offence punishable by imprisonment; or
  - (b) for people subject to residential restrictions:
    - (i) the person is jeopardising the safety of any person at their residence;
    - (ii) a suitable residence in an area in which a residential scheme is operated is no longer available; or
    - (iii) the person no longer wishes to be subject to residential restrictions; or
  - (c) for people subject to a special condition that requires their attendance at a residential programme:
    - (i) the person is jeopardising the safety of any person at the residence or the order or security of the residence;

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<sup>1</sup> While subject to imprisonment, the provisions of the Corrections Act 2004 govern non-compliance with the conduct required of prisoners: see for example ss 83–127.

<sup>2</sup> Standard release conditions apply to every person who is released on parole from a sentence of imprisonment: Parole Act 2002, s 29(1). The Parole Board has discretion to impose special release conditions upon a person released on parole: Parole Act 2002, s 29AA(1).

<sup>3</sup> Parole Act 2002, s 71(1).

<sup>4</sup> Parole Act 2002, s 61(b).

<sup>5</sup> Parole Act 2002, ss 59–66.

<sup>6</sup> Parole Act 2002, s 61.

- (ii) the person has failed to remain at the residence for the duration of the programme; or
- (iii) the programme has ceased to operate or the person's participation in it has been terminated for any reason.

17.7 When recalled to prison, the person may only be released again if directed by the Parole Board on the basis they will not pose an undue risk to the community.<sup>7</sup>

### Extended supervision orders

17.8 A person subject to an extended supervision order (ESO) is subject to the standard extended supervision conditions and any special extended supervision conditions imposed by the Parole Board.<sup>8</sup>

17.9 The main consequence for non-compliance is through conviction and sentence. Breaching conditions without reasonable excuse is an offence with a maximum penalty of two years' imprisonment.<sup>9</sup>

17.10 There are two ways the restrictions applying to a person subject to an ESO can be escalated. First, the Parole Board has power at any time during the term of an ESO to impose special conditions.<sup>10</sup> It is possible the Parole Board could impose additional conditions in response to any heightened risk presented by a person subject to an ESO. The only exceptions are that intensive monitoring conditions and "at all times" residential restrictions may only apply during the first 12 months of the ESO's term.<sup>11</sup>

17.11 Second, people subject to an ESO are eligible for a more restrictive PPO provided that:<sup>12</sup>

- (a) they are or have been made subject to a condition of full-time accompaniment and monitoring imposed under section 107K of the Parole Act 2002; or
- (b) they are subject to a condition of long-term full-time placement in the care of an appropriate agency, person or persons for the purposes of a programme under sections 15(3)(b) and 16(c) of the Parole Act.

17.12 A person subject to an ESO fitting these eligibility criteria can be escalated to detention pursuant to a public protection order (PPO) if the person satisfies the tests for imposition under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).

17.13 It is not possible to recall a person subject to an ESO to prison.

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<sup>7</sup> Parole Act 2002, s 28.

<sup>8</sup> Parole Act 2002, s 107J(1).

<sup>9</sup> Parole Act 2002, s 107T.

<sup>10</sup> Parole Act 2002, s 107K(1). Note that a purpose of special conditions is to "reduce the risk of reoffending by the offender": Parole Act 2002, s 15(2)(a).

<sup>11</sup> Parole Act 2002, s 107K(3)(b)–(ba).

<sup>12</sup> Public Safety (Public Protection Orders) Act 2014, s 7(1)(b).

## Public protection orders

- 17.14 Non-compliance is mainly relevant to PPOs when a court cancels a PPO and the person becomes subject to a public supervision order.<sup>13</sup> A person subject to a public supervision order must comply with any “requirements” the court includes in the order.<sup>14</sup> Like ESOs, breaching any requirements included in a public supervision order without reasonable excuse is an offence with a maximum penalty of two years’ imprisonment.<sup>15</sup> For people subject to a public supervision order, escalation back to a PPO is possible but the court must impose a new PPO.<sup>16</sup>
- 17.15 To date, no person has been made subject to a public supervision order.
- 17.16 There are means to escalate the restrictions relating to a person subject to a PPO. The court may make a prison detention order requiring them to be detained in prison instead of a PPO residence.<sup>17</sup> The court may make a prison detention order only if it is satisfied that:<sup>18</sup>
- (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.
- 17.17 We are aware of only one instance in which a court has imposed a prison detention order.<sup>19</sup>

## ISSUES

### Concerns about the appropriateness of recall

- 17.18 As noted, it is possible for the Parole Board to order that a person subject to preventive detention be recalled to prison as a consequence for non-compliance with release conditions and as an escalation to respond to reoffending risk.
- 17.19 Nearly half the people subject to preventive detention who are released from prison on parole are recalled to prison. Between the years starting 1 July 2013 and ending 30 June 2023, the Parole Board directed the release of 113 people, 48 of whom were later recalled to prison.<sup>20</sup>

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<sup>13</sup> A residence manager does have coercive powers to manage the behaviour of residents subject to PPOs, however, such as powers of seclusion: Public Safety (Public Protection Orders) Act 2014, ss 63–68 and 71–74.

<sup>14</sup> Public Safety (Public Protection Orders) Act 2014, s 94.

<sup>15</sup> Public Safety (Public Protection Orders) Act 2014, ss 103–103A.

<sup>16</sup> Public Safety (Public Protection Orders) Act 2014, s 7(1)(c).

<sup>17</sup> Public Safety (Public Protection Orders) Act 2014, s 85(1).

<sup>18</sup> Public Safety (Public Protection Orders) Act 2014, s 85(2).

<sup>19</sup> *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581.

<sup>20</sup> Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama Aotearoa | Department of Corrections) to John-Luke Day (Kaitohutohu Taumata | Principal Legal and Policy Adviser, Te Aka Matua o te Ture | Law

- 17.20 In the Issues Paper, we noted how the indefinite possibility of recall to prison was one of the most coercive exercises of state power known to New Zealand law.<sup>21</sup>
- 17.21 Throughout this Preferred Approach Paper, we explain our concerns about the appropriateness of imprisoning people for the purposes of protecting the community (rather than as punishment for prior offending). As we discuss in Chapter 5, 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. We conclude that, if a person needs to be detained after serving a punitive prison sentence to address the risks they may reoffend, it is not appropriate for them to remain in prison.
- 17.22 Recall to prison prolongs a person's exposure to prison conditions. We also note in Chapter 5 the particularly harmful psychological effects of indeterminate imprisonment that recall to prison is likely to reinforce.
- 17.23 In our interviews with people subject to preventive measures, interviewees on indeterminate sentences were particularly concerned about the possibility of recall to prison. Interviewees described how having recall "hanging over them" made them anxious and defensive. Every interaction with probation services, they said, felt like an interrogation. Some interviewees explained how they were fearful of people making accusations against them or being seen to "talk to the wrong person at the wrong place". One interviewee said that the possibility of going back to prison means it can be difficult to look forward.
- 17.24 Two interviewees spoke about their experience of being recalled. They explained how their reintegration into the community had to be "reset" because they lost their accommodation, their job and their support networks. One interviewee described the effects recall had on them as "devastating". These interviewees also considered the decision to recall them to prison was a "knee-jerk reaction" — it was done too readily and there was no indication of risk of further serious offending.
- 17.25 We do not have information about the circumstances that have resulted in people subject to preventive detention being recalled to prison. We note, however, the severe impacts recall can have in terms of the detrimental experience of prison and the setbacks to a person's reintegration to the community. Given the high rates at which people subject to preventive detention are recalled, it is understandable there are concerns.

### Concerns that breaching an ESO condition is an offence

- 17.26 In the Issues Paper, we noted concerns about whether convictions and criminal sentences potentially resulting in imprisonment are appropriate for ensuring compliance with ESO conditions. We made the following points:<sup>22</sup>

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Commission) regarding data on preventive detention and ESOs (11 March 2024). Some of the 113 individuals were released again after being recalled to prison. Between 1 July 2013 and 30 June 2023, the Parole Board directed 161 releases. Of those releases, 75 resulted in a recall.

<sup>21</sup> Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, May 2023) (Issues Paper) at [3.1], [5.32] and [5.42].

<sup>22</sup> Issues Paper at [11.60]–[11.67].



- (a) Because an ESO is a second penalty, convicting and sentencing a person for breaching an ESO condition amounts to punishing a person for breaching the restrictions of a second penalty.<sup>23</sup>
- (b) Research shows that, for high-risk people, the process of desistance (stopping offending) is slow and can take years to become consolidated.<sup>24</sup> During this process, a person may make considerable progress but nevertheless commit minor offences (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.
- (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.

17.27 The number of people convicted for breaching ESO conditions and then imprisoned is reasonably high. The data we have received from Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) shows that roughly two in three people subject to an ESO are convicted of at least one breach.<sup>25</sup> Between the financial years 2012/13 and 2022/23, 816 people were convicted for breaching an ESO. Some of these individuals were convicted multiple times. Of those individuals, 631 were imprisoned for breaching their ESO.<sup>26</sup>

17.28 We noted in the Issues Paper the frequency with which people subject to ESOs are convicted for breaching ESO conditions. We added, however, that we do not have information about the circumstances that resulted in convictions or any data about breaches that did not result in convictions.

17.29 We also explained why it might be appropriate for breaching ESO conditions to remain a criminal offence. ESO conditions are imposed for the purposes of reducing the risk of reoffending, facilitating or promoting rehabilitation and reintegration and providing for the reasonable concerns of victims.<sup>27</sup> Breaching a condition imposed for these purposes could indicate unmanaged risk. In some cases, the breach may consist of offence-

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<sup>23</sup> In *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [115] and [153]–[154], te Kōti Pira | Court of Appeal noted the offences the legislation created for breaching conditions in support of its conclusion that ESOs and PPOs are punitive in character.

<sup>24</sup> *Re 14 Bristol Street* CCC Independent Hearing Commissioners RMA/2020/173, 18 January 2022 statement of evidence of Devon Polaschek on behalf of Ara Poutama Aotearoa | Department of Corrections at 22. See too Jay Gormley, Melissa Hamilton and Ian Belton *The Effectiveness of Sentencing Options on Reoffending* (Sentencing Council, 30 September 2022) at 12–13.

<sup>25</sup> Issues Paper at [11.67].

<sup>26</sup> Email from Phil Meredith (Manager Strategic Analysis — Research & Analysis, Ara Poutama Aotearoa | Department of Corrections) to Samuel Mellor (Kaitohutohu | Legal and Policy Advisor, Te Aka Matua o te Ture | Law Commission) regarding data on preventive detention and ESOs (15 February 2024).

<sup>27</sup> Parole Act 2002, s 15(2).

paralleling behaviour.<sup>28</sup> Robust measures are needed for the court to be able to respond to breaches of condition flexibly and appropriately. The courts are also able to impose a sentence that responds appropriately to the breach, such as conviction and discharge, home detention or imprisonment. Convicting and sentencing a person for breaching a condition may deter that person or others from breaching conditions in future.

- 17.30 We suggested in the Issues Paper that there could be ways to ensure compliance and respond to risk that do not involve convictions and sentences.<sup>29</sup> We gave the example of the bail system, under which a court may vary bail conditions when a person has breached their conditions.

## RESULTS OF CONSULTATION

- 17.31 In the Issues Paper, we asked whether submitters thought that breaching an ESO condition should be an offence or whether other mechanisms should be used for ensuring compliance with ESO conditions.
- 17.32 Most submitters who addressed this question expressed dissatisfaction with the current approach.<sup>30</sup> These submitters included those with a criminal defence perspective such as Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and the Criminal Bar Association. Their complaints were that often charges are laid even if the breach of an ESO did not indicate risk of serious reoffending. Some noted that people subject to ESOs often struggle to comply with stringent conditions for understandable reasons such as that they might be disabled, have mental health or addiction issues or have issues with accommodation and support. Some submitters thought a more restorative approach ought to be considered. The Public Defence Service suggested that, if breaching an ESO was to remain an offence, there should be a higher threshold for a charging a breach so that a person may only be charged where the breach is indicative of risk.
- 17.33 Defence barrister Lara Caris thought that convictions for breaches often led to imprisonment and that alternative sentences such as community work or supervision were seldom considered.
- 17.34 Te Tari Ture o te Karauna | Crown Law Office submitted that breaching an ESO condition should remain an offence. It acknowledged the need to avoid prosecution where a breach does not indicate a risk of serious reoffending but said that charging a breach of an ESO is frequently a measure of last resort. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted that there is a need for an effective way to enforce compliance. It said, however, a regime that recognised that a person's rehabilitation journey may involve slip-ups is likely to lead to better outcomes than a more heavy-handed or punitive approach.

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<sup>28</sup> 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.

<sup>29</sup> Issues Paper at [11.64]–[11.66].

<sup>30</sup> Bond Trust, Lara Caris, Criminal Bar Association, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association. Te Tari Ture o te Karauna | Crown Law Office considered that breaching conditions should remain a criminal offence.

- 17.35 We did not ask consultation questions in the Issues Paper in relation to recall to prison or to escalation to more restrictive measures.

## PREFERRED APPROACH

### Consequences for non-compliance with conditions

#### PROPOSAL

P79

The new Act should provide that a person subject to a preventive measure who breaches any conditions of that measure without reasonable excuse commits an offence and is liable on conviction to imprisonment for a term not exceeding two years.

- 17.36 We conclude that conviction and sentence should continue to be a means through which the new Act responds to non-compliance with the conditions of a preventive measure.<sup>31</sup> Conviction and sentence are a conventional means of censuring non-compliance and deterring future non-compliance.<sup>32</sup> As discussed above and in the Issues Paper, non-compliance with conditions can indicate unmanaged risk and consist of offence-parallel behaviour. Robust measures are needed to respond to breaches of condition flexibly and appropriately.
- 17.37 By making non-compliance an offence, police will have power to arrest, without warrant, any person found engaging in conduct in breach of conditions.<sup>33</sup> This is of particular importance for residential preventive supervision. As we explain in Chapter 15, managers and staff at residential facilities should have no coercive powers apart from limited powers of inspection and confiscation attaching to the conditions of the preventive measure. Consequently, the appropriate response to a person absconding from a residential preventive supervision facility would be for police to arrest the person.
- 17.38 Not all breaches of conditions should be prosecuted. As discussed, a conviction and the prospect of returning to prison are severe consequences for non-compliance. In our view, prosecution should only be considered if the breach undermines the purposes of the regime, namely, the protection of the community from serious reoffending and the rehabilitation and reintegration of people considered at high risk of serious reoffending.<sup>34</sup> If a breach of condition does not meet this threshold, a criminal conviction may be a

<sup>31</sup> For the purposes of this proposal, a preventive measure should include an interim preventive measure. This would avoid the current issue arising in respect of interim supervision orders. Section 107TA of the Parole Act 2002 makes it an offence for any person subject to an ESO to breach a drug and alcohol condition. It omits to cover people who are subject to interim supervision orders.

<sup>32</sup> Nearly all comparable jurisdictions we examined make contravention of a supervisory order an offence punishable by imprisonment. See for example Crimes (High Risk Offenders) Act 2006 (NSW), s 12; Serious Sex Offenders Act 2013 (NT), s 46; Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 43AA; Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 41; Serious Offenders Act 2018 (Vic), s 169; and High Risk Serious Offenders Act 2020 (WA), s 80.

<sup>33</sup> Crimes Act 1961, s 315.

<sup>34</sup> For a definition of what might be considered a “serious contravention” of a condition, see Serious Offenders Act 2018 (Vic), s 172.

disproportionate response and unjustifiably heighten the punitive character of the regime. It may also be counter-productive to the long-term goal of community safety through the rehabilitation and reintegration of people subject to preventive measures. As the people we interviewed during consultation explained, return to prison can uproot a person and erase whatever reintegrative gains they may have made. The threat of prosecution could potentially lead to damaged or inhibited relationships between the person subject to the preventive measure and the person responsible for supervising them.

- 17.39 If a breach is prosecuted, the courts may impose a sentence from the full range of sentences available under the Sentencing Act 2002, from conviction and discharge to home detention to imprisonment. We would expect the sentence to be proportionate to the severity of the breach.
- 17.40 Prosecuting a breach of condition is, however, one among several possible responses to non-compliance. If the conduct that breached a condition is of itself a criminal offence, the person could be prosecuted for that offence rather than as a breach of condition. Non-compliance may also provide grounds for escalation in some cases. Non-compliance of a particularly severe nature may demonstrate that the preventive measure to which a person is subject is inadequate to prevent the person from serious reoffending. In that case, Ara Poutama might consider applying to escalate the preventive measure to a more restrictive measure (see proposals below). In some cases, however, enforcing a breach of condition by conviction and sentence may address the risks the person poses and be a less severe and restrictive option than escalating the person to a different preventive measure.
- 17.41 A decision to prosecute a breach should therefore engage with whether it is the appropriate response when considered against the alternative options available. While conviction and imprisonment for non-compliance will incapacitate the person and prevent them, temporarily at least, from reoffending, we caution that prosecution for non-compliance should not be treated as a de facto means of escalation. Rather, if a more restrictive preventive measure is required to address the risks the person presents, the appropriate course would be for the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) to apply for that measure.
- 17.42 We have considered the option of articulating in the legislation a threshold for when non-compliance should be prosecuted that reflects these considerations. This is not a common approach to prosecutorial decisions, and it does not feature in the law of any of the comparable jurisdictions we have examined. We therefore do not favour this approach.
- 17.43 We have also considered the option of involving the review panel (see Chapter 18) in decisions to prosecute condition breaches. For example, in Victoria, the Post Sentence Authority may inquire into an alleged contravention of a supervision order.<sup>35</sup> Upon inquiry, the Authority may do one or more of:
- (a) taking no action;
  - (b) warning the offender;
  - (c) varying any direction given to the offender;

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<sup>35</sup> Serious Offenders Act 2018 (Vic), s 170(1).

- (d) recommending a review of the conditions of the order;
- (e) recommending that an application be made for a detention order; or
- (f) recommending that criminal proceedings be commenced against the offender in respect of the contravention.

17.44 While this approach adds extra scrutiny and accountability for decisions to prosecute breaches of conditions, it would also increase the administration involved. On balance, we do not think that involving the proposed review panel in a similar role is desirable. In addition, although the Victorian legislation sets out what responses the Post Sentence Authority may consider taking, it provides no guidance on which response would be appropriate in any particular case.

### Escalation to a more restrictive preventive measure

#### PROPOSAL

P80

Te Kōti Matua | High Court should have power to order that a preventive measure to which a person is subject be terminated and a more restrictive preventive measure be imposed if:

- a. the person would, if they were to remain subject to the preventive measure, pose such an unacceptably high risk to the community, themselves or others that they cannot be safely managed under that preventive measure; and
- b. all less restrictive options for managing the behaviour of the person have been considered and any appropriate options have been tried.

17.45 The new Act should provide an avenue to escalate a person to a more restrictive preventive measure. There may be some people who cannot be safely managed on the preventive measure to which they were initially made subject. For example, their risk of serious reoffending may increase or may not have been fully appreciated at the time of the original order. It may be that the facilities at which a person is detained cannot provide the security and supervision required to ensure the safety of the person themselves, other residents or staff at the facility or the community.<sup>36</sup>

17.46 We are mindful too that, if a person cannot be moved to a more restrictive measure, a cautionary practice of subjecting people to unnecessarily severe measures may arise because there would be no later opportunity to respond to elevated risk.<sup>37</sup>

<sup>36</sup> See for example *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305 (upheld on appeal *Pori v Chief Executive of the Department of Corrections* [2023] NZCA 407) and *Chief Executive of the Department of Corrections v Waiti* [2023] NZHC 2310 in which individuals had been made subject to ESOs with intensive monitoring conditions. The Court granted applications against them for a PPO or interim detention order because, while on the ESO, the individuals posed risks of absconding and risks to the safety of staff and other residents at the facilities.

<sup>37</sup> By analogy, before amendments in 2014, ESOs could be imposed for a maximum term of 10 years, after which no further ESO could be imposed. During this period, we understand that Ara Poutama Aotearoa | Department of Corrections frequently sought ESOs for the maximum 10-year term on the basis there would be no future opportunity to extend the period of the ESO.

- 17.47 To escalate a person to a more restrictive measure, the chief executive should be required to apply to the High Court. We think this should be the case for people subject to community preventive supervision, who would be escalated to residential preventive supervision, and for people subject to residential preventive supervision, who would be escalated to secure preventive detention. We consider that giving the High Court jurisdiction for escalation applications to residential preventive supervision and to secure preventive detention is consistent with our approach that the High Court has jurisdiction to impose and review these two measures.
- 17.48 We propose that the chief executive should be able to apply for escalation at any point during the period a person is subject to any preventive measure. This may appear a broader approach than the current law because a PPO may only be imposed on people subject to ESOs with an intensive monitoring condition or a condition requiring the long-term full-time placement of the person. In practice, however, Ara Poutama will sometimes apply for the imposition of a new ESO with more restrictive conditions to replace an existing ESO,<sup>38</sup> thereby enabling eligibility for a PPO.<sup>39</sup> Our preferred approach therefore reflects what can already be achieved in practice but provides a more responsive and efficient procedure.
- 17.49 The new Act should provide a separate and targeted test to determine whether a person should be escalated to a more restrictive measure. The test we propose differs from the primary legislative tests we propose in Chapter 10 for the imposition of the initial preventive measure for the following reasons:
- (a) The primary tests proposed in Chapter 10 are framed around the risks of the person committing a further qualifying offence if the preventive measure sought was not imposed on them. The test for escalation operates in a different context. It should focus on the risk posed by the person with a preventive measure already in place — more specifically the risks posed by the person to the community, themselves or other residents or staff at secure preventive detention facilities or residential preventive supervision facilities.
  - (b) Imposing a more restrictive preventive measure would further infringe the protection against second punishment under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) beyond the imposition of the initial measure. It is important then that a more restrictive measure be justified.
- 17.50 The test we propose incorporates elements to address these matters. It is modelled on the test for imposing a prison detention order under the PPO Act and how it has been applied by the courts.<sup>40</sup> By focusing on whether the person presents an “unacceptable risk”, the court would make a value judgement as to what risk should be accepted against

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<sup>38</sup> See for example *Te Pania v Chief Executive of the Department of Corrections* [2023] NZCA 161; *Chief Executive of the Department of Corrections v Aima'asu (aka Tima)* [2016] NZHC 603; and *Chief Executive of the Department of Corrections v Ranui* [2016] NZHC 1174.

<sup>39</sup> As occurred in the proceedings in *Department of Corrections v Pori* [2017] NZHC 3082 (imposition of a new ESO with an intensive monitoring condition) and *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305 (subsequent imposition of a PPO).

<sup>40</sup> Public Safety (Public Protection Orders) Act 2014, s 85(2); *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581; and *Chief Executive of the Department of Corrections v Waiti* [2023] NZHC 2310.

the alternative of escalating the person to a more restrictive measure.<sup>41</sup> The assessment of risk would be as to the nature and degree of risk in the particular circumstances of the person and the preventive measure to which they are subject.<sup>42</sup> The test of “unacceptable risk” recognises that some risk may be acceptable, but the risk to the person themselves, residents or staff at the facility and the community should not be more than is tolerable or acceptable.<sup>43</sup>

17.51 We also propose that the chief executive be required to demonstrate that options for managing the behaviour of the person on the preventive measure have been considered and, where appropriate, tried. This should include consideration of whether the review panel ought to vary any of the conditions applying to the preventive measure (discussed further in Chapter 18).

17.52 The test we propose does not limit the court to imposing the next most restrictive preventive measure. It would be possible for the court to order that a person subject to community preventive supervision be made subject to secure preventive detention. We would, however, expect this to be rare.

## Prison detention orders

### PROPOSALS

P81

Te Kōti Matua | High Court should have power to order that a person subject to secure preventive detention be detained in prison if:

- a. the person would, if they were to remain subject to secure preventive detention, pose such an unacceptably high risk to the community, themselves or others that they cannot be safely managed on secure preventive detention; and
- b. all less restrictive options for managing the behaviour of the person have been considered and any appropriate options have been tried.

P82

A person who te Kōti Matua | High Court has ordered to be detained in prison should:

- a. be treated in the same way as a prisoner who is committed to prison solely because they are awaiting trial;
- b. have the rights and obligations of such a prisoner; and
- c. have all the rights conferred on that person under the new Act to the extent that those rights are compatible with the provisions of the Corrections Act 2004 that apply to prisoners who are committed to prison solely because they are awaiting trial.

<sup>41</sup> *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [53].

<sup>42</sup> *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [53].

<sup>43</sup> *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [53].

- 17.53 In our view, recall to prison should not be a means of escalation. The preventive measures we propose under the new Act would operate as a post-sentence regime. The sentence in respect of a person's qualifying offending will come to an end before a preventive measure takes effect. It follows that there should be no recall to prison under the new Act tied to a prior prison sentence.
- 17.54 A difficult question, however, is whether, as a matter of last resort, there ought to be the ability to escalate a person subject to secure preventive detention to detention in prison. We propose in Chapter 16 that secure preventive detention should be administered in secure facilities separate from prisons. We reason that facilities separate to prison can better provide for detainees' quality of life and support their rehabilitation and reintegration. We also note the discussion above that return to prison can have a highly detrimental impact on a person. To remove a person from a secure preventive detention facility to prison would be a significant step.
- 17.55 On the other hand, there may be people who need to be placed in prison-like conditions to manage their behaviour. For example, they may need to be secluded and placed in rooms with no moveable items. As we propose in Chapter 16, managers of secure facilities should be equipped with powers to restrain a detainee and seclude them.
- 17.56 We have considered whether to propose that there be no avenue to detain a person in prison on the expectation that all behaviour should be managed within secure preventive detention facilities. We do not, however, prefer this approach. Instead, we propose that detention in prison should continue to be available as an option of last resort in some cases for the following reasons:
- (a) Secure preventive detention facilities should, to the extent possible, be run to provide a safe and therapeutic environment for all detainees. This will provide humane treatment and as much quality of life as possible. Requiring a facility to be run with heightened security — such as the removal of furniture, kitchenware and other amenities and to have some detainees separated from communal life within the facility — could have considerable impact on the facility and other detainees.
  - (b) We understand that staff safety can be better managed in prisons. For example, a prison officer who is the target of specific threats can be moved to other areas or otherwise separated from the prisoner. In the confines of a smaller secure preventive detention facility, it may be more difficult to manage unsafe staff and detainee relationships.
  - (c) We anticipate that, if a detainee was to be managed in high security conditions within a secure preventive detention facility, their quality of life would be qualitatively similar to that within prison. Indeed, it may be that prison provides better quality of life such as better opportunities to socialise with other prisoners.
- 17.57 We therefore propose that the High Court should have the ability to impose a prison detention order based on the same test that currently features in the PPO Act.<sup>44</sup>

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<sup>44</sup> Public Safety (Public Protection Orders) Act 2014, s 85.



- 17.58 We propose that a person ordered to be detained in prison should be treated in the same way as prisoners on remand. This should, however, be subject to the additional rights given to people subject to preventive measures under the new Act. In particular, it is important that people detained in prison continue to have the same right to rehabilitative and reintegrative treatment and programmes.
- 17.59 As we propose in Chapter 18, the continuing justification for the detention in prison should be periodically and regularly reviewed by both the High Court and the independent review panel.
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**CHAPTER 18**

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# Duration and reviews of preventive measures

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**IN THIS CHAPTER, WE CONSIDER:**

- issues relating to inconsistencies and a lack of clarity with the current mechanisms to review preventive measures;
- proposals for what period preventive measures should be imposed and under which conditions they should be suspended; and
- proposals for how preventive measures under the new Act should be reviewed, varied and terminated.

**INTRODUCTION**

- 18.1 In this chapter, we consider the duration for which preventive measures are imposed and the ways in which they can be reviewed, varied and terminated. These are important matters. Human rights law requires that the ongoing justification for preventive measures needs to be regularly and periodically tested. Where a measure is no longer justified, it is imperative that the restrictions of a person's rights and freedoms be removed.
- 18.2 There are several issues with the current law that we conclude should be addressed through reformed review mechanisms under the new Act. Our preferred approach is for preventive measures to be in place until terminated by a court, subject to rigorous reviews to ensure that preventive measures are in force no longer than is justified.
- 18.3 The measures should be periodically reviewed by both the courts and a review panel to ensure they remain justified. On review, the court should have powers to confirm, vary or terminate the preventive measure. The review panel should be able to either confirm the measure, vary its conditions or trigger a court review if it considers the measure should be terminated. We also propose avenues for the variation or termination of preventive measures in between periodic reviews.

## CURRENT LAW

### Preventive detention

- 18.4 Preventive detention is an indeterminate sentence.<sup>1</sup> It does not have a fixed expiry date.
- 18.5 A person subject to preventive detention will remain in prison unless they are granted release on parole by the New Zealand Parole Board (Parole Board).<sup>2</sup> A person becomes eligible for parole once they have served the minimum period of imprisonment set at sentencing.<sup>3</sup>
- 18.6 When deciding whether to grant parole, the Parole Board assesses whether the person in question will pose an undue risk to the safety of the community if released.<sup>4</sup> The Parole Board must consider an offender for parole at least once every two years until it is granted.<sup>5</sup>
- 18.7 If released, a person is subject to the standard release conditions under the Parole Act 2002 for life (unless the conditions are discharged by the Parole Board).<sup>6</sup> The person subject to parole or their probation officer may apply to the Parole Board to vary or discharge any parole conditions.<sup>7</sup> They can be recalled to prison for the rest of their life, for example, if they breach release conditions.<sup>8</sup>

### Extended supervision orders

- 18.8 Extended supervision orders (ESOs) are imposed for a term not exceeding 10 years. An ESO expires at the end of its term unless the sentencing court cancels it earlier.<sup>9</sup> Before an ESO expires, the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) may apply for a new, consecutive ESO, which means ESOs can be imposed repeatedly without limit.<sup>10</sup>
- 18.9 If, because of the imposition of consecutive ESOs, a person has not ceased to be subject to an ESO for 15 years, the sentencing court must review the ESO. The court reviews the reoffending risk during the remaining period of the ESO rather than “the future”, which is used in the original legislative test.<sup>11</sup> After the initial review, the court must review the ESO

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<sup>1</sup> Sentencing Act 2002, ss 4 definition of “indeterminate sentence of imprisonment”, 87 and 89.

<sup>2</sup> Parole Act 2002, s 86(3).

<sup>3</sup> Parole Act 2002, ss 20(1)(a) and 84(2).

<sup>4</sup> Parole Act 2002, s 28(2).

<sup>5</sup> Parole Act 2002, s 21.

<sup>6</sup> Parole Act 2002, s 29(4)(b).

<sup>7</sup> Parole Act 2002, s 56(1)–(2).

<sup>8</sup> Parole Act 2002, ss 6(4)(d) and 61.

<sup>9</sup> Parole Act 2002, s 107I(4).

<sup>10</sup> Parole Act 2002, s 107F(1)(b).

<sup>11</sup> Parole Act 2002, s 107RA(1)–(2).

within five years after the imposition of any and each new ESO.<sup>12</sup> The court must either confirm or cancel the ESO.<sup>13</sup>

- 18.10 At any time, the person subject to the ESO or the chief executive may apply to the sentencing court to cancel the order.<sup>14</sup> If the court declines to cancel the ESO, it can also order that the offender is not be permitted to apply for cancellation for a period of up to two years.<sup>15</sup>
- 18.11 In addition to the court review of the order itself, the Parole Board must review “high-impact conditions” every two years after the condition in question was imposed, confirmed or varied.<sup>16</sup> The Parole Board must also review certain special conditions every two years if they have the combined effect of requiring a person to participate in a rehabilitative programme and reside with the programme provider.<sup>17</sup> Following a review, the Parole Board may confirm, discharge or vary the relevant conditions.<sup>18</sup>
- 18.12 The person subject to an ESO or their probation officer may apply to the Parole Board at any time to vary or discharge any ESO condition other than an intensive monitoring condition.<sup>19</sup>
- 18.13 An ESO is suspended if the person subject to it is taken into custody, and it is cancelled if the person receives an indeterminate sentence.<sup>20</sup>

### Public protection orders

- 18.14 Public protection orders (PPOs) do not have an end date. They end only when cancelled by te Kōti Matua | High Court following a review. The High Court must cancel the PPO if the legislative test is no longer met and impose a protective supervision order instead.<sup>21</sup> If it does not find that the PPO must be cancelled, it must instead review whether the person’s management plan is still appropriate.<sup>22</sup>
- 18.15 The chief executive must apply to the High Court for a periodic review of a PPO every five years.<sup>23</sup> The person subject to a PPO may themselves, with the leave of the court, apply to the High Court for a review of the PPO at any time.<sup>24</sup>

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<sup>12</sup> Parole Act 2002, s 107RA(2).

<sup>13</sup> Parole Act 2002, s 107RA(5).

<sup>14</sup> Parole Act 2002, s 107M(1).

<sup>15</sup> Parole Act 2002, s 107M(6).

<sup>16</sup> A high-impact condition is a residential condition that requires the offender to stay at a specified residence for more than a total of 70 hours during any week or a condition requiring the offender to submit to electronic monitoring: Parole Act 2002, s 107RB(1).

<sup>17</sup> Parole Act 2002, s 107RC(1)–(2).

<sup>18</sup> Parole Act 2002, ss 107RB(5) and 107RC(5).

<sup>19</sup> Parole Act 2002, s 107O(1)–(1A).

<sup>20</sup> Parole Act 2002, ss 107P–107Q.

<sup>21</sup> Public Safety (Public Protection Orders) Act 2014, ss 18(4) and 93(1).

<sup>22</sup> Public Safety (Public Protection Orders) Act 2014, s 19.

<sup>23</sup> Public Safety (Public Protection Orders) Act 2014, s 16(1)(a)–(c). Note that the court can extend this interval to up to 10 years: s 16(2).

<sup>24</sup> Public Safety (Public Protection Orders) Act 2014, s 17(1).

- 18.16 PPOs are also subject to annual reviews by a review panel established under the Public Protection (Public Protection Orders) Act 2014 (PPO Act).<sup>25</sup> If the review panel considers that the legislative test of a PPO (“very high risk of imminent serious sexual or violent offending”) is no longer met, it may direct the chief executive to apply to the High Court for a review of the order.<sup>26</sup> If the review panel does not make a direction to the chief executive to apply for a court review, it must review whether the person’s management plan is still appropriate.<sup>27</sup>
- 18.17 The review panel consists of six members appointed by the Minister of Justice.<sup>28</sup> Two of the members must be health assessors (registered and practising psychiatrists or registered psychologists), and four members must have experience in the operation of the Parole Board.<sup>29</sup>
- 18.18 The chief executive must provide certain reports to the review panel, including the most recent assessment of the person by a health assessor, the person’s management plan and any further supplementary reports requested by the review panel.<sup>30</sup> Additionally, the review panel must interview the person subject to the PPO unless they do not wish to be interviewed.<sup>31</sup>

## ISSUES

- 18.19 We have identified several issues concerning the review mechanisms for preventive detention and ESOs but few with PPOs. We do not take this as an indication that there are no problems with the way PPOs are reviewed and terminated. The lack of critical commentary about PPOs is likely because so few people have been subject to a PPO, and as far as we are aware, no person has yet been placed on a protective supervision order.

### Issues concerning preventive detention

#### *Concerns that people on preventive detention do not have the right to apply to court for review*

- 18.20 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) places two types of review obligations on state parties in relation to detention:<sup>32</sup>
- (a) First, article 9(1) requires that periodic reviews are carried out by an independent body to decide whether continued detention is justified.<sup>33</sup> The United Nations Human

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<sup>25</sup> Public Safety (Public Protection Orders) Act 2014, s 15(1).

<sup>26</sup> Public Safety (Public Protection Orders) Act 2014, s 15(2).

<sup>27</sup> Public Safety (Public Protection Orders) Act 2014, s 15(3).

<sup>28</sup> Public Safety (Public Protection Orders) Act 2014, s 122(2).

<sup>29</sup> Public Safety (Public Protection Orders) Act 2014, s 122(5).

<sup>30</sup> Public Safety (Public Protection Orders) Act 2014, s 112.

<sup>31</sup> Public Safety (Public Protection Orders) Act 2014, s 113.

<sup>32</sup> For example MacKenzie J made this distinction in *Miller v Parole Board of New Zealand* (2008) 24 CRNZ 104 (HC) at [18]–[19].

<sup>33</sup> Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [12] and [21]; and *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC) at [7.3].

Rights Committee (UNHRC) has stated repeatedly that the Parole Board fulfils the criteria for being an “independent body”.<sup>34</sup>

- (b) Second, article 9(4) requires that a person detained can take proceedings before a court at any time to determine the lawfulness of the detention and order their release if the detention is unlawful. The UNHRC has found in *Miller v New Zealand* that the Parole Board does not constitute a “court” for the purposes of article 9(4) of the ICCPR.<sup>35</sup>

18.21 Aotearoa New Zealand’s compliance with article 9(1) is not contentious, but there has been some confusion about the scope of, and compliance with, article 9(4). In the Issues Paper, we noted that, in finding breaches of article 9(4) of the ICCPR, 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 assessments and judicial review of those decisions. This is not quite right, as a person subject to preventive detention can apply to court to determine whether detention is lawful by way of judicial review and habeas corpus.<sup>36</sup>

18.22 When considering habeas corpus applications, however, New Zealand courts will not apply the ICCPR’s standards of what constitutes a “lawful” detention. The UNHRC stated that “unlawful” detention for the purposes of article 9(4) “includes both detention that violates domestic law and detention that is incompatible with the requirements of [article 9(1)] or with any other relevant provision of the Covenant”.<sup>37</sup> It also includes “detention that was lawful at its inception but has become unlawful because ... the circumstances that justify the detention have changed”.<sup>38</sup> However, when determining whether the detention is unlawful, the New Zealand courts will consider only whether the detention has been imposed and reviewed in accordance with the Sentencing Act 2002 and Parole Act.<sup>39</sup>

### **The provisions governing release on parole do not sit comfortably with human rights law**

- 18.23 As discussed in more detail in Chapter 4, 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.<sup>40</sup>
- 18.24 Section 28(2) of the Parole Act provides that the Parole Board may direct a person’s release on parole only if it is satisfied on reasonable grounds that “the offender ... will not

<sup>34</sup> *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC) at [7.3]; Human Rights Committee *Communication 1385/2005* UN Doc CCPR/C/91/D/1385/2005 (14 November 2007) at [7.3]; and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.15].

<sup>35</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.15]. See also *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC) at [7.2].

<sup>36</sup> Habeas Corpus Act 2001, s 6; and New Zealand Bill of Rights Act 1990, s 23(1)(c).

<sup>37</sup> Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [44].

<sup>38</sup> Human Rights Committee *General comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [43].

<sup>39</sup> *Miller v New Zealand Parole Board* [2010] NZCA 600 at [70].

<sup>40</sup> See *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3]; and *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC) at [7.3].

pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence”.

- 18.25 The Parole Act also states that “the offender has no entitlement to be released on parole”.<sup>41</sup> However, in *Vincent v New Zealand Parole Board*, the High Court stated that this provision must be interpreted consistently with the New Zealand Bill of Rights Act 1990. It explained that, if a person imprisoned on preventive detention no longer constitutes an undue risk, there is no basis to maintain the detention.<sup>42</sup>
- 18.26 In the Issues Paper, we stated our preliminary view that the wording of the legislative test should reflect the approach the courts apply in practice. We said it may be preferable that the tests expressly 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. We added that the wording in section 28(1AA) of the Parole Act that a person on preventive detention has “no entitlement to be released on parole” should be omitted.<sup>43</sup>

### Concerns with the “increasing justification” test

- 18.27 When examining the right to liberty and protection against arbitrary detention in the context of preventive detention, the courts and the UNHRC have suggested the test for justifying the detention changes over time.
- 18.28 In *Miller v New Zealand*, the UNHRC commented in relation to article 9 of the ICCPR that “as the length of preventive detention increases, the State party bears an increasingly heavy burden to justify continued detention”.<sup>44</sup> It concluded that “a level of risk which might reasonably justify a short-term preventive detention, may not necessarily justify a longer period of preventive detention”.<sup>45</sup>
- 18.29 In the Issues Paper, we said that 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.<sup>46</sup>
- 18.30 We expressed concern that an increasing justification test would result in unintended situations where a person posing a lesser risk is detained while a person posing a higher

<sup>41</sup> Parole Act 2002, s 28(1AA).

<sup>42</sup> *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [87].

<sup>43</sup> Te Aka Matua o te Ture | Law Commission *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* (NZLC IP51, 2023) (Issues Paper) at [11.39].

<sup>44</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.5].

<sup>45</sup> *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.5].

<sup>46</sup> Issues Paper at [11.43]–[11.44].

risk is released. Instead, we said our preliminary view was that the initial justification for imposing preventive detention should be high and remain the same in subsequent reviews.<sup>47</sup>

## Issues concerning extended supervision orders

### *Separate jurisdictions for cancelling and for varying extended supervision orders*

- 18.31 As noted above, the sentencing court and Parole Board share responsibility for different elements of the imposition of an ESO. Two issues arise from the separate jurisdictions for cancelling and for varying ESOs.
- 18.32 First, the court can either confirm an ESO or cancel it. It has no jurisdiction to vary the conditions. If the applicant unsuccessfully applies to cancel the ESO, they must then make a separate application to the Parole Board to vary conditions. This can cause procedural inefficiencies.
- 18.33 Second, it is unclear whether the Parole Board can vary an intensive monitoring (IM) condition. The Parole Board may not impose an IM condition unless a court has ordered it. If the court does order an IM condition, the Parole Board must impose it.<sup>48</sup> Generally, the Parole Board may vary any condition. It may not, however, vary any ESO condition in a way that would be contrary to a court order for an IM condition.<sup>49</sup>
- 18.34 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 and then immediately cancelling it, but other scenarios are less clear. For example, a court could order the Parole Board to impose an IM condition for six months. It is not clear whether the Parole Board could reduce the term from six to four months a while after imposing the IM condition or if this, too, would amount to varying the condition “in a way that would be contrary” to the order of the court.
- 18.35 These two issues relate to the broader issue caused by the division of order-making and condition-setting jurisdictions for ESOs. We consider this overarching issue in more detail in Chapter 10.

### *Extended supervision order review periods are unclear*

- 18.36 The sentencing court must review an ESO after 15 years if the person has not ceased to be subject to an ESO since first becoming subject to an ESO.
- 18.37 It is unclear if and when an ESO starts or ends if an interim supervision order, an interim detention order or a PPO is imposed in between ESOs.
- 18.38 In the Issues Paper, our preliminary view was that:
- (a) any time spent on an interim supervision order should be included in the calculation of the ESO review period;

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<sup>47</sup> Issues Paper at [11.45].

<sup>48</sup> Parole Act 2002, s 107IAC.

<sup>49</sup> Parole Act 2002, s 107O(1A).



- (b) any time spent on an interim detention order, if a PPO is not subsequently granted, should be included in the calculation of the ESO review period; and
- (c) ESO review obligations should end if the court makes a PPO.

## RESULTS OF CONSULTATION

- 18.39 We did not make specific proposals in relation to review mechanisms in the Issues Paper. We did, however, express preliminary views on some issues related to the variation and termination of preventive measures and asked for submitters' opinions on them.
- 18.40 We asked submitters several questions concerning preventive detention and ESOs. We also asked whether there are any issues relating to the variation or termination of PPOs but did not receive any responses to this question.

### Questions concerning preventive detention

- 18.41 Although we propose preventive detention should not continue under the new Act (see Chapter 4), we consider that submitters' answers to consultation questions in the context of preventive detention also signal their preferences about variation and termination in a post-sentence order regime.
- 18.42 First, we asked submitters whether the courts, rather than the Parole Board, should have greater responsibilities for reviewing preventive detention. Most submitters who addressed this question thought that courts should have greater responsibilities for reviewing preventive detention.<sup>50</sup> The South Auckland Bar Association added that a right of habeas corpus alone does not suffice because of its narrow scope. Lara Caris thought there should be an appeal right to the court in respect of Parole Board decisions. She considered the current review mechanisms of the Parole Board decisions to be inadequate.
- 18.43 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Te Tari Ture o te Karauna | Crown Law Office disagreed. The NZLS thought that the determination of whether someone serving a sentence of preventive detention should be released should remain with the Parole Board. The Crown Law Office criticised the UNHRC's finding in *Miller* that the Parole Board does not meet the definition of a court for the purposes of article 9(4) of the ICCPR.
- 18.44 Second, we asked whether the test for release on parole from preventive detention should expressly recognise a person's right to liberty except when justified by compelling reasons relating to community safety. All submitters who responded to this question agreed that this should be the case.<sup>51</sup>
- 18.45 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and the NZLS added that this is already the approach taken. The NZLS acknowledged, however, that the suggested amendments may increase transparency and clarity. Dr Tony Ellis referred to the

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<sup>50</sup> Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>51</sup> Dr Jordan Anderson, Bond Trust, Criminal Bar Association, Dr Tony Ellis, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

European Court of Human Rights' line of jurisprudence that, at a minimum, periodic judicial reviews of indeterminate detention are required after 25 years of detention.

- 18.46 Third, we asked submitters whether they thought the test for release from detention for people sentenced to preventive detention should require “increasing justification” over time. The majority of submitters who answered this question agreed with our preliminary view that it should not.<sup>52</sup> The New Zealand Council of Civil Liberties and the Criminal Bar Association disagreed. They thought that the initial justification requirement should be high and should increase over time.

### Questions concerning extended supervision orders

- 18.47 In the Issues Paper, we asked submitters several questions concerning reviews, variation and cancellation of ESOs.
- 18.48 First, we asked submitters whether the law relating to the Parole Board's ability to vary an IM condition needs clarification. The Bond Trust, The Law Association and the Criminal Bar Association agreed that clarification was needed, whereas the Public Defence Service and the NZLS disagreed. The Public Defence Service added, however, that legislative clarification in this regard could still be useful “to ensure that both the court and the Parole Board engage with what the appropriate length of IM should be”.
- 18.49 Second, we asked whether submitters agreed that an ESO should be suspended if an interim detention order is made. Most submitters who answered this question agreed that an ESO should be suspended if an interim detention order is made.<sup>53</sup> The Law Association added that would happen in practice anyways. Relatedly, Lara Caris said she was unable to see the rational basis for the automatic suspension of an ESO when an individual becomes subject to a supervening sentence of imprisonment. She added that it would cause undue extensions of the ESO period unless the imprisonment occurred in reaction to qualifying offending.
- 18.50 We also asked whether submitters agreed that an ESO should come to an end if a PPO is ordered. Most submitters who responded to this question agreed an ESO should end if a PPO is made.<sup>54</sup>

## PREFERRED APPROACH

### Duration of preventive measures

#### PROPOSAL

P83

The new Act should provide that a preventive measure is indeterminate and remains in force until it is terminated by a court.

<sup>52</sup> Bond Trust, Dr Tony Ellis, Te Kāhui Ture o Aotearoa | New Zealand Law Society Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association.

<sup>53</sup> Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>54</sup> Bond Trust, Criminal Bar Association, New Zealand Council for Civil Liberties and Te Kāhui Ture o Aotearoa | New Zealand Law Society, The Law Association.

- 18.51 The aim of making the period of preventive measures indeterminate is to provide the flexibility to ensure that they are in place for only as long as necessary to protect the community — not any longer or shorter. Imposing indeterminate preventive measures must be coupled with rigorous review obligations, which we propose further below.
- 18.52 Given our concerns with indeterminate imprisonment as a preventive measure (see Chapter 5), we have considered alternatives to the approach of imposing the new preventive measures indeterminately.
- 18.53 The first alternative to indeterminate orders we have considered is providing for fixed-term orders that can be renewed. The difference between our proposal and this option is subtle. The former relies on reviews that assess whether the measure should remain in place, whereas the latter relies on reviews that assess whether the measure should be reimposed. In effect, however, both amount to the availability of indeterminate restriction.
- 18.54 We acknowledge that the imposition of an indeterminate preventive measure may invoke feelings of hopelessness in the person subject to the measure (as it currently does for some of the people we have interviewed who are subject to preventive detention). An alternative approach whereby the term of a preventive measure may be repeatedly renewed may be equally if not more frustrating and disheartening for some. In our view, it is better to describe preventive measures clearly as indeterminate and communicate that a preventive measure will only cease once the reoffending risk has reduced.
- 18.55 The second alternative to indeterminate orders we have considered is imposing preventive measures as determinate orders without any possibility of renewal. We have concluded, however, that ongoing safety concerns after the period has expired would undermine the community safety objective of the measure. Our comparative analysis supports this conclusion. None of the comparable jurisdictions we have analysed provide for an end date of detention for preventive purposes beyond which it cannot be extended. Only very few provide for fixed-term supervision orders that cannot be renewed upon expiry.<sup>55</sup> Removing the ability of continued or renewed preventive measures may also lead to the imposition of excessively long terms for preventive measures as a matter of precaution.
- 18.56 In short, we consider that imposing preventive measures for as long as needed is more flexible and clearer than the first alternative and more effective in protecting community safety than the second alternative.
- 18.57 As noted, there is some uncertainty how an interim supervision order, an interim detention order or a PPO affects the term of an ESO. Making preventive measures indeterminate avoids the fraught task of providing for what impact intervening orders might have on the preventive measure's duration.
- 18.58 Finally, we propose that all — rather than only some — preventive measures should be imposed indeterminately. The three preventive measures we propose are intended to provide a gradation of restrictions to respond to different levels of risk. The legislative tests we propose in Chapter 10 are designed to direct the court to impose the least restrictive of these measures that would be adequate to address the reoffending risks a

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<sup>55</sup> In Canada, “long-term supervision” cannot be extended beyond a certain period (10 years, in this case): Criminal Code RSC 1985 c C-46, s 755(2). A post-sentence supervision order in Western Australia is determinate but has no minimum or maximum duration: High Risk Serious Offenders Act 2020 (WA), s 27(2).

person poses. Preventive measures with terms of differing duration may distort this assessment. It could lead to outcomes where a person's risk may not appropriately correlate to the preventive measure to which they are subject.<sup>56</sup> We also consider that uniform duration across all preventive measures best serves our aim to provide for a coherent regime that allows for movement between different measures when a person's risk subsides or increases.

## Suspension and termination of preventive measures

### PROPOSALS

P84

Under the new Act, a preventive measure to which a person is subject should be suspended while that person is detained in a prison (except under a prison detention order or a sentence of life imprisonment). Community preventive supervision and residential preventive supervision should remain suspended during any period the person is released from prison (if applicable) until the sentence expiry date. Secure preventive detention should reactivate once the person is no longer detained in a prison.

P85

A preventive measure a person is subject to should continue in force while that person is serving a community-based sentence or a sentence of home detention.

- 18.59 It is possible for a person to be made subject to a new criminal sentence while they are subject to a preventive measure. This will usually be if the person is convicted and sentenced for a new offence during the time a preventive measure is in effect. We consider that sentences of imprisonment should operate in place of a preventive measure, so any preventive measure in force should be suspended while the person is detained in prison.
- 18.60 We also propose that community preventive supervision and residential preventive supervision should, in line with the current rules of the Parole Act, continue to be suspended if a person serving an intervening long-term sentence of imprisonment is released on parole.<sup>57</sup> It is conceivable that a person is found not to be an undue risk to the community for the purposes of the Parole Act after having previously been found to be at a high risk of reoffending for the purposes of the new Act. While a person is on parole, they can be made subject to similar conditions as the conditions that are available under community preventive supervision and residential preventive supervision. If a person successfully serves the rest of their sentence on parole without being recalled to prison, this may serve as evidence that the preventive measure in place should be varied or terminated.

<sup>56</sup> By way of comparison, in some instances, the chief executive of Ara Poutama Aotearoa | Department of Corrections has sought PPOs against a person because, while they could be safely managed on an ESO, conditions like intensive monitoring are only available for limited periods. See for example *Deputy Chief Executive of Department of Corrections v McCorkindale* [2020] NZHC 2484 at [56].

<sup>57</sup> Parole Act 2002, s 107P(1)(b).

- 18.61 At the same time, we do not consider it should be possible under the new Act for a person subject to secure preventive detention who is serving an intervening long-term prison sentence to be released on parole. This scenario may be unlikely given that the high risks a person subject to secure preventive detention poses would need to significantly subside during the prison sentence to be found not to be an undue risk to the community and granted parole. However, we consider the new Act should expressly provide for this scenario in line with the current provision on suspension of orders under the PPO Act.<sup>58</sup>
- 18.62 Community-based sentences and sentences of home detention may not provide the same level of community safety as the preventive measure. The preventive measure should therefore remain in force alongside such sentences. Suspending preventive measures for sentences of imprisonment but not for community-based sentences and sentences of home detention is in line with the current provisions on the suspension of ESOs under the Parole Act.<sup>59</sup>
- 18.63 In Chapter 5, we propose that a preventive measure should be suspended while a person is subject to a compulsory treatment order or a compulsory care order under the relevant mental health and intellectual disability legislation. We also propose in that chapter that, while the preventive measure is suspended, a probation officer should be able to reactivate any conditions of residential preventive supervision or community preventive supervision to supplement the conditions of a compulsory treatment order or a compulsory care order where necessary to maintain community safety.

#### PROPOSAL

P86

A preventive measure to which a person is subject should be suspended while an interim preventive measure is in force in relation to that person. If the court declines the application for the substantive preventive measure to which the interim measure relates, the suspended preventive measure should reactivate. If the court grants the application for the new substantive preventive measure, the suspended preventive measure should terminate.

- 18.64 In Chapter 17, we propose that the chief executive should be able to apply to the court for the imposition of a more restrictive preventive measure on a person already subject to a preventive measure. It should also be possible for the chief executive to seek interim orders pending the application for the more restrictive measure. We propose that preventive measures should be suspended while an interim preventive measure is in force. If the court ultimately declines the substantive application, the former preventive measure should reactivate.

#### PROPOSAL

P87

A preventive measure to which a person is subject should terminate if a sentence of life imprisonment is imposed on that person.

<sup>58</sup> Public Safety (Public Protection Orders) Act 2014, s 139.

<sup>59</sup> Parole Act 2002, ss 107P–107Q.

18.65 Under a sentence of life imprisonment, a person must remain in prison until they are released on direction of the Parole Board on the basis they do not pose an undue risk to the community. Like preventive detention, a person subject to a sentence of life imprisonment will remain on parole conditions and be subject to recall for life. Life imprisonment therefore contains features to protect the public without the need for preventive measures. It follows that a preventive measure should terminate if a sentence of life imprisonment is imposed on a person subject to a preventive measure, as is currently the case with people subject to ESOs.<sup>60</sup>

## Periodic reviews of preventive measures

### Court reviews

#### PROPOSALS

P88

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections should apply to the court for a review of a preventive measure no later than three years after the court has finally determined the application to impose the measures. For subsequent reviews, the chief executive should apply for a review of the preventive measure no later than three years after the court has finally determined the previous application for review.

P89

Applications for a review of community preventive supervision should be made to te Kōti-a-Rohe | District Court. Applications for the review of residential preventive supervision or secure preventive detention should be made to te Kōti Matua | High Court.

P90

To accompany an application, the chief executive of Ara Poutama Aotearoa | Department of Corrections should submit:

- a. one health assessor report for the review of community preventive supervision or two health assessor reports for the review of residential preventive supervision and secure preventive detention; and
- b. the decisions of the review panel since the last court review.

P91

The health assessor reports should address whether:

- a. the eligible person is at high risk of committing a further qualifying offence in the next three years if the person does not remain subject to the preventive measure; and
- b. having regard to the nature and extent of the high risk the person will commit a further qualifying offence, the preventive measure is the least restrictive measure adequate to address the high risk that the eligible person will commit a further qualifying offence.

<sup>60</sup> Parole Act 2002, s 107Q(3).

**PROPOSALS****P92**

When determining an application for review of a preventive measure, the court should review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures.

**P93**

The court should determine an application for the review of a preventive measure by:

- a. confirming the preventive measure and, if applicable, its conditions;
- b. confirming the preventive measure but varying the special conditions of the preventive measure to make them less restrictive (in the case of community preventive supervision or residential preventive supervision);
- c. terminating the preventive measure and imposing a less restrictive measure; or
- d. terminating the preventive measure without replacement.

**P94**

If the court confirms the preventive measure or orders the imposition of a less restrictive measure, it should review the person's treatment and supervision plan. The court should have the power to make recommendations to the person responsible for developing and administering the plan.

***Reviews by a review panel*****PROPOSALS****P95**

The new Act should provide for the establishment of a review panel. The review panel should:

- a. be chaired by a judge or former judge;
- b. include other judges or former judges or experienced solicitors or barristers as members and panel convenors;
- c. include psychiatrists and clinical psychologists as members;
- d. include members with Parole Board experience and have at least one member who is also a current member of the Parole Board; and
- e. include members with knowledge of mātauranga Māori (including tikanga Māori).

**P96**

The review panel should review the preventive measure annually except in the years during which an application for a court review of a preventive measure is pending.

## PROPOSALS

**P97**

The review panel should be able to request information relevant to the review from those responsible for the administration of a preventive measure. It should also be able to conduct interviews with a person subject to a preventive measure if they consent.

**P98**

The review panel should review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures.

**P99**

The review panel should conclude a review of a preventive measure by issuing a decision:

- a. confirming the ongoing justification for preventive measure and, if applicable, its conditions;
- b. confirming the ongoing justification for the preventive measure but varying the special conditions to make them less restrictive (in the case of residential preventive supervision or community preventive supervision); or
- c. if it considers the preventive measure may no longer be justified, directing the chief executive of Ara Poutama Aotearoa | Department of Corrections to apply to the relevant court to terminate the measure.

### Overview of periodic review mechanisms

18.66 We have attempted to make our proposals for how preventive measures should be reviewed detailed and comprehensive. This is to enable us to test the workability of the proposed review mechanisms in consultation. We invite submitter feedback to help us develop these proposals for our recommendations for reform in our Final Report.

18.67 Periodic reviews of the ongoing justification for a preventive measure are essential to make the regime under the new Act compliant with human rights standards. Periodic reviews of residential preventive supervision and secure preventive detention are required to ensure that preventive detention does not amount to arbitrary detention in breach of article 9 of the ICCPR. Te Kōti Pīra | Court of Appeal noted in *Chisnall v Attorney-General* that judicial oversight through the court's PPO review responsibilities was a factor that weighed against PPOs being penalties.<sup>61</sup> Periodic reviews would also provide better assurance that the limits a preventive measure would place on other rights are justified by ensuring the restrictions endure no longer than necessary.

18.68 Because we propose that preventive measures be in place for an indeterminate period, periodic reviews are essential. Requiring that a court monitor and scrutinise the continued need for preventive measures will help assure people subject to them that the measures can be brought to an end as soon as their reoffending risk is sufficiently reduced.

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<sup>61</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [163].



- 18.69 The review mechanisms we propose consist of periodic reviews by the courts and, during the intervening periods, annual reviews by a specialist review panel established under the new Act. The periodic reviews are intended to facilitate progress to fewer restrictions and, ultimately, to safe and unrestricted life in the community.
- 18.70 We propose below other avenues for people to apply for variation (to make the special conditions of a measure less or more restrictive) or termination of preventive measures outside these periodic review mechanisms. Chapter 17 deals with procedures to escalate from one preventive measure to a more restrictive one.

### *The need for court reviews*

- 18.71 Entrusting the review of the ongoing justification for a preventive measure to the courts will ensure a high degree of scrutiny and reflects the severity of preventive measures and the importance of the reviews. It would also address any concerns that the law does not comply with article 9(4) of the ICCPR. Most submitters thought that the courts, rather than the Parole Board, should have greater responsibilities for reviewing preventive detention.
- 18.72 Our comparative analysis of review mechanisms supports court reviews. Most comparable jurisdictions we assessed require a court to periodically review the ongoing necessity of detention as a preventive measure.<sup>62</sup> Supervision orders in the assessed jurisdictions are usually not subject to periodic reviews. Instead, the responsible authority (typically a court, sometimes a parole board) may vary, extend or terminate the supervision order at any time on application by the state or the supervised person.
- 18.73 As an alternative, we have considered whether the Parole Board should have a role in reviewing any of the preventive measures. The advantages of this approach would be the Parole Board's expertise, its relative accessibility through its informal and inquisitorial procedure and reduced demand on court resources. We decided against this approach primarily because a central aim of our proposals is to create a stand-alone regime distanced from sentencing and parole. Proposing the Parole Board as a review body would undermine this aim. As we explain below, however, we think the Parole Board's expertise should be utilised through the review panel's membership.

### *Intervals of court reviews*

- 18.74 We propose that the chief executive should have responsibility for initiating reviews of preventive measures by applying to the court that imposed the measure. This continues the current law in respect of PPOs and, in effect, ESOs, seeing as the chief executive must apply for a new ESO if the term of the previous ESO expires.<sup>63</sup>
- 18.75 The chief executive should apply for a review of a preventive measure within the first three years of its imposition. We propose the three year period commences from the date the court first imposes the measure. It should not include any time before, during which an interim measure was in force because the court will consider afresh the need and justification for the preventive measure when imposing the substantive measure. If the court determines the application by confirming the preventive measure or imposing

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<sup>62</sup> We have looked at the law in the Australian jurisdictions, Canada, England and Wales, Ireland and Scotland.

<sup>63</sup> Parole Act 2002, s 107F(1)(b); and Public Safety (Public Protection Orders) Act 2014, s 16.

an alternative measure, the chief executive should apply for the next review of the measure within three years.

- 18.76 The PPO Act provides for court reviews every five years and annual reviews by a review panel.<sup>64</sup> We used the PPO Act's five-year period as a starting point for the review period because we propose a similar combination of court and panel reviews. We found, however, that the comparable jurisdictions we looked at, without exception, all provide for court reviews of detention every three years or more frequently.<sup>65</sup> The Victorian Serious Offenders Act 2018, for example, requires annual court reviews despite also providing for a "Post Sentence Authority", whose functions include reviewing and monitoring the progress of offenders on detention orders.<sup>66</sup>
- 18.77 Our proposal is that time runs on the review intervals only during the period between:
- (a) the imposition of the preventive measure or the final determination of the previous review application; and
  - (b) the chief executive's application for the next review of the preventive measure.
- 18.78 In other words, time would not run in the period between the application for review and the court's final determination (including any appeals). This makes allowance for varying durations of review proceedings depending on factors like court availability, the evidence to be gathered and appeals.
- 18.79 The severity of human rights restrictions that preventive measures involve demands rigorous and frequent judicial oversight. We are mindful that a three-year review period for all preventive measures would add to the courts' workload. To alleviate some of the pressure on the senior courts, we propose that both the High Court and te Kōti-a-Rohe | District Court have reviewing responsibility under the new Act. Nevertheless, implementing this proposal will require resource modelling.

### **Determination of court review applications**

- 18.80 The primary purpose of reviewing a preventive measure is to test its continued justification. It is appropriate, therefore, that the courts apply the same tests as are used for the imposition of preventive measures (see Chapter 10). This is common in other jurisdictions such as Australia.<sup>67</sup>
- 18.81 Using a different test would likely cause difficulties. A test that requires increasing justification over time such as the test referred to in *Miller v New Zealand* could lead to different treatment of people who pose the same level of risk. We raised this point in the

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<sup>64</sup> Public Safety (Public Protection Orders) Act 2014, ss 15–16.

<sup>65</sup> Criminal Code Act 1995 (Cth), s 105A.10(1B); Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 27(1B); and Serious Offenders Act 2018 (Vic), s 100 provide for annual court reviews. Serious Sex Offenders Act 2013 (NT), s 65(2); and High Risk Serious Offenders Act 2020 (WA), s 64(2)(b) provide for court reviews every two years. Sentencing Act 1991 (Vic), s 18H(1)(b); and Dangerous Criminals and High Risk Offenders Act 2021 (Tas), s 10(2)(b) and (c) provide for court reviews every three years. Note that, as a rule among comparable jurisdictions, detention as a preventive measure typically involves periodic reviews whereas supervision orders may be varied or discharged at any time on application.

<sup>66</sup> Serious Offenders Act 2018 (Vic), ss 100 and 291(1)(e).

<sup>67</sup> Criminal Code Act 1995 (Cth), s 105A.12(4); Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 30; Serious Sex Offenders Act 2013 (NT), s 77; and Serious Offenders Act 2018 (Vic), ss 106 and 108.

Issues Paper, and most submitters agreed with our concern. We consider an approach that consistently requires the same level of justification to be preferable.

- 18.82 The temporal dimension of the legislative test — the future period for which the court must assess whether there is a high risk the person will reoffend — is linked to the review period of three years (see Chapter 10). Each review therefore re-establishes whether the legislative test is still fulfilled looking at the predicted reoffending risk for the next three-year period, at the end of which the next review procedure commences.
- 18.83 Because we propose that the courts should apply the same test as the test for the initial imposition of a preventive measure, the court should also have the same type of information in those two situations. We propose that the chief executive should be required to submit the same number of health assessor reports as for the initial imposition of that preventive measure — one report for community preventive supervision and two reports for residential preventive supervision and secure preventive detention.
- 18.84 We acknowledge the current resource constraints on health assessor reports and that regular reviews will create additional pressure. Nevertheless, the outcome of a review would usually mean the continuation of the preventive measure until the next review. In our view, the consequences of a review warrant the same level of assessment as applications for the initial imposition of a measure. The reviewing court should look at the necessity of a preventive measure afresh during review proceedings. The risk a person poses may have subsided because of various factors, including how they have responded to rehabilitative treatment. It is imperative fresh assessments enable the court to take these matters into account.
- 18.85 We propose that a court review application should lead to one of the following outcomes:
- (a) **Confirmation.** If the reviewing court considers the tests remain met, it should confirm the continuation of the preventive measure with the same conditions.
  - (b) **Variation.** Both community preventive supervision and residential preventive supervision may include special conditions. There will likely be cases where the court confirms that the preventive measure itself should remain in place but that individual special conditions should be changed. We consider that, within periodic reviews, the court should only be able to vary special conditions to make them less restrictive. Other procedures would be in place to address the need to make measures more restrictive in certain, exceptional, circumstances (see Chapter 17).
  - (c) **Moving to a less restrictive measure.** The court may determine that a less restrictive preventive measure is justified and order its imposition in place of the existing measure.<sup>68</sup> In other words, an outcome of a review could result in a move:
    - (i) from secure preventive detention to residential preventive supervision;
    - (ii) from residential preventive supervision to community preventive supervision;or

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<sup>68</sup> Note that we do not propose that the court should have powers to impose a more restrictive measure. As we propose in Chapter 17, any escalation to a more restrictive measure should require the chief executive to apply to the court seeking the imposition of this measure, thereby enabling the person against whom the measure is sought to properly defend it.

- (iii) from secure preventive detention directly to community preventive supervision.

Because the aim of periodic reviews is to ensure that people progress towards less restrictive measures, the court may only replace preventive measures with less restrictive measures. Escalating a person to a more restrictive preventive measure is dealt with under a different procedure separate from periodic reviews, which we explain in Chapter 17.

- (d) **Termination.** If the court finds on review that no preventive measure can be justified, it must terminate the preventive measure.

18.86 A confirmation should always prompt a court review of a person's treatment and supervision plan, because confirming a measure indicates that insufficient rehabilitative progress was made to lessen restrictions. Upon review, the court should have the ability to make any recommendations regarding the plan. The court may also review the plan and make recommendations on it whenever it varies a measure or directs moving to a less restrictive measure.

18.87 The purpose of reviewing a person's treatment and supervision plan is for the court to assess whether the plan is appropriate or whether it needs amending to ensure it is helpful in reducing the person's reoffending risks. It will also provide scrutiny and accountability over how the plan is being implemented and what rehabilitative treatment and reintegration support a person has received. This proposal reflects the current law of the PPO Act, which provides that the High Court must review, and may make recommendations about, a person's management plan if it does not cancel a PPO upon review.<sup>69</sup> Given that a person's treatment and supervision plan forms part of the evidential basis for the review, we do not anticipate that separate hearings or even separate judgments are required for a review of a person's treatment and supervision plan.

18.88 In Chapter 12, we propose that there should be a right to appeal to the Court of Appeal against a court's review decision under the new Act.<sup>70</sup>

### **Purpose and constitution of the review panel**

18.89 We heard through engagement and consultation that prolonged periods of unnecessary restrictions can be detrimental to a person's rehabilitation and reintegration as well as for their overall sense of progress. Although probation officers and facility managers can facilitate more freedom by relaxing conditions, we consider that, given the restrictiveness of the preventive measures, they should be comprehensively reviewed at least once a year. Such a high frequency of court reviews would not be an efficient use of court resources, however. Court availability may not be adequate to react to a person's behavioural changes and rehabilitative progress.

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<sup>69</sup> Public Safety (Public Protection Orders) Act 2014, s 19.

<sup>70</sup> An express right of appeal from review decisions would avoid the concerns raised in *Douglas v Chief Executive of the Department of Corrections* [2023] NZCA 522 at [6] that a review judgment confirming a PPO imposes no superseding order but rather the PPO continues by operation of law. The appellant in this case argued that the appropriate course was to appeal the judgment imposing the PPO rather than the review decision.

- 18.90 This is why we propose that the new Act establish a review panel for this purpose, similar to the review panel that currently exists to review PPOs.<sup>71</sup> We also consider annual reviews by a review panel would achieve the following:
- (a) **Provide independent oversight and accountability.** The panel would consider, on an annual basis, the progress each person makes towards restoration to safe and unrestricted life in the community. Further, as we set out below, the panel should have the ability to review a person’s treatment and supervision plan and make recommendations. These functions should provide accountability to ensure people subject to preventive measures are receiving the treatment and support needed for their rehabilitation and reintegration.
  - (b) **Develop experience and expertise on preventive measures.** We anticipate the panel would, because of the profile of its membership and its annual review functions, come to hold considerable experience and expertise on preventive measures. This would make the exercise of its review responsibilities efficient. It would also serve as a useful source of information for the court when it undertakes its reviews.
- 18.91 We consider that the review panel should be an independent, multidisciplinary review body. It would be a similar model to the review panel established under the PPO Act and the Parole Board.<sup>72</sup> On the one hand, the review panel would fulfil primarily a periodic review function alongside the courts, which resembles the current role of the PPO review panel. On the other hand, it would also have the power to vary special conditions (see below), which is more similar to the role the Parole Board currently exercises.
- 18.92 The review panel’s scope would be much broader than that of the PPO review panel. Its workload would consequently be more extensive. This is why we propose that the constitution of the review panel should be modelled on the Parole Board rather than on the PPO review panel.
- 18.93 We think the review panel should, similar to the Parole Board, have a pool of members sufficient in number to enable the review panel to carry out its functions. Some of the review panel members with a legal background (judges, former judges or experienced solicitors or barristers) should be appointed as panel convenors. A convened panel should sit in varying compositions comprising three to four members (including the panel convenor). The convenor of an individual panel should ensure that it comprises adequate expertise in law, psychiatry, clinical psychology and mātauranga Māori (including tikanga Māori).

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<sup>71</sup> As noted above, there is also precedent in comparable overseas jurisdictions for a combination of court and review panel reviews. In Victoria, the Post Sentence Authority is responsible for monitoring and reviewing detention and supervision orders, while courts carry out periodic reviews as well: *Serious Offenders Act 2018 (Vic)*, ss 99–100 and 291(1)(e) and (i).

<sup>72</sup> *Te Aka Matua o te Ture | Law Commission* has recommended establishing a similar type of review body in the past. In the context of mental health legislation, it recommended a Special Patients’ Review Tribunal should decide about reclassification, discharge or long leave in relation to special patients and restricted patients under mental health and intellectual disability legislation. It recommended a pool of 10 to 12 members should be appointed with a range of expertise in psychiatry, law, other forensic mental health, forensic consumer advice or service use, Māori issues, risk assessment and management and/or the reintegration of the mentally ill or intellectually impaired into society: *Te Aka Matua o te Ture | Law Commission Mental Impairment Decision-Making and the Insanity Defence* (NZLC R120, 2010) at [12.14]–[12.17].

### *Reviews by the review panel*

- 18.94 The review panel should have broad powers to request relevant information from the chief executive, the relevant probation officer or the manager of the relevant facility.<sup>73</sup>
- 18.95 We do not propose, however, that new health assessment reports should be prepared for each annual panel review. Rather, we consider that the review panel's main task would be to assess any rehabilitation or reintegration progress the person concerned may have made in the previous year. This would include collating and scrutinising documentation prepared by probation officers (for community preventive supervision) or facility managers and their staff (for residential preventive supervision and secure preventive detention) as well as interviewing the person concerned if they consent. We propose that the chief executive should submit the review panel's most recent decision to the court when applying for the next court review.
- 18.96 It each decision, the review panel should conclude its review by:
- (a) confirming the ongoing justification for the preventive measure and, if applicable, its conditions;
  - (b) confirming the ongoing justification for the preventive measure but varying the special conditions to make them less restrictive (in the case of community preventive supervision or residential preventive supervision); or
  - (c) if it considers the preventive measure may no longer be justified, directing the chief executive to apply to the relevant court for termination of the measure.
- 18.97 If the review panel finds that the legislative tests for imposing the preventive measure continue to be met, it should review the person's treatment and supervision plan and may make recommendations to the person responsible for developing the treatment and supervision plan on possible changes to it. This proposal reflects the current law of the PPO Act, which provides that the PPO review panel must review, and may make recommendations about, a person's management plan if it does not direct the chief executive to apply for a court review.<sup>74</sup>
- 18.98 As explained above, it is desirable that changes to preventive measure are as responsive as possible to changes in a person's risk levels. For this reason, we suggest the review panel should have powers to vary special conditions to make them less restrictive. As with periodic court reviews, we do not propose that periodic reviews by the review panel should allow for making special conditions more restrictive. We note below, however, that this outcome would be available if the chief executive (or, theoretically, the person subject to the measure) applied to the review panel specifically for a variation of community preventive supervision or residential preventive supervision outside the periodic review process. We explain our reasoning for this exception below.
- 18.99 Finally, if the review panel finds that a preventive measure may no longer be justified based on the legislative tests and may have to be terminated — either to be replaced by a different measure or to be terminated without replacement — it must direct the chief executive to apply to the relevant court to terminate the measure. Although the resulting

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<sup>73</sup> Compare Public Safety (Public Protection Orders) Act 2014, s 112.

<sup>74</sup> Public Safety (Public Protection Orders) Act 2014, s 15(3).

application would be brought by the chief executive, we expect that its substance would usually be the review panel's reasoning why in their view the measure may no longer be justified. The court would not be bound by the review panel's view.

18.100 We propose that, generally, the review panel should, like the courts, review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures. However, a slightly different threshold should be applied by the review panel only when triggering an application to the court for the termination of a measure. In that case, the review panel under the new Act should not need to be certain that the legislative tests are no longer met. Rather, its determination that this may be the case should be enough to trigger a court review. This is in line with the relevant provision of the PPO Act on which this review model is based.<sup>75</sup> We expect that the review panel would trigger a court review only where there is a reasonable prospect the legislative tests are no longer met.

## Applications to terminate or vary a preventive measure

### PROPOSALS

#### P100

Under the new Act, the chief executive of Ara Poutama Aotearoa | Department of Corrections and, with the leave of the court, the person subject to a preventive measure should be able to apply to the court to terminate the preventive measure. An application concerning community preventive supervision should be submitted to te Kōti-a-Rohe | District Court. An application concerning residential preventive supervision or secure preventive detention should be submitted to te Kōti Matua | High Court.

#### P101

The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to community preventive supervision or residential preventive supervision should be able to apply to the review panel to vary the special conditions of community preventive supervision or residential preventive supervision.

#### P102

The new Act should allow the chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to a preventive measure to appeal to the relevant court (te Kōti-a-Rohe | District Court for community preventive supervision or te Kōti Matua | High Court for residential preventive supervision) against a decision by the review panel to vary special conditions.

<sup>75</sup> Public Safety (Public Protection Orders) Act 2014, s 15(2).

### **Application for termination by the court**

- 18.101 In addition to the periodic reviews by the courts and the review panel, it is important that the chief executive and the person subject to a preventive measure can apply to the relevant court for termination of the measure in force. This is to ensure that the court can respond to improvements in a person's risk profile between periodic reviews or in case the applicant thinks that the review panel erred in its assessment.
- 18.102 The chief executive and the person subject to a preventive measure should be able to apply to the court to:
- (a) terminate the preventive measure and impose a less restrictive measure instead; or
  - (b) terminate the preventive measure without replacement.
- 18.103 The escalation to a more restrictive preventive measure should require a separate application to the High Court, as we explain in detail in Chapter 17.
- 18.104 Because we propose that these applications be available in addition to periodic reviews by both the courts and the review panel, we think it is justifiable to restrict applications for termination by the person subject to the measure to those for which the court grants leave. Otherwise, there would be a risk of overwhelming the courts with an excessive number of applications that have no realistic chance of success. This proposal is in keeping with the PPO Act, which provides that a person subject to a PPO may apply for a review only with the leave of the court.<sup>76</sup> The PPO Act does not specify which test or criteria the court should use for granting leave to apply for a court review.<sup>77</sup> We consider that the new Act does not need to specify this either, but if the court refuses to grant leave, it should briefly explain why.<sup>78</sup>
- 18.105 In Chapter 12, we propose that there should be a right to appeal to the Court of Appeal against a court's decision to terminate a preventive measure.

### **Applications to the review panel for variation of special conditions**

- 18.106 We propose that it should be possible to apply to the review panel for a variation of special conditions of community preventive supervision or residential preventive supervision. This proposal would allow the review panel to vary special conditions to make them either less or more restrictive — in contrast to its powers within periodic reviews, which would be restricted to making conditions less restrictive. The purpose of this proposal is to allow timely reactions to sudden changes in a person's risk profile, for example, if new information indicating that a person's risk is higher than expected comes to light. If the review panel was not to have this power, any type of increase in restrictiveness — even if it is just an adjustment of one special condition — would have to go through a court. This could take longer and be an unnecessary use of court resources when the review panel could undertake this function.

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<sup>76</sup> Public Safety (Public Protection Orders) Act 2014, s 17(1).

<sup>77</sup> Criteria or tests for granting leave (to appeal) typically specify situations where leave must not be granted rather than situations where leave must be granted. See for example Senior Courts Act 2016, s 74; and Arbitration Act 1996, sch 2 cl 5.

<sup>78</sup> Compare High Court Rules 2016, r 26.18; and Senior Courts Act 2016, s 77.



18.107 The review panel's ability to vary special conditions of community preventive supervision and residential preventive supervision would be analogous to the Parole Board's power to vary ESO conditions under the current law. However, the new Act would avoid the current issues of split jurisdictions between the courts and the Parole Board by allowing both the courts and the review panel to vary special conditions. If, for example, a court declined an application to terminate a measure, it may still vary the special conditions of that measure instead.

18.108 By varying special conditions, the review panel has the authority to significantly change the character of community preventive supervision or residential preventive supervision. We consider that both the person subject to the preventive measure and the chief executive should have appeal rights to the court that imposed the measure. We prefer rights to appeal the substantive decision over the mechanisms that currently exist to review Parole Board decisions.

## Reviews and termination of prison detention orders

### PROPOSALS

#### P103

Under the new Act, prison detention orders should remain in force until terminated by te Kōti Matua | High Court.

#### P104

The new Act should provide for the following review procedure for prison detention orders:

- a. The same legislative test for imposing a prison detention order should be applied for reviewing it.
- b. A prison detention order should be reviewed annually by te Kōti Matua | High Court upon application by the chief executive of Ara Poutama Aotearoa | Department of Corrections.
- c. A prison detention order should be reviewed by the review panel every six months or, if there is an application for a court review pending, within six months after the court review is finalised.
- d. The chief executive of Ara Poutama Aotearoa | Department of Corrections and, with leave of the court, a person subject to a prison detention order should be able to apply to te Kōti Matua | High Court for the termination of a prison detention order.

18.109 In Chapter 17, we propose that the High Court should have power to order that a person subject to secure preventive detention be detained in prison if a person cannot be safely managed on secure preventive detention (and other requirements are fulfilled).

18.110 In line with our reasoning about the duration of preventive measures, we consider that prison detention orders should be in place for as long as the test for imposing it is met.

18.111 Given that the new Act aims to set up a preventive regime that is strictly separated from prisons, however, we consider that every reasonable effort should be made to end a prison detention order as soon as possible. This is why we propose more frequent

reviews by both the High Court (not the District Court, because prison detention orders should only be available in relation to people subject to secure preventive detention) and the review panel than for the periodic review of preventive measures.

- 18.112 Our proposal is modelled on the current review mechanisms for prison detention orders under the PPO Act. It provides for annual reviews of prison detention orders by the High Court and reviews every six months by the PPO review panel.<sup>79</sup>
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<sup>79</sup> Public Safety (Public Protection Orders) Act 2014, ss 87–88.

**CHAPTER 19**

# Transitional provisions

**IN THIS CHAPTER, WE CONSIDER:**

- the new Act's prospective and retrospective application; and
- the position of people already subject to preventive measures and how the new Act might apply to them.

**INTRODUCTION**

- 19.1 In this chapter, we consider the transitional arrangements that might be put in place to repeal the current law governing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) and move to the proposed new regime under a new Act.
- 19.2 We propose that Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) should determine how the new Act should come into effect. The proposed regime under the new Act will require some time to implement. Ara Poutama, as the government department responsible, is best placed to consider these matters.
- 19.3 There are, however, several difficult questions that Ara Poutama will need to consider regarding the prospective and retrospective application of the new Act. Without making proposals, we share some thoughts on how these questions might be addressed.

**PREFERRED APPROACH****PROPOSAL****P105**

Ara Poutama Aotearoa | Department of Corrections should consider the appropriate transitional arrangements to bring the new Act into effect.

## Commencement and prospective application of the new Act

- 19.4 It would take time to implement our proposal for a new Act. It will be necessary to establish facilities for residential preventive supervision and secure preventive detention. It will also be necessary to allow time for the establishment of the review panel (Chapter 18) and the appointment of facility managers (Chapters 15 and 16).
- 19.5 Ara Poutama, as the agency that we propose should be responsible for implementing and administering the new regime (Chapter 13), would be best placed to determine the appropriate time for when the new Act should come into effect. We therefore propose that Ara Poutama consider when the new Act should commence when work for the preparation of the Bill is under way.
- 19.6 We stress, however, that, in our view, reform of the preventive regimes is required given the manifold issues with the current law we have identified throughout this Preferred Approach Paper. We therefore consider that the new regime should commence sooner rather than later. For comparison, the German constitutional court set a two-year deadline for the German federal and local governments to develop new preventive detention facilities that comply with all constitutional requirements.<sup>1</sup>

## Prospective application of the new Act

- 19.7 We see no difficulty concerning the prospective application of the new Act. The new Act should therefore be applied to all people whose qualifying offending occurs after the commencement of the new Act.

## Retrospective application of the new Act to people not yet subject to preventive measures

- 19.8 We suggest that most aspects of the new Act could apply retrospectively to people who, at the time of commencement of the new Act, are awaiting sentencing or serving a determinate prison sentence for qualifying offending (except strangulation or suffocation and the imprisonable offences under the Films, Videos, and Publications Classification Act 1993 that are currently qualifying offences for an ESO). We make this suggestion because we consider that the new Act would provide for preventive measures that are less harsh than the current law that would otherwise apply to these groups of people.

## Relevant human rights protections

- 19.9 Sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and section 6 of the Sentencing Act 2002 protect people who have committed qualifying offences before the commencement of the new Act against harsher, retrospectively applied penalties. Section 26(1) protects against a conviction of an offence on account of any act or omission that did not constitute an offence at the time it occurred.
- 19.10 Section 25(g) of the NZ Bill of Rights protects the right of a person convicted of an offence to have the benefit of the lower penalty if the penalty has been changed between the commission of the offence and sentencing. The protection is engaged by both increased and reduced penalties. To the extent that the new Act imposes less harsh penalties than

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<sup>1</sup> B v R 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011 at [170].

the current law, the retrospective application of the new Act would therefore be required. The right to the benefit of the lesser penalty is also affirmed by the almost identical section 6 of the Sentencing Act. In contrast to section 25(g) of the NZ Bill of Rights (read in conjunction with s 4 of the NZ Bill of Rights), section 6 of the Sentencing Act applies despite any other enactments.<sup>2</sup>

- 19.11 The primary scenario that section 25(g) of the NZ Bill of Rights and section 6 of the Sentencing Act envision is the alteration of a criminal sentence, for example, if the maximum punishment for a specific offence is increased from five to 10 years. Section 25(g) of the NZ Bill of Rights has, however, been applied intermittently in the context of post-sentence orders as well.<sup>3</sup>
- 19.12 The primary focus of section 26(2) is double punishment rather than retrospective penalties. However, to the extent that a second penalty applies retrospectively, section 26(2) has also been treated as a protection against retrospective penalties.<sup>4</sup> The Attorney-General identified in a report under the NZ Bill of Rights on the ESO regime that the retrospective application of the ESO regime was in breach of section 26(2).<sup>5</sup> Te Kōti Pira | Court of Appeal in *Belcher v Chief Executive of the Department of Corrections*, too, focused on the retrospectivity of the ESO legislation in the context of section 26(2) (as well as section 25(g)).<sup>6</sup>
- 19.13 Any limitations that retrospective, harsher penalties put on sections 25(g) and 26(2) are impossible, or at the very least very difficult, to justify in accordance with section 5 of the NZ Bill of Rights.<sup>7</sup>

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<sup>2</sup> In *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213, te Kōti Mana Nui | Supreme Court held at [59] that a sex offender registration order was a penalty for the purposes of both provisions. But see *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA), where te Kōti Pira | Court of Appeal held that the retrospective application of the ESO regime engaged s 25(g) of the New Zealand Bill of Rights Act 1990 but not s 6 of the Sentencing Act 2002.

<sup>3</sup> *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110; *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [39]–[40]; and *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA). See also David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Amendment Bill* (2023) at [12]–[22]. Compare *Commissioner of Police v G* [2023] NZCA 93, (2023) 13 HRNZ 918 at [99]–[103], which states that s 25(g) is not engaged if the penalty is imposed by a member of the executive branch.

<sup>4</sup> The protection of s 26(2) against double penalties (rather than retrospective penalties) would still be engaged even if the new regime featured less harsh penalties than the current law, provided they are penalties at all. We explain elsewhere in this Preferred Approach Paper why we think such a limitation of the right not to be subject to second punishment can be justified under s 5 of the New Zealand Bill of Rights Act 1990.

<sup>5</sup> Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill* (2003) at [6]–[15].

<sup>6</sup> *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

<sup>7</sup> *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [183]–[190]; *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 at [22]–[25]; *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 at [13] per Elias CJ and Keith J; *R v Pora* [2001] 2 NZLR 37, (2000) 6 HRNZ 129 (CA) at [79] per Gault, Keith and McGrath JJ; and *R v Poumako* [2000] 2 NZLR 695, (2000) 5 HRNZ 652 (CA) at [6] and [33] per Richardson P, Gault and Keith JJ.

- 19.14 There have also been instances of using section 26(1) of the NZ Bill of Rights, at least partially, to protect against retrospective penalties.<sup>8</sup> On the plain wording of the provision, section 26(1) only concerns retrospective “convictions”, not retrospective penalties in the form of post-sentence orders. For this reason, Whata J held in *Chief Executive of the Department of Corrections v Chisnall* that section 26(1) was not engaged, and the Court of Appeal did not focus on section 26(1) in its appeal decision.<sup>9</sup> Te Kōti Mana Nui | Supreme Court has, however, granted leave to appeal in relation to section 26(1) (among other rights).<sup>10</sup>
- 19.15 To the extent that our proposals impose harsher penalties (or widen their scope) compared to the current law, they engage section 25(g) and the retrospective dimension of section 26(2) if applied retrospectively in specific cases. It is possible they may also engage section 26(1). To the extent that our proposals impose penalties that are less harsh (or narrower in scope) compared to the current law, they only engage section 25(g).

### How the new Act would compare to current law

- 19.16 We set out below which of the proposals we have made in this Preferred Approach Paper would constitute less harsh penalties or would narrow the scope of application and which proposals would constitute harsher penalties or would widen the scope.
- 19.17 As we have expressed throughout this Preferred Approach Paper, there are multiple issues with the current law on preventive detention, ESOs and PPOs. We have explained why we think the new Act would provide for preventive measures that are less harsh than the current law. The most important factors are that the new Act, in summary, would provide for:
- (a) a cohesive regime aimed at people’s progression towards fewer restrictions (Chapter 4);
  - (b) the repeal of preventive detention (which includes indefinite imprisonment coupled with parole conditions and the availability of recall for life) as a preventive measure (Chapter 4);
  - (c) a strengthened focus on rehabilitation and reintegration (Chapter 5);
  - (d) more extensive appeal rights (Chapter 12);
  - (e) an entitlement to appropriate rehabilitative treatment and reintegration support (Chapter 13);
  - (f) guiding principles to ensure that those responsible for administering preventive measures exercise their powers in accordance with the overall purposes of the new Act (Chapter 13);

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<sup>8</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill* (2 April 2009) at [6]–[10] and [21]–[23]; and Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill* (27 March 2014) at [12]–[20].

<sup>9</sup> *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 at [16]; and *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.

<sup>10</sup> *Attorney-General v Chisnall* [2022] NZSC 77 (leave decision).

- (g) more extensive inspection of residential facilities and secure facilities (Chapters 15 and 16);
  - (h) secure facilities that are separate from prison (Chapter 16); and
  - (i) more extensive review of all preventive measures (Chapter 18).
- 19.18 We also consider that the changes we propose to eligibility criteria are relevant here. We propose a set of eligibility criteria in Part 3 of this Preferred Approach Paper that are narrower than under the current law. Under the new Act:
- (a) the minimum age of eligibility should be 18, whereas under the current law, people under 18 can be made subject to an ESO (Chapter 7);
  - (b) incest, bestiality and accessory after the fact to murder (sections 130, 143 and 176 of the Crimes Act 1961) should be removed from the list of qualifying offences (Chapter 8); and
  - (c) overseas offenders should only be eligible for a preventive measure if their offence would have been a qualifying offence in Aotearoa New Zealand. This requirement does not currently apply to a specific category of returning prisoners under the Returning Offenders (Management and Information) Act 2015 (Chapter 9).
- 19.19 By contrast, the introduction of strangulation or suffocation as a new qualifying offence under the new Act would bring some offenders within the scope of the new regime that are outside the scope of application of the current law. Similarly, the imprisonable offences under the Films, Videos, and Publications Classification Act 1993 that are currently qualifying offences only for ESOs would be qualifying offences that make a person eligible for all preventive measures under the new Act. People who have committed these offences before the commencement of the Act should not be eligible for the new regime.
- 19.20 In summary, we consider that our suggestion that the new Act should apply retrospectively (with the aforementioned exceptions) complies with the relevant protections under the NZ Bill of Rights. It also aligns with the Legislation Design and Advisory Committee's *Legislation Guidelines*, which state that retrospective legislation might be appropriate if it is intended to be entirely to the benefit of those affected.<sup>11</sup>

### **Safeguarding against retrospective harsher penalties**

- 19.21 As we have explained above, the new Act would, overall, impose less harsh penalties than the current law. There may, however, be individual, unforeseen situations where it would at least be unclear whether the new Act would be a less harsh penalty for a person than the current law.
- 19.22 The courts should therefore take any potentially adverse effects of a retrospective application of the new Act into account when imposing new preventive measures. These considerations would be prescribed by the legislative tests we propose in Chapter 10. Under these legislative tests, the court would be required to be satisfied that any limits on people's rights affirmed by the NZ Bill of Rights, including the protection against

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<sup>11</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at [12.1].

retrospective penalties, are justified considering the protection it will give to the community.

### **Transitioning people already subject to preventive measures to the new Act**

19.23 There is a second group of people to whom the new Act could apply retrospectively: those who are already subject to either a post-sentence order or a sentence of preventive detention.

#### ***People subject to extended supervision orders***

19.24 A possible approach is that ESOs continue in force until they expire but that no new ESOs may be imposed. ESOs would therefore fade out of operation within 10 years from the commencement of the Act.<sup>12</sup> All ESOs that are in force when the new Act commences would either be succeeded by a new preventive measure or simply end without a new measure being imposed. We anticipate that, if the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) made applications in relation to people currently subject to ESOs at the end of their term, the applications would typically be for either community preventive supervision or residential preventive supervision (but not secure preventive detention) given that these two proposed measures would cover a similar range of restrictiveness as ESOs.

19.25 This approach would avoid the additional resourcing pressures that would otherwise be created by having to reapply for preventive measures for all those currently subject to ESOs.

#### ***People subject to public protection orders***

19.26 With respect to people subject to orders under the PPO Act, we suggest a different approach. We suggest that, as soon as reasonably practicable after the commencement of the new Act, the chief executive should apply to the High Court to impose an appropriate new preventive measure on the person in question. As soon as the new measure would take effect, the PPO would end. We make this suggestion for three reasons. First, PPOs, unlike ESOs, are imposed indefinitely so would not expire on their own. Second, there are currently only three people subject to PPOs. It would be inefficient to maintain the PPO regime side by side with the new Act for such low numbers of affected people. We anticipate that people subject to PPOs would likely be transferred to secure preventive detention. Third, the especially severe nature of PPOs makes it particularly important that people are swiftly transitioned to the new Act.

#### ***People sentenced to preventive detention***

19.27 As of June 2023, 297 people were subject to preventive detention — 221 detained in prison and 76 released on parole. The question of whether, and if so how, to transition these individuals to preventive measures under the new Act is difficult. There are significant resourcing implications for Ara Poutama, health assessors and the courts.

19.28 One approach is to apply the new Act to people who are subject to preventive detention at the commencement of the new Act whether released on parole or not. Because it is

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<sup>12</sup> This transitional period would be 10 years because that is the maximum term for ESOs: Parole Act 2002, s 107(4).



appropriate that these individuals serve the punitive component of their sentence in prison, we suggest that the chief executive should make applications for a new preventive measure in respect of people on preventive detention who have completed their minimum term of imprisonment, whether in custody or released on parole.

- 19.29 It is likely that, for most people still in custody after the minimum period of imprisonment of their sentences, the chief executive would apply to transition them to secure preventive detention. That is because the reoffending risks they pose have prevented their release on parole. People released on parole, on the other hand, would likely be transitioned to either community preventive supervision or residential preventive supervision.<sup>13</sup> For people currently on preventive detention who do not satisfy the legislative test for any of the new preventive measures, the sentence should end without a new preventive measure being imposed.
- 19.30 In our view, this would be a principled approach consistent with the general reasoning behind our proposals across this Preferred Approach Paper. In Chapter 5, we detail the negative effects that indefinite imprisonment has on a person. We argue there and in the Issues Paper that using indefinite imprisonment as a preventive measure is inhumane because:
- (a) indeterminate prison sentences can cause people to feel hopeless;
  - (b) the prison environment negatively affects prisoners' physical and mental health; and
  - (c) prisons have been described as “toxic environments” in which antisocial behaviour is often reinforced by criminally minded peers.
- 19.31 A recent report from the Chief Ombudsman, *Kia Whaitake | Making a Difference*, has reinforced many of these concerns.<sup>14</sup> For these reasons, among others, we propose in Chapter 4 that preventive detention as a sentence be repealed. It would be consistent with that view to transition people currently subject to preventive detention to the new Act.
- 19.32 We acknowledge, however, that our proposal would create resourcing pressure on Ara Poutama. It would eventually need to accommodate many people currently subject to preventive detention in residential or secure facilities. In addition to the operation of the preventive measure itself, it would also take time and significant resourcing for Ara Poutama, health assessors and the courts to work through the many applications in respect of those who have passed their minimum period of imprisonment.
- 19.33 An alternative approach could be that people serving a sentence of preventive detention at commencement of the new Act remain subject to preventive detention unless released on parole. For those released on parole, the sentence would end after a certain period such as five or 10 years, provided the person has not been recalled to prison. We do not prefer this approach because it would continue indefinite imprisonment as a preventive measure for all those who are not granted parole. Nor would it achieve the same standard of community safety as our first suggestion.

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<sup>13</sup> It is important that the new Act apply to people subject to preventive detention who have been released on parole as well to avoid the potentially problematic aspects of parole conditions and recall for life.

<sup>14</sup> Peter Boshier *Kia Whaitake | Making a Difference* (Office of the Ombudsman, June 2023).

19.34 The experience of England and Wales with Imprisonment for Public Protection (IPP) sentences — which are similar to Aotearoa New Zealand’s preventive detention sentences — also suggests that people should not remain subject to preventive detention. When IPP sentences were abolished in 2012, the abolishing legislation did not have retrospective effect, which meant over 1,200 prisoners remained subject to IPP sentences. This was criticised at the time.<sup>15</sup> In 2022, the House of Commons Justice Committee recommended resentencing all people subject to IPP sentences, noting that this would be the only way to “address the unique injustice caused by the IPP sentence and its subsequent administration, and to restore proportionality to the original sentences that were given”.<sup>16</sup> The Committee highlighted the significant psychological harm that IPP sentences cause.<sup>17</sup> The United Kingdom Government rejected the Justice Committee’s recommendation to implement resentencing but later reduced the period after which the licence period of people serving IPP sentences after their release can be terminated.<sup>18</sup> This has been welcomed by experts and advocacy groups but simultaneously criticised for not going far enough.<sup>19</sup> It offers no benefits for those who have never been released on licence.

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<sup>15</sup> For example Beverley Alden and others *Unintended consequences: Finding a way forward for prisoners serving sentences of imprisonment for public protection* (HM Inspectorate of Prisons, November 2016) at 7.

<sup>16</sup> House of Commons Justice Committee *IPP sentences – Third Report of Session 2022–23* (HC 266, 28 September 2022) at [152]–[153].

<sup>17</sup> House of Commons Justice Committee *IPP sentences – Third Report of Session 2022–23* (HC 266, 28 September 2022) at [40]–[48].

<sup>18</sup> House of Commons Justice Committee *IPP sentences: Government and Parole Board Responses to the Committee’s Third Report* (HC 933, 9 February 2023) at 1; and Victims and Prisoners Act 2024 (UK), s 66.

<sup>19</sup> See Haroon Siddique “Over 1,800 offenders to have indefinite jail sentences terminated, says MoJ” *The Guardian* (online ed, London, 28 November 2023); Claire Brader “Current Affairs Digest: Law (February 2024)” (6 February 2024) House of Lords Library <[www.lordslibrary.parliament.uk](http://www.lordslibrary.parliament.uk)>; and Salma Ben Souissi “UN expert says UK indefinite prison sentence reforms insufficient” *JURIST* (online ed, 21 January 2024).

## APPENDIX 1

# Qualifying offences for preventive detention, ESOs and PPOs

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
C	A conspiracy to commit this offence is also a qualifying offence
A	An attempt to commit this offence is also a qualifying offence

TABLE 1: QUALIFYING OFFENCES			
Qualifying offence	Preventive detention	ESOs	PPOs
<b>Sexual offences – Crimes Act 1961</b>			
128B: sexual violation by rape or unlawful sexual connection	✓	✓ ○ C A	✓ ○
129(1) and (2): attempted sexual violation and assault with intent to commit sexual violation	✓	✓ ○ C A	✓ ○
129A(1): sexual connection with consent induced by threats	✓	✓ ○ C A	✓ ○
129A(2): indecent act with consent induced by threats but only if the victim is under 16	✗	✓ ○ C A	✗

130: incest	✓	✓ O C A	✓ O
131(1) and (2): sexual connection or attempted sexual connection with a dependent family member under 18	✓	✓ O C A	✓ O
131(3): indecent act on a dependent family member but only if the victim is under 16	✗	✓ O C A	✗
131B: meeting a young person following sexual grooming	✓	✓ O C A	✓ O
132(1), (2) and (3): sexual connection, attempted sexual connection or indecent act on a child under 12	✓ O A	✓ O C A	✓ O A
134(1), (2) and (3): sexual connection, attempted sexual connection or indecent act on a young person under 16	✓ O A	✓ O C A	✓ O A
135: indecent assault	✓ A	✓ O C A	✓ O A
138(1) and (2): exploitative sexual connection or attempted exploitative sexual connection with a person with a significant impairment	✓	✓ O C A	✓ O
138(4): exploitative indecent act on a person with a significant impairment	✗	✓ O C A	✗
142A: compelling an indecent act with an animal	✓	✓ O C A	✓ O
143: bestiality	✓	✓ O C A	✓ O
144C: organising or promoting child sex tours	✓	✓ O C A	✓ O
208: abduction for purposes of marriage or civil union or sexual connection	✓	✓ O C A	✓ O
<b>Sexual offences – Prostitution Reform Act 2003</b>			
23(1): offences relating to use in prostitution of persons under 18 years	○	○	○
<b>Sexual offences – relating to Films, Videos, and Publications Classification Act 1993</b>			
107B(3) Parole Act 2002: 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; and/or	✗	✓ O	✗

(c) exploits the nudity of children and/or young persons			
<b>Violent offences – Crimes Act 1961</b>			
171 or 177: manslaughter	✓	✓ O C A	✓ O
172: murder	x	✓ O C A	✓ O
173: attempt to murder	✓	✓ O C A	✓ O
174: counselling or attempting to procure murder	✓	✓ O C A	✓ O
175: conspiracy to murder	✓	✓ O C A	✓ O
176: accessory after the fact to murder	✓	✓ O C A	✓ O
188(1) and (2): causing grievous bodily harm with intent or reckless disregard for safety	✓	✓ O C A	✓ O
189(1): injuring with intent to cause grievous bodily harm	✓	✓ O C A	✓ O
191(1) and (2): aggravated wounding or injury	✓	✓ O C A	✓ O
198(1) and (2): discharging a firearm or doing a dangerous act with intent or reckless disregard for safety	✓	✓ O C A	✓ O
198A(1) and (2): using a firearm against a law enforcement officer or to resist arrest	✓	✓ O C A	✓ O
198B: commission of a crime with a firearm	✓	✓ O C A	✓ O
199: acid throwing	✓	✓ O C A	✓ O
209: kidnapping	✓	✓ O C A	✓ O
210: abduction of a young person under 16	✓	x	✓ O
234: robbery	✓	✓ O C A	✓ O
235: aggravated robbery	✓	✓ O C A	✓ O
236: assault with intent to rob	✓ A	✓ O C A	✓ O A



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