

Pūrongo | Report 149

Here ora

Preventive measures in a reformed law



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

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

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

The Commissioners are:

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Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka.

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19 March 2025

Tēnā kōrua Ministers

NZLC R149 — Here ora: Preventive measures in a reformed law

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Nāku noa, nā

A handwritten signature in blue ink, reading 'Amokura Kawharu'.

Amokura Kawharu

Tumu Whakarae | President



Foreword

Many studies and reports over the years have explained the need for a fundamental shift in approach to criminal justice in Aotearoa New Zealand. Evidence continues to accumulate that the current system delivers punishment but is ineffective at keeping communities safe. Addressing this fundamental problem requires a concentrated effort to uplift the overall welfare and security of families, whānau and society at large.

As part of that effort, we must accept that genuine public safety is unobtainable without reshaping current law and policy. Simply put, the historical focus on containment and restriction needs rebalancing to put greater emphasis on approaches that treat people who offend with dignity and support their rehabilitation and reintegration.

This review focuses on people who commit serious sexual and violent offences and present a high risk of reoffending. The current law responds to the reoffending risk in a fragmented and unbalanced way.

Our recommendations recognise that, to achieve sustainable community safety, reformed preventive measures must prioritise a person's health, rehabilitation and reintegration needs. They will ensure the state can respond to the potential for harm while, at the same time, working with people towards their restoration as part of our community.

Our findings and recommendations are informed by wide engagement with experts in law, Māoritanga and the criminal justice system. In addition, we have heard directly from people with lived experience of being subject to preventive measures. We are grateful for the knowledge and aspirations for better law shared with us during this review. While our recommendations do not achieve the full extent of systemic transformation that many seek, we are confident they represent an important step towards safer communities.



Amokura Kawharu

Tumu Whakarae | President

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Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of everyone who has helped us in this review.

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- Associate Professor Sarah Christofferson
- Dr Danica McGovern
- Professor Khylee Quince
- Michael Starling

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- Riki Donnelly
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- Kirsti Luke
- Professor Tracey McIntosh
- Professor Khylee Quince
- Julia Spelman
- Poata Watene

We are also grateful for the support and guidance of the Māori Liaison Committee to Te Aka Matua o te Ture | Law Commission.

We thank the many people who, throughout the course of this review, found time to meet with us to share their views and experience. Likewise, we acknowledge the valuable contribution of all who submitted during the consultation periods. The input we received has been central to the development of our recommendations for reform.

Ka rere ā mātou mihi ki a koutou, e ngā tohunga kauanuanu. Nā koutou te rourou, nā mātou te rourou, ka ora ai te iwi. Tēnā koutou, tēnā koutou, tēnā rā tātou katoa.

The Commissioner responsible for this project is Amokura Kawharu. The project is led by Principal Legal and Policy Adviser John-Luke Day. The Legal and Policy Advisers who have worked on this Report are Thomas Buocz, Ruth Campbell and Samuel Mellor. The law clerks who have worked on this Report are George Curzon-Hobson, Kaea Hudson and Sean McElwain-Wilson.

Contents

Foreword.....	iv
Acknowledgements.....	v
Chapter 1: Executive summary.....	6
PART 1: INTRODUCTORY MATTERS	
Chapter 2: Introduction.....	35
Introduction.....	35
Background to the review.....	35
Scope.....	36
Overview of the law relating to preventive measures.....	36
Our process.....	41
Our approach.....	42
Matters addressed in this Report.....	43
Terminology and other matters.....	44
PART 2: FOUNDATIONAL MATTERS	
Chapter 3: The continuation of preventive measures in New Zealand law.....	46
Introduction.....	46
The case for preventive measures.....	46
The decision in <i>Attorney-General v Chisnall</i>	52
Recommended reformed preventive measures.....	55
Chapter 4: A single, post-sentence regime.....	59
Introduction.....	59
Issues.....	60
Results of consultation.....	69
Recommendations.....	72
Chapter 5: Reorienting preventive measures.....	83
Introduction.....	83
Issues.....	83

Results of consultation	92
Recommendations	93
Pathways into the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003	96
Chapter 6: Te ao Māori and the preventive regimes	103
Introduction	103
Background	103
Issues	112
Results of consultation	114
Recommendation	116
PART 3: ELIGIBILITY	
Chapter 7: Age of eligibility	122
Introduction	122
Background	122
Young adults and preventive detention	124
Results of consultation	125
Recommendation	126
Chapter 8: Qualifying offences	129
Introduction	129
Background	129
Qualifying offences for the purposes of eligibility	130
Consistency of qualifying offences across the regime	131
Qualifying offences to be included in the new Act	135
Further qualifying offences	151
Chapter 9: Overseas offending	155
Introduction	155
Background	155
Issue	158
Results of consultation	159
Recommendation	160

PART 4: IMPOSING PREVENTIVE MEASURES	
Chapter 10: Legislative tests for imposing preventive measures	163
Introduction	163
Current law	163
Applications for preventive measures	166
Legislative tests for imposing a preventive measure	170
Imposition of special conditions	181
Traits and behavioural characteristics should not be prescribed in the tests	185
Ability to impose a less restrictive measure	188
Interim preventive measures	189
Chapter 11: Evidence of reoffending risk	193
Introduction	193
Health assessor reports as the principal evidence in preventive measures proceedings	193
Use of risk assessment tools	200
Other evidence a court may consider	206
Chapter 12: Proceedings under the new Act	208
Introduction	208
Whether proceedings under the new Act should be criminal or civil	209
Rights of appeal	210
Views of kin groups	214
Rights of victims	217
Suppression of names, evidence and details of preventive measures	226
PART 5: ADMINISTRATION OF PREVENTIVE MEASURES	
Chapter 13: Overarching operational matters	238
Introduction	238
Operational responsibility	239
Guiding principles	247
Entitlement to rehabilitative treatment and reintegration support	252
Needs assessments and supervision plans	257

Implications for rehabilitative treatment and reintegration support during determinate prison sentences	263
Chapter 14: Community preventive supervision.....	264
Introduction	264
Current law	264
Community preventive supervision as a stand-alone preventive measure	268
Standard conditions	269
Special conditions	276
The role of probation officers.....	283
The rights of people subject to community preventive supervision	285
Chapter 15: Residential preventive supervision.....	286
Introduction	286
Current law	287
Residential preventive supervision as a new stand-alone preventive measure	288
Standard and special conditions.....	295
Establishment and operation of residential facilities	305
Rights of residents	308
Chapter 16: Secure preventive detention	311
Introduction	311
Current law	311
Secure preventive detention as a stand-alone preventive measure.....	313
Coercive powers of secure facility managers	321
Rights of detainees.....	324
Chapter 17: Non-compliance and escalation	327
Introduction	327
Current law	327
Consequences for non-compliance	329
Escalation to a more restrictive preventive measure	336

Chapter 18: Duration and review of preventive measures	345
Introduction	345
Current law	346
Duration of preventive measures	348
Periodic reviews by a court	356
Periodic reviews by a Review Authority.....	367
Applications to terminate or vary a preventive measure.....	374
Chapter 19: Transitional provisions.....	379
Introduction	379
Recommendation	379
Human rights implications of transitional provisions	380
List of recommendations	391
Appendix 1: Qualifying offences for preventive measures.....	418
Appendix 2: Rights of residents and detainees.....	423
Appendix 3: List of submitters.....	426
Appendix 4: Terms of reference	428

CHAPTER 1

Executive summary

- 1.1 Te Aka Matua o te Ture | Law Commission has reviewed the laws that aim to protect the community from reoffending risks posed by some people convicted of serious crimes. These laws provide for preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs). We refer to these measures throughout this Report as “preventive measures”.
- 1.2 This is our Final Report in which we make our recommendations to the Government for how the law governing preventive measures should be reformed. We recommend that a single, new Act should replace the three regimes under the current law. The recommended reforms will improve the safety of our communities while treating those restricted or detained more humanely.
- 1.3 This executive summary provides an overview of our recommendations and signposts the relevant chapters. Each chapter contains a full discussion of the issues with the current law, feedback we received during consultation and analysis of our recommendations.
- 1.4 We reference the relevant recommendations in this executive summary by the recommendation numbers. A list of all recommendations is set out at the end of this Report.

OVERVIEW

- 1.5 We have concluded that the law governing preventive measures requires a significant overhaul to address fundamental issues. Those issues include the following:
 - (a) **Fragmentation of the law.** The law is separated across different regimes governed by different statutes. This fragmentation can cause procedural inefficiencies. It can hinder the court from imposing the most appropriate order to keep the community safe and comply with human rights law.
 - (b) **Human rights issues.** The current law does not facilitate the humane treatment of people subject to preventive measures. It unduly restricts their rights and freedoms. In particular, there is an inadequate focus on their rehabilitative and therapeutic needs. In the case of preventive detention, it is problematic that the method of addressing reoffending risk is to detain people indefinitely in the same conditions as people serving punitive prison sentences. The current law has been criticised by the domestic courts and international human rights bodies. In particular, the United Nations Human Rights Committee has found that preventive detention breaches the International Covenant on Civil and Political Rights. Te Kōti Mana Nui | Supreme Court

has held that aspects of the ESO and PPO regimes breach the protection under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) against punishing a person twice for the same crime.

- (c) **Risk assessment at sentencing.** To impose preventive detention, the court must assess the likelihood that a person will reoffend were they to complete a determinate sentence of imprisonment and then released into the community. It requires predictions of a person's risk years into the future. The assessment is likely to be more accurate if undertaken when the person's release into the community is imminent and how the person responded to rehabilitation interventions in prison can be taken into account.
- (d) **Consistency with tikanga and the Treaty of Waitangi.** As with the wider criminal justice system, there are concerns that the law is inconsistent with tikanga Māori and does not give effect to obligations under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).
- (e) **Omission of some types of qualifying offending.** To be eligible for preventive detention, an ESO or a PPO, a person must have been convicted of one of the qualifying offences specified in the legislation. The legislation omits some serious offences that might indicate a risk of serious reoffending. Notably, the law omits the offence of strangulation or suffocation. The law governing preventive detention and PPOs omits offences relating to the possession and distribution of child sexual abuse material.
- (f) **Technical issues with the legislative tests for imposing measures.** The legislation governing the imposition of preventive detention, ESOs and PPOs may not focus on the appropriate level of risk. Some provisions require the courts to be satisfied the person displays certain traits and behavioural characteristics that may not indicate reoffending risk. Also, the courts apply additional tests arising from human rights law that are not expressed in the primary legislation.
- (g) **Authorising detention through placements with a programme provider.** People subject to ESOs can be detained if the New Zealand Parole Board (Parole Board) imposes special conditions requiring their full-time placement with a programme provider. This is achieved through a combination of programme conditions and residential restrictions. It is preferable that the law authorises more clearly detention of this nature and places responsibility for its imposition with the court.

1.6 To address these issues, we make several recommendations in this Report. The key recommendations include the following:

- (a) **The introduction of a new, single statutory regime.** Measures to prevent serious sexual and violent reoffending should be brought into a new, single statute. The new Act should provide a cohesive gradation of measures to prevent serious reoffending — from supervision in the community through to secure detention. The legislation governing preventive detention, ESOs and PPOs should be repealed.
- (b) **A move to post-sentence measures.** Measures under the new Act should be imposed at the end of a person's determinate sentence for their qualifying offending. We do not favour the imposition of preventive measures imposed at sentencing. Preventive detention should be abolished.

- (c) **Adjustments to the list of qualifying offences.** New qualifying offences should be added to ensure the inclusion of serious offences that might indicate a risk of serious reoffending.
- (d) **Revisions to the legislative tests for the imposition of preventive measures.** The legislative tests according to which the court determines whether to impose a preventive measure should be revised. The new tests should better address community safety risks while ensuring restrictions on rights and freedoms are limited only to the extent necessary and justified.
- (e) **A gradation of three new preventive measures.** The new Act should provide for three preventive measures of varying degrees of restrictiveness. Each measure should be established as a separate measure and the restrictions it imposes clearly communicated in the legislation. The three measures are:
 - (i) supervised life in the community (“community preventive supervision”);
 - (ii) detention in a community-based residential facility (“residential preventive supervision”); and
 - (iii) detention in a secure facility designed to stop people from leaving (“secure preventive detention”).
- (f) **Strengthening Māori involvement and the operation of tikanga.** The new Act should promote and strengthen the placement of a person within the care of an iwi, hapū, marae or whānau.
- (g) **Greater entitlements to rehabilitative treatment and reintegration support.** All preventive measures under the new Act should have a central focus on restoring people at high risk of serious reoffending to safe and unrestricted life in the community. The legislation should provide greater entitlements to rehabilitative treatment and reintegration support.
- (h) **The conditions of detention should be distinct from prison.** The recommended preventive measures that authorise detention should be subject to legislative protections that require the conditions of detention to be different to and better than the conditions of punitive prison sentences.

1.7 We now step through the contents of each chapter of the Report.

PART 1: INTRODUCTORY MATTERS

- 1.8 Part 1 of this Report sets out a number of introductory matters related to our review and the aims of this Report. This chapter (Chapter 1) provides an executive summary of the Report and our recommendations for reform.
- 1.9 Chapter 2 provides an overview of current laws governing preventive measures and sets out the purpose and aims of our review process.
- 1.10 The Minister responsible for the Law Commission asked us to review the law relating to preventive detention. Our terms of reference expanded the scope of the review to include ESOs and PPOs. We published an Issues Paper in 2023 and a Preferred Approach Paper in 2024, consulting on the content of each paper.

PART 2: FOUNDATIONAL MATTERS

1.11 Part 2 of this Report sets out the foundational and overarching matters relating to our recommendations for reform.

The continuation of preventive measures in New Zealand law (Chapter 3)

1.12 In Chapter 3, we explain a key conclusion on which this Report rests — that the law of Aotearoa New Zealand should continue to provide preventive measures to protect the community from serious sexual and violent reoffending (R1).

The need for preventive measures

1.13 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. 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.

1.14 The Supreme Court has confirmed that the protection of the community from serious sexual and violent reoffending is of great importance and that the restrictions preventive measures impose, including detention, can be justified.

Three new preventive measures

1.15 We recommend that there should be three types of preventive measures to form a gradation of measures at different levels of restriction (R2). These measures should sit within a new legislative framework that has been reformed in accordance with the recommendations made in this Report. In order of severity of restrictions, these are the recommended preventive measures:

- (a) **Community preventive supervision.** This measure will 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. No condition under community preventive supervision should authorise detention.
- (b) **Residential preventive supervision.** This measure will require a person to be detained at a residential facility with minimal security features. The measure aims to provide a structured and supported living arrangement as close to life in the community as possible.
- (c) **Secure preventive detention.** This measure will allow for a person to be detained in a secure facility designed to stop them from leaving. The secure facility should be separate to, and distinct from, prison. As the most restrictive measure, this should be an option only when no less restrictive measure would be able to provide adequate community protection.

1.16 We explain how these measures should operate in greater detail in Part 5 of this Report.

A single, post-sentence regime (Chapter 4)

1.17 In Chapter 4, we consider reforms necessary to address:

- (a) the fragmentation of the law governing preventive measures across three separate statutory regimes; and

- (b) the difficulties of imposing preventive detention based on assessments of a person's future risk made at sentencing.

The new Act

- 1.18 We recommend the creation of a new Act to bring all preventive measures into a single statutory regime (R3). We consider this is preferable to amending existing legislation given the extent of amendments that will be required. It also provides an opportunity to assert the Act's own purpose and principles, focused on rehabilitation and reintegration alongside community safety.
- 1.19 The new Act will link, and provide for the gradation of, the preventive measures. This will ensure that each measure imposed is the least restrictive measure necessary in the circumstances. It will address some of the procedural problems caused by the current fragmentation across three separate statutes.
- 1.20 Because of our recommendation for new legislation, the current legislation governing preventive detention, ESOs and PPOs should be repealed (R4). While some aspects of the current law relating to ESOs and PPOs will be carried forward into the new Act, we recommend that the sentence of preventive detention be repealed and not continued. We do not consider that imprisonment beyond a punitive prison sentence is a humane and proportionate means of achieving the community protection objective.

New preventive measures should be post-sentence orders

- 1.21 We recommend that preventive measures should be post-sentence orders (R5). They should be imposed towards the end of a person's indeterminate prison sentence. Under the current law, ESOs and PPOs are post-sentence orders, but preventive detention is imposed at sentencing.
- 1.22 The benefits of imposing measures towards the end of a sentence outweigh concerns that post-sentence orders engage the right not to be subjected to second punishment. In particular:
- (a) Assessing a person's risk of reoffending post-sentence is more accurate than assessing it at sentencing. Towards the end of a sentence, an assessment can take into account any changes that have occurred during the person's time in prison to the risks they pose.
 - (b) The most severe preventive measure, indeterminate detention, should not be considered unless all less restrictive measures for managing a 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. The punitive focus of sentencing may obscure or inhibit that approach.
- 1.23 The limitations that post-sentence preventive measures put on the right to protection against second punishment can be justified. Our recommendations are designed to ensure that:
- (a) public protection is achieved by the least restrictive means possible;

- (b) the punitive impact of restrictions on people subject to preventive measures is minimised; and
 - (c) the provision of sufficient rehabilitative treatment and reintegration support is mandatory.
- 1.24 Lastly, people should be notified at sentencing of the possibility that they will be made subject to a preventive measure at the end of their sentence (R6). This is to give people a fair warning about the possibility of a measure being sought against them.

Reorienting preventive measures (Chapter 5)

- 1.25 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 explain that the indefinite detention in prison exposes people on preventive detention to the highly detrimental effects of prison for longer periods than people sentenced to determinate sentences. We also discuss the prevalence of disabled people and people with mental health needs or complex behavioural conditions among those who are subject to preventive detention, ESOs and PPOs.
- 1.26 We conclude that the law should be reoriented to facilitate a more humane and rehabilitative approach towards people subject to preventive measures.

The new Act should include a purpose clause

- 1.27 The new Act should include a purpose clause that clearly expresses the policy objectives of the legislation (R7).
- 1.28 The first purpose we recommend is protecting the community by preventing serious sexual and violent reoffending. Given our conclusion that preventive measures continue to be needed, we consider the new Act should express this purpose.
- 1.29 The second purpose is to 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. The intent of this purpose is to:
- (a) recognise that community safety is enhanced by supporting people to address factors that trigger risks of reoffending;
 - (b) provide clarity that preventive measures must focus on rehabilitation and reintegration in order to comply with human rights standards; and
 - (c) reinforce that the needs of disabled people and those with mental health needs and complex behavioural conditions should be addressed.
- 1.30 The third purpose is to ensure that the law imposes restrictions on a person only to the extent justified for community safety. This is in addition to our recommendations that this objective be embedded in the legislative tests for imposing a preventive measure (see Chapter 10). 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.

Pathways to mental health and intellectual disability legislation should continue

- 1.31 The new Act should provide pathways for a person subject to a preventive measure to move to regimes that provide for compulsory care and treatment for mental health needs

or intellectual disabilities (R8–R11). This recognises that, even with our recommendations aiming to provide a more supportive environment for those subject to preventive measures, there will be some people for whom care within the mental health or disability regimes is appropriate.

Te ao Māori and the preventive regimes (Chapter 6)

- 1.32 In Chapter 6, we conclude that the current law relating to preventive measures does not enable Māori to live in accordance with tikanga and does not give effect to the Crown's obligations to Māori under the Treaty.
- 1.33 In order to better facilitate the exercise of tino rangatiratanga and the implementation of the principles of equality and active protection, we recommend that the new Act should include specific provision that ensures Māori involvement in the management of people subject to the new regime (R12). Our recommendation will require the court to consider whether to place a person in the care of a Māori group. In doing so, the court will need to be satisfied of the availability and suitability of such a placement in the circumstances.
- 1.34 Our recommendation is deliberately flexible 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. Their programmes and approaches may draw on tikanga and mātauranga Māori as well as current clinical practice on rehabilitation and risk management.
- 1.35 We anticipate that different kinds of government resourcing and support and a commitment to cooperation will be necessary to implement this recommendation.

PART 3: ELIGIBILITY

- 1.36 Part 3 of this Report sets out recommendations for who should be eligible to have a preventive measure imposed on them. The recommendations 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)

- 1.37 In Chapter 7, we discuss issues relating to the age at which a person is eligible for a preventive measure under the current law.
- 1.38 Preventive measures should only apply once a person is aged 18 or over (R13). Our recommendation 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 is unsuitable for imposition on young people.
- 1.39 The age of eligibility we recommend 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.

Qualifying offences (Chapter 8)

1.40 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).

The use of qualifying offences as a trigger for eligibility for a preventive measure should continue

1.41 Eligibility for preventive measures should continue to be based on conviction and a sentence of imprisonment for qualifying offences (R14). We recommend that these qualifying offences should, with some amendments, be the same offences as under the current regimes.

1.42 Previous offending is one of the most stable and significant predictors of future offending. Basing eligibility on previous offending provides a rational connection to the aim of the preventive regime — protection of the community from the harm caused by serious reoffending.

Qualifying offences should be the same for all preventive measures

1.43 Qualifying offences should be the same for all preventive measures under the new Act (R15). This aligns with our recommendation 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. The legislative tests for imposition (see Chapter 10) will ensure that measures are imposed only when appropriate and in response to appropriately serious offending and levels of risk.

Qualifying offences should continue to focus on sexual and violent offending

1.44 The law governing preventive measures should continue to focus on the prevention of sexual and violent offending. This should be reflected in the qualifying offences that make a person eligible for a preventive measure (R16). This is because of the harm caused by this type of offending. We conclude that the current regimes target serious sexual and violent offences appropriately.

Qualifying offences should be the same as under the current law, with some modifications

1.45 We recommend that qualifying offences for the current regimes should continue as qualifying offences in the new Act, subject to the addition and removal of a small number of offences (R17). The full set of qualifying offences we recommend for the new Act is listed in Appendix 1 of this Report.

1.46 Some qualifying offences — such as indecent assault — cover a range of behaviour that varies in seriousness. The legislative tests for imposition (see Chapter 10) will ensure that preventive measures will not be imposed when offending that involves less serious behaviour does not justify a preventive measure.

Certain offences under the Films, Videos, and Publications Classification Act 1993 should be qualifying offences

1.47 Certain imprisonable offences under the Films, Videos, and Publications Classification Act 1993 (FVPC Act) involving objectionable material of children and young people should be

qualifying offences under the new Act (R18). These offences are currently qualifying offences for ESOs only.

- 1.48 Our conclusion on this point is finely balanced. There is no direct or certain link between non-contact offending that involves child sexual abuse material and future contact sexual offending. However, psychological assessment can 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 that someone may commit future contact offending. The prospect of failing to identify and respond to offenders who pose particular risks of committing contact child sexual offences outweighs the detriment of identifying a larger cohort of offenders, many of whom will not pose a risk of committing future contact offending.

Strangulation or suffocation should be a qualifying offence

- 1.49 The offence of strangulation or suffocation should be a qualifying offence (R19). This offending causes considerable harm to the community. In the context of family violence, the offence is an indicator for risk of escalation to a future fatal attack. We consider these are harms from which the community should be protected. Many people are convicted of strangulation or suffocation, so its inclusion may have a widening effect on the regime. We consider this can be justified given the seriousness of the offending. The legislative tests will ensure that preventive measures are only imposed when appropriate and justified.

Incest, bestiality and accessory after the fact to murder should not be qualifying offences

- 1.50 We recommend the removal of three existing qualifying offences: incest, bestiality and accessory after the fact to murder (R20). These offences are less serious than other existing qualifying offences in that they do not involve the same level of direct harm to people (noting that cases of incest involving non-consensual behaviour or offending against children or young people will be addressed by existing qualifying offences).
- 1.51 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 no 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 so do not create a risk of reoffending.

Most qualifying offences should be further qualifying offences

- 1.52 All qualifying offences, except the ones specified below, should be further qualifying offences for the purpose of application of the legislative tests (R21). 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.
- 1.53 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. 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)

- 1.54 In Chapter 9, we consider some of the inconsistencies in the current regimes relating to eligibility for a preventive measure for offending committed overseas.
- 1.55 Offenders returning from overseas can pose a high risk to community safety. The imposition of a preventive measure may be justified. We recommend that, under the new Act, a person convicted of an offence overseas should be eligible for a preventive measure only if it would be a qualifying offence if committed in Aotearoa New Zealand (R22).
- 1.56 Our recommendation will require that a person's overseas offending falls within the definition of a qualifying offence under the new Act. This will resolve 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.

PART 4: IMPOSING PREVENTIVE MEASURES

- 1.57 Part 4 of this Report sets out our conclusions on how a court should determine whether to impose a preventive measure. We make recommendations on the tests the court should apply, the relevant evidence of reoffending risk it should consider and how the court should conduct proceedings.

Legislative tests for imposing preventive measures (Chapter 10)

- 1.58 In Chapter 10, we consider the legislative tests that the court should apply to determine whether and which preventive measure should be imposed.
- 1.59 There are several issues with the tests under the current law:
- (a) The separate tests for preventive detention, ESOs and PPOs are framed very differently and may not focus on the appropriate level of likelihood of reoffending relative to the severity of the measure.
 - (b) The courts and international human rights bodies have applied several additional features to the tests that are not expressed in the legislation.
 - (c) The tests for ESOs and PPOs require the court to be satisfied that the person displays certain traits and behavioural characteristics. The meaning of some of these traits and characteristics is unclear. There are doubts about whether they are the best indicators of reoffending risk.
- 1.60 We therefore recommend in Chapter 10 that the tests be redrafted.

Jurisdiction to impose preventive measures should be shared between te Kōti-ā-Rohe | District Court and te Kōti Matua | High Court

- 1.61 All proceedings for imposing a preventive measure should commence with an application made by the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) (R23). This continues the approach in place for ESO and PPO applications.
- 1.62 Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for residential preventive supervision and secure preventive detention. Te Kōti-ā-Rohe | District Court should have first instance jurisdiction for applications for community preventive supervision (R24). 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.

The same set of legislative tests should apply to all preventive measures

- 1.63 We recommend a single set of tests that should apply to the imposition of all preventive measures under the new Act (R25). The tests should require the court to be satisfied:
- (a) the person poses a high risk of committing a further qualifying offence;
 - (b) the measure sought is the least restrictive of the measures that would adequately address the risks; and
 - (c) any limits that the measure sought would impose on the person's rights and freedoms are justified by the nature and extent of risks the person poses.
- 1.64 These tests are designed to 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 measure would best achieve the objective of community safety while imposing only justified limits on a person's rights and freedoms.
- 1.65 In contrast to the current approach to ESOs and PPOs, our recommended tests do not refer to specific traits or behavioural characteristics. This omission does not, however, preclude any traits or behavioural characteristics from being considered by the court where they have specific relevance to the assessment of a person's risk of reoffending.
- 1.66 The legislation should include a list of matters relevant to whether the tests are met and that the court should take into account (R26).

Special conditions should be imposed by the courts as part of the preventive measures

- 1.67 The recommended 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 community preventive supervision or residential preventive supervision.
- 1.68 The court should consider any special conditions sought as part of its overall assessment of whether, and what, preventive measure should be imposed (R27). It should impose the measure and the conditions of the measure at the same time.
- 1.69 We consider that the power to impose special conditions should rest with the court rather than, as at present, with the Parole Board. This is because:
- (a) Enabling the court to consider the imposition of a preventive measure and special conditions together will reduce the inefficiencies caused by multiple hearings concerning similar issues and the same evidence.
 - (b) It is appropriate for special conditions to be imposed through a court decision and subject to full appeal rights given the potential restrictiveness of some conditions.
 - (c) This approach is taken in almost all comparable jurisdictions we have examined.
 - (d) The recommended legislative test requires the court to impose the least restrictive measure adequate to address the risk a person poses and is proportionate to that risk. The court cannot do that if the special conditions of the measure were set subsequently by a separate body.

The court should have the power to impose a less restrictive preventive measure

- 1.70 If the court is not satisfied the tests are met in respect of the preventive measure sought, the court should have power to impose a less restrictive preventive measure on its own initiative (R28). 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.

The court should have the power to impose interim measures

- 1.71 Lastly, the law should provide for the imposition of a preventive measure on an interim basis, pending the final determination of an application (R29–R31). This reflects the approach under the current law.

Evidence of reoffending risk (Chapter 11)

- 1.72 In Chapter 11, we consider the evidence a court relies on when determining whether to impose a preventive measure.
- 1.73 Under the current law, health assessors who are registered psychiatrists or psychologists prepare reports. The reports contain the health assessors' views on a person's risk based on the results of risk assessment tools and clinical judgement.
- 1.74 Risk assessment tools have several limitations. There is the potential for results to be relied upon in inappropriate ways. We do not recommend reforms to address these problems because we consider they can be dealt with within the existing legal and procedural frameworks.

Health assessor reports should continue to be the principal evidence

- 1.75 Health assessor reports on a person's risk of reoffending should remain the principal evidence on which a court makes its determination (R32).
- 1.76 Requiring the applicant to submit a health assessor report is established practice in both Aotearoa New Zealand and overseas jurisdictions. Our recommendation requires two reports to be submitted where residential preventive supervision and secure preventive detention 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. The court's assessment of whether to impose residential preventive supervision or secure preventive detention is likely to require a high degree of expert input.

Health assessor reports should focus on legislative tests

- 1.77 The legislation should not be overly prescriptive about what the health assessor reports should cover. Our recommendation is to enable health assessors to focus on matters relevant to the legislative tests (R33). 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.

Definition of health assessor should continue

- 1.78 The new Act should define the term "health assessor" in the same way as it is currently defined in ESO and PPO legislation (R34). We are not aware of any concerns with this approach.

Additional reports should be obtainable

1.79 Both the court and the person subject to an application should be able to obtain additional reports from a health assessor (R35–R36). As provided for in the Public Safety (Public Protection Orders) Act 2014 (PPO Act), public funding should continue to be available to meet the expense of the health assessor reports obtained by the court or the person against whom the preventive measure is sought (R37).

The court should have the power to receive and consider other evidence

1.80 The new Act should maintain the status quo regarding the court's ability to receive and consider evidence as provided for in the ESO and PPO legislation (R38). 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 will facilitate the court receiving views from family, whānau, hapū and iwi who wish to be heard.

Proceedings under the new Act (Chapter 12)

1.81 In Chapter 12, we consider several matters that arise when the courts hear and determine applications relating to preventive measures.

Proceedings under the new Act should be conducted under criminal jurisdiction

1.82 Proceedings concerning preventive measures should be conducted through the courts' criminal jurisdiction (R39). The criminal jurisdiction more appropriately reflects the role of the state in the imposition and administration of preventive measures compared to the civil jurisdiction. It also recognises that the trigger for consideration of a preventive measure is previous criminal offending. Crucially, a criminal approach will address the practical issues caused by the split in the current law between criminal jurisdiction, used in preventive detention and ESO proceedings, and the civil jurisdiction, used in PPO proceedings. It will allow for continuity of counsel and ensure procedural efficiency.

There should be a right of appeal to te Kōti Pira | Court of Appeal

1.83 There should be a right of appeal against all decisions by a court in relation to preventive measures (R40–R42). Our recommendation will 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.

1.84 Te Kōti Pira | Court of Appeal should hear all appeals relating to preventive measures. This reflects the current approach to appeals relating to ESOs. Creating a singular approach to challenge decisions relating to the imposition of a preventive measure addresses concerns about the fragmentation of the law.

1.85 We consider that a right of appeal is more appropriate than a judicial review process for challenging decisions. Judicial review is limited to reviewing whether the decision was lawful and complied with standards contained in administrative law. Because the imposition of a preventive measure involves a significant restriction on a person's rights and freedoms, the correctness of the decision — rather than just its compliance with administrative law standards — should be open to re-examination.

The court should be required to consider views of kin groups

- 1.86 The court should be required 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 them (R43). We also recommend the development of initiatives to facilitate kin groups' participation in proceedings (R44).
- 1.87 Enabling kin groups to share their views when the court makes determinations regarding preventive measures will better facilitate tino rangatiratanga guaranteed by the Treaty. Their input may help ensure the imposition and administration of preventive measures in a way that accords with tikanga and help preserve the fundamental tikanga values of whakapapa and whanaungatanga. It will also go some way to improving participation of Māori in decisions affecting them and their communities.
- 1.88 Kin groups have an interest in the proceedings, owing to their whānau or other kin relationship with the person considered at risk of reoffending. They may have information and views about a person's background, the risks they pose and the appropriate way of responding to them.

Victims' rights and protections should continue

- 1.89 The new Act should continue many of the rights and protections victims have under the current law regarding preventive measures. Our recommendations align with the rights of victims afforded under Part 3 of the Victims' Rights Act 2002.
- 1.90 The rights and protections we recommend include:
- (a) 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 (R45–R46); and
 - (b) rights to make submissions to the court, although the ability to appear and make oral submissions should require the leave of the court (R47).
- 1.91 The rights we recommend should apply to people who are victims of a qualifying offence committed by a person either being considered for, or subject to, a preventive measure (R48). They must also have requested to be registered according to the requirements under the Victims' Rights Act.
- 1.92 A person subject to a preventive measure or against whom an application has been made should be prohibited from receiving any information that discloses a victim's address or contact details (R49). This mirrors the Parole Act 2002 and provides a basic level of protection for the victim from harassment or reprisal. We also recommend that respondents should be prohibited from retaining written submissions and that the court should be able to give directions or impose conditions related to the disclosure or distribution of a victim's submissions where there are grounds to do so.

Court proceedings should be open to the public

- 1.93 Any proceedings relating to an application to impose, review, terminate or escalate a preventive measure should generally be open to the public (R50).
- 1.94 Our recommendation 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 in 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 comes with open proceedings are particularly important given the human rights implications of imposing preventive measures.

The court should have the power to make suppression orders

- 1.95 The new Act should continue to allow for the court to make an order forbidding publication of particular information (R51).
- 1.96 In certain cases, the principle of open justice can be limited by other competing interests. Our recommendation continues the established approach under the Criminal Procedure Act 2011 (CPA) in allowing the court to forbid publication of the name or identifying details of anyone subject to a preventive measure (or an application for a measure) and any evidence given or submissions made during the proceedings. Additionally, we recommend that the court may suppress any details of the measure imposed.
- 1.97 The new Act should continue the two-stage test currently applied by the courts in regard to suppression orders under the CPA (R52). This will require the court to consider, first, whether any of the threshold grounds for suppression are 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. The second stage of the test was developed by the courts. We expect that the courts will adopt the same approach as they have in interpreting the test under the current law.

The court should have the power to clear the court

- 1.98 Lastly, the court should have the power to clear the court if a suppression order would not be sufficient to avoid certain risks (R53). The court will have the power to clear the court for all or part of proceedings, but only as a last resort. In most cases, a suppression will be an adequate safeguard.

PART 5: ADMINISTRATION OF PREVENTIVE MEASURES

- 1.99 Part 5 of this Report outlines recommendations for how preventive measures should be administered. It also sets out recommendations for how non-compliance with, and escalation between, preventive measures should be managed. Lastly, it covers how measures should be reviewed, varied or terminated and discusses some human rights implications of transitional provisions.

Overarching operational matters (Chapter 13)

- 1.100 In Chapter 13, we consider a number of overarching operational matters relating to the administration of the new preventive measures.

Ara Poutama Aotearoa | Department of Corrections should have operational responsibility

- 1.101 Ara Poutama should continue as the government department responsible for the operation of preventive measures (R54). It has institutional knowledge and experience detaining and supervising people considered at risk of reoffending. In all comparable jurisdictions we have analysed, preventive measures are managed by the same agency that operates the wider corrections system.

Facility managers should be appointed

- 1.102 The chief executive should appoint facility managers for residential facilities and secure facilities (R55). This is currently the case with prison managers under the Corrections Act 2004 and residence managers under the PPO Act. In relation to facilities run by an external entity through a management contract, the contractor should appoint the facility manager, subject to the chief executive's approval (R56).
- 1.103 Facility managers should have primary responsibility for the operation 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. Facility managers will need to comply with them (R57).

The chief executive should have the power to enter into facility management contracts

- 1.104 Facility management contracts should continue to be available under the new Act (R58). External organisations (such as iwi organisations and charitable entities) may bring different skills and expertise than Ara Poutama and be better placed to cater to the particular needs that people subject to residential preventive supervision or secure preventive detention may have.
- 1.105 All operators should 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 (R59).
- 1.106 The chief executive should be able to take over control of facilities in emergencies (R60). This is in line with current provisions under the Corrections Act and the PPO Act.

Investigation, inquiry and inspection procedures

- 1.107 The new Act should provide for the appointment of independent inspectors (R61–R66). The recommendations are modelled on the investigation and inquiry procedure provided for under the PPO Act.
- 1.108 The inspectors should be able to investigate and inquire into alleged breaches of the new Act by a probation officer, a facility manager or facility staff. Accountability for correcting any deficiencies identified by inspectors should lie with the relevant probation officer or facility manager.
- 1.109 We recommend that, as places of detention, both residential and secure facilities should be subject to National Preventive Mechanism examination under the Crimes of Torture Act 1989. We also recommend additional inspections by independent inspectors appointed by the chief executive to provide for a supplementary, broader inspection mandate (R67–R68).

Three guiding principles for making operational decisions

- 1.110 The new Act should provide overarching guiding principles for the administration of preventive measures (R69).
- 1.111 Those responsible for supervising people subject to preventive measures have considerable powers in respect of how that measure and its conditions are applied. There have been cases in which probation officers have exercised their powers to limit the rights of those subject to a preventive measure more than necessary.

- 1.112 The principles we recommend will guide probation officers and facility managers and staff on how to exercise their powers in a rights-compliant manner. The principles are that:
- (a) people subject to community preventive supervision must not be subject 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 must 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; and
 - (c) people subject to any preventive measure must, 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.

Entitlement to rehabilitative treatment and reintegration support

- 1.113 Rehabilitation is critical to ensuring preventive measures intrude on human rights to the least extent. Rehabilitation treatment and reintegration support will enable people subject to preventive measures to address the causes of their offending and learn to live safely in the community. It will therefore minimise the extent and length of the preventive measure. In addition, a rehabilitative focus will also more clearly distinguish these regimes from punishment.
- 1.114 We conclude that people subject to preventive measures should have stronger legislative entitlements to rehabilitative treatment and reintegration support than under the current law (R70–R71). This is to give effect to our broader aim to reorient preventive measures towards rehabilitation and reintegration. The extent of the duty on Ara Poutama to provide rehabilitative treatment and reintegration support should be based on the need to release people from a preventive measure at the earliest opportunity.

Needs assessment and supervision plans

- 1.115 We recommend a comprehensive initial needs assessment and a coordinated treatment and supervision plan to respond to the needs identified in a structured, consistent and methodical manner (R72–R75). The needs assessment and the supervision plan will help to ensure that people are subject to preventive measures no longer than necessary and that restrictions on their freedoms are relaxed as quickly as possible while ensuring community safety.
- 1.116 The initial needs assessment should serve as a starting point for a person's rehabilitative treatment and reintegration support and other activities designed to improve their wellbeing. The key function of the treatment and supervision plan will be to keep the progress of the person to safe and unrestricted life in the community under consideration.

Community preventive supervision (Chapter 14)

- 1.117 In Chapter 14, we set out our recommendations for the operation of community preventive supervision, the least restrictive of the recommended new measures. Community preventive supervision will enable a person to live, subject to supervisory restrictions, within the community (R76). It will be similar to the current law governing ESOs and parole for people sentenced to preventive detention and released from imprisonment.

Minor adjustments to the existing set of standard conditions

- 1.118 People subject to community preventive supervision should be required to comply with a set of standard conditions (R77). Our recommendation adopts, with some amendments, the existing standard ESO conditions listed in the Parole Act. This includes retaining all reporting, notification and prior approval conditions and the condition not to associate with a victim.
- 1.119 We recommend a minor amendment to the standard condition regarding non-association. Rather than allowing a probation officer to direct a person not to associate with a specified person or persons, we recommend allowing a probation officer to define conditions for contacting or associating with specified people. This provides greater freedom and flexibility.
- 1.120 There are some conditions that we do not recommend retaining as standard conditions under community preventive supervision:
- (a) A condition that requires a person to take part in a rehabilitative and reintegrative needs assessment should not continue. Forced participation may, in some instances, engage the right to refuse medical treatment. In any event, we doubt whether effective participation in a needs assessment can be forced.
 - (b) A standard condition requiring the prior approval of a probation officer to associate with, or contact, people under the age of 16 should not continue. This condition will not respond to the risks posed by all people subject to community preventive supervision and, therefore, should not be a standard condition. Instead, a requirement of non-association with people under the age of 16 will continue to be available as a special condition.

Some adjustments to the list of example special conditions

- 1.121 In addition to the standard conditions, it should be possible for the court to add special conditions when imposing community preventive supervision. Our recommendation is based on the current list of example special conditions in the Parole Act with some amendment (R78–R80). We have not identified major problems or concerns with these existing special conditions.
- 1.122 We recommend the inclusion of an example special 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 also recommend adding the condition that a person must not use any electronic device capable of accessing the internet without supervision.
- 1.123 Compulsory participation in a rehabilitative or reintegrative programme should not be included as an example special condition. We doubt that compulsory participation will be an effective pathway towards rehabilitation and reintegration. In some instances, it may violate the right to refuse medical treatment. In addition, such a condition may amount to detention, which should not be available under community preventive supervision.

Certain special conditions should be prohibited

- 1.124 The conditions of community preventive supervision should not allow for the detention or intensive monitoring (in person, line-of-sight monitoring) of those subject to the measure (R81).

- 1.125 When assessing how preventive measures interfere with human rights and what is required for that interference to be justified, the courts have drawn a distinction between measures that allow for supervised life in the community and measures that authorise detention. Community preventive supervision should be a stand-alone preventive measure that does not detain people. We therefore recommend that the new Act contain specific safeguards to prohibit detention.
- 1.126 In particular, we recommend that it should not be lawful to require a person to be at a particular place of residence for more than eight hours in a 24-hour period. We are satisfied that a nightly curfew of up to eight hours, while otherwise allowing the person to reintegrate into the community, will not amount to detention for the purposes of the relevant human rights protections.

Duration of special conditions should align with duration of the preventive measure

- 1.127 The duration of special conditions should not be limited to a specific period that differs from the period of the preventive measure itself (R82). 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.

Probation officers should be responsible for supervising people subject to community preventive supervision

- 1.128 Probation officers should continue to be the people responsible for supervising those on community preventive supervision and to monitor their compliance with the conditions (R83). This is because probation officers are already responsible for other types of community supervision, meaning they have experience in managing people with reoffending risks in the community. This is also the approach taken in all comparable jurisdictions. We do not think members of other professions would be better suited to manage people subject to community preventive supervision.

Rights of people subject to community preventive supervision

- 1.129 The new Act should clarify that rights of people subject to community preventive supervision are only restricted to the extent that the new Act limits them (R84).
- 1.130 Some of the rights of people subject to community preventive supervision should not be restricted by probation officers under any circumstances (R85). These are the person's rights to be informed about relevant legal acts or decisions that affect them, to be dealt with in a respectful manner and to make complaints about their probation officer.

Residential preventive supervision (Chapter 15)

- 1.131 In Chapter 15, we set out our recommendations for the operation of a new preventive measure, residential preventive supervision.
- 1.132 Residential preventive supervision will require a person to remain at a residential facility but, unlike a secure facility, which we discuss in Chapter 16, a residential facility will not have features to physically prevent the person from leaving.
- 1.133 Residential preventive supervision, like community preventive supervision, should be implemented through a set of standard conditions, supplemented by special conditions (R86). Within this, some discretion should be given to the manager of residential facilities to set rules for day-to-day operations.

A separate middle-tier measure is needed

- 1.134 Residential preventive supervision should be a stand-alone, middle-tier measure. It is intended for people at high reoffending risk who do not need to be securely detained but who cannot be safely placed into the community. For this cohort, the law should authorise placement within a residential facility that can provide a controlled and supported environment and facilitate progressive community reintegration.
- 1.135 The new measure will replace the current practice of detaining the highest-risk individuals on ESOs through programme conditions and residential restrictions set by the Parole Board after a court imposes an ESO. We recognise the need for people to be restricted to a supported residential environment. However, the legislation should be clear that this amounts to detention. It should also place the responsibility for the imposition of residential preventive supervision with the court.

Standard conditions

- 1.136 The recommended standard conditions of residential preventive supervision (R87) should include conditions to reside at a specified residential facility, to stay at the facility unless permitted to leave, and to submit to electronic monitoring.
- 1.137 Line-of-sight monitoring should only be required for the time that a resident spends outside the residential facility. The facility manager should have power to relax this requirement. We consider that this restricted form of intensive monitoring should be available beyond the 12-month period currently allowed for intensive monitoring. Our recommendation reflects the current practice in residential facilities to limit in-person, line-of-sight monitoring to outings into the community.
- 1.138 We do not recommend a standard condition that requires a person to take part in a rehabilitative and reintegrative needs assessment. As we explain in Chapter 14, we doubt whether participation in a needs assessment can be forced because it will require the person in question to speak honestly about, for example, any needs relating to mental health, education or personal relationships. In some instances, forced participation may engage the right to refuse medical treatment.

Special conditions

- 1.139 We recommend that it should be possible for the High Court to add special conditions to the standard conditions of residential preventive supervision as needed on a case-by-case basis (R88–R90). Enabling the Court to impose special conditions in this way will allow the residential preventive supervision regime to be tailored to the individual reoffending risk of each person.
- 1.140 We do not recommend that required participation in a rehabilitative or reintegrative programme should be included as an example special condition. As we explain in Chapter 14 as well, we doubt that compulsory participation will be an effective pathway towards rehabilitation and reintegration. In some instances, forced participation may engage the right to refuse medical treatment.

Designation of residential facilities

- 1.141 The responsible Minister should designate residential facilities by New Zealand Gazette notice (R91). This is to ensure that all residential facilities are fit for purpose and that a

comprehensive record of all residential facilities exists so that periodic inspections can be carried out.

Detention conditions should be distinct from prison

- 1.142 Residential facilities should resemble normal life in the community to the extent consistent with the orderly functioning and safety of the facility (R92).
- 1.143 The legislation should require that the circumstances and conditions of the detention must be distinct from the circumstances and conditions of imprisonment to ensure that detention-authorising preventive measures do not impair the protection against second punishment more than necessary.

Legal custody and care responsibility

- 1.144 The chief executive should have legal custody of residents (R93). This reflects the Corrections Act and the PPO Act, which place people subject to preventive detention or PPOs into the custody of the chief executive. Care responsibility for residents should lie with the manager of a residential facility (R94).

Facility manager should have the power to delegate powers to staff

- 1.145 The facility manager should be able to delegate powers under standard or special conditions to facility staff (R95). We anticipate that some situations in the daily operation of residential facilities may arise in which the facility manager will need to rely on delegation, for example, during absences from the facility.

Rights of residents

- 1.146 The new Act should clarify that rights of people subject to residential preventive supervision can only be limited by standard and special conditions imposed on them in accordance with the new Act or by directions issued by the facility manager pursuant to standard or special conditions (R96).
- 1.147 The new Act should set out a non-exhaustive list of residents' rights in order to make them as clear as possible and to give direction to those who are responsible for managing residential preventive supervision (R96). Such rights will include rights to send and receive communications, to access information and education and to have regular supervised outings. The new Act should also include rights to participate in meaningful recreational activities, as these have been shown to help reduce people's reoffending risk.
- 1.148 In addition to the list of rights that people under the new Act have unless limited in accordance with the Act, there should also be a separate list of rights (minimum entitlements) that may not be limited unless the security of the facility, or the health or safety of any person, is threatened (R97). The minimum entitlements are intended to clarify that people subject to preventive measures retain an immutable core of rights that cannot be lawfully limited apart from in exceptional circumstances. They relate to exercise, nutrition, legal advice, medical treatment and voting.
- 1.149 We recommend a non-exhaustive list of rights and an exhaustive list of minimum entitlements in Appendix 2 of this Report.

Secure preventive detention (Chapter 16)

- 1.150 In Chapter 16, we set out our recommendations for the operation of secure preventive detention, the most restrictive of the recommended new measures. It will require the detention of a person in a facility designed to stop them from leaving without the permission of the facility manager (R98). The secure facility will need to be designed accordingly. Detainees should be in the custody of the chief executive (R99).
- 1.151 We recognise that the indeterminate detention of a person after they have completed a prison sentence is an extraordinary and truly exceptional measure for the law to provide. It is a most severe intrusion on a person's rights and freedoms. However, in some cases, this preventive measure can be justified.
- 1.152 We therefore recommend that secure detention should continue to be available for people posing the highest risk of serious reoffending when no less restrictive preventive measure would adequately protect the community.

Secure facilities should be distinct from prison

- 1.153 The new Act should require that secure preventive detention must be distinct from the conditions of imprisonment that apply to people serving punitive criminal sentences (R100). Facilities that are run independently from prisons are better suited to minimising restrictions on detainees' quality of living and to focusing on rehabilitation and reintegration.
- 1.154 The distinction between secure facilities and prisons is critical to ensuring that secure preventive detention does not constitute arbitrary detention or an unjustified second punishment. We recommend that facilities should be physically separate from prisons. 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. The rooms or units at a secure facility should be materially different from prison cells. They should provide detainees with privacy and a reasonable level of comfort.

Designation of secure facilities

- 1.155 As is currently the case under the PPO Act, the responsible Minister should designate premises as a secure facility by New Zealand Gazette notice (R101). This is to ensure that all secure facilities are fit for purpose and that a comprehensive record of all secure facilities exists so that periodic inspections can be carried out.

Facility manager should have certain coercive powers

- 1.156 The manager of a secure facility should have a set of statutory powers to ensure the orderly functioning of the secure facility and the safety of the public (R102). The recommended list of coercive powers largely reflects those currently available to facility managers under the PPO Act.
- 1.157 The facility manager's powers should include powers needed to return an escaped detainee to the secure facility, including by requesting the support of Ngā Pirihimana Aotearoa | New Zealand Police. Relatedly, Police should have powers to arrest a person who has escaped (R105).
- 1.158 Facility managers should be able to make rules for the management of the facility and for the conduct and safe custody of the detainees, if authorised to do so by the chief executive (R103). This allows a facility manager to address all detainees through one set

of 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.

- 1.159 Facility managers should be able to delegate their powers to suitably qualified staff, as is currently the case in respect of PPOs (R104). This is necessary for the orderly functioning of a secure facility, including when the facility manager is on site.

Rights of detainees

- 1.160 The new Act should clarify that rights of people subject to secure preventive detention can only be limited by provisions of the new Act or by directions and rules issued by the facility manager pursuant to provisions of the new Act (R106). As with residential preventive supervision, the new Act should set out a non-exhaustive list of detainees' rights in order to make them as clear as possible and to give direction to those responsible for managing secure preventive detention. Such rights will include rights to send and receive communications, to access information and education and to have regular supervised outings.
- 1.161 The Act should also set out a separate list of minimum entitlements that specifies which rights may only be limited where the security of the facility, or the health or safety of any person, is threatened (R107). This is to clarify that people subject to preventive measures retain an immutable core of rights that cannot be limited except in exceptional circumstances. They relate to exercise, nutrition, legal advice, medical treatment and voting.
- 1.162 We recommend a non-exhaustive list of rights and an exhaustive list of minimum entitlements in Appendix 2 of this Report.

Non-compliance and escalation (Chapter 17)

- 1.163 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 type of preventive measure.

Consequences for non-compliance

- 1.164 Conviction and sentence are conventional means of censuring non-compliance with the conditions of preventive measures and deterring future non-compliance. Non-compliance with conditions can indicate unmanaged risk and may be offence-paralleling behaviour. Robust measures are needed to respond to breaches of conditions flexibly and appropriately.
- 1.165 We recommend that conviction and sentence to imprisonment or a fine should continue to be means through which the new Act responds to non-compliance with the conditions of a preventive measure (R108). Police will have the power to arrest any person found to be in breach of conditions, for example, if a person absconds from a residential facility.
- 1.166 Not all breaches of conditions should be prosecuted. A conviction and the prospect of returning to prison are severe consequences for non-compliance. We have heard concerns throughout this review that Ara Poutama will prosecute breaches of conditions too readily. To address this issue, Ara Poutama should continue to be required to follow the Solicitor-General guidelines and its internal policies on when it is in the public interest to prosecute breaches.

Escalation to a more restrictive type of preventive measure

- 1.167 The new Act should provide an avenue to escalate a person to a more restrictive type of preventive measure (R109–R110).
- 1.168 A move from one type of measure to a more restrictive one may be justified in some cases. There may be some people who cannot be safely managed were they to remain on community preventive supervision or residential preventive supervision. For example, their risk of serious reoffending may increase or may not have been fully appreciated at the time the original measure was imposed.
- 1.169 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.
- 1.170 We recommend a test for the determination of whether someone should be escalated to a more restrictive measure that is separate from, and more targeted than, 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 should meet a higher threshold.

Prison detention orders

- 1.171 The High Court should, as a matter of last resort, have the power to make a prison detention order that escalates a person from secure preventive detention to detention in prison (R111–R112).
- 1.172 Secure preventive detention should be administered in secure facilities separate from prison. There may be people, however, who need to be detained under prison-like conditions. 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. This might be, for example, because they pose significant risk to the safety of other staff or detainees.
- 1.173 If detained in prison, a detainee should have the same rights as they would have had if they had remained detained in a secure facility (R113). Of particular importance is continued access to rehabilitative treatment and reintegration support. Ara Poutama would, we expect, develop a special status for prisoners in this category.
- 1.174 Prison detention orders should remain in force until terminated by the High Court (R114). The continuing justification for detention in prison should be periodically and regularly reviewed by both the High Court and the Review Authority (R115). We discuss the operation of the Review Authority in Chapter 18.
- 1.175 The power to recall a person to prison under the Parole Act should not be a means of escalation under the new Act. The preventive measures we recommend will 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. There should be no recall to prison under the new Act tied to a prior prison sentence.

Duration and review of preventive measures (Chapter 18)

1.176 In Chapter 18, we consider how long preventive measures should be in place, when they should be reviewed and by whom and how they can be varied or terminated.

Preventive measures should be in place for as long as they are justified

1.177 Preventive measures under the new Act should be indeterminate and remain in force until terminated by a court (R116). We recommend this approach to ensure a preventive measure is in place for as long as necessary to protect the community — no longer or shorter. We conclude that a system of indeterminate measures achieves the same level of scrutiny as a system of renewable, fixed-term measures while having some procedural advantages. To ensure scrutiny, regular and periodic reviews are necessary.

Preventive measures should be suspended in certain situations

1.178 Preventive measures should be suspended while a person is subject to a determinate sentence of imprisonment or on remand in custody (R117). In both circumstances, detention in prison sufficiently addresses community safety concerns. The preventive measure should reactivate upon the person's sentence expiry date or the date they cease to be subject to release conditions. For a person on remand, it should reactivate when they are released from custody (R118).

1.179 We recommend that a preventive measure should continue to be suspended if a person serving an intervening sentence of imprisonment is released on parole (R119). It is conceivable that a person could be found not to be an undue risk to the community for the purposes of release on parole even if the risks they posed had previously justified the imposition of a preventive measure.

1.180 If a person successfully serves the rest of their sentence on parole without being recalled to prison, this may serve as evidence that the suspended preventive measure should be varied or terminated. The Review Authority should review the preventive measure upon its reactivation to determine whether the reactivated measure should be varied or terminated.

1.181 A preventive measure should terminate if a sentence of life imprisonment is imposed on a person subject to a preventive measure (R120). Life imprisonment is an indeterminate sentence that subjects a person to either imprisonment or parole conditions for the remainder of their life. These features offer protection for the public without the need for preventive measures.

1.182 In contrast, community-based sentences and sentences of home detention should not interrupt the operation of a preventive measure (R121). The restrictions imposed under these sentences are unlikely to provide the same level of community safety as the preventive measure.

1.183 The chief executive should have the power to seek interim orders pending the application for a more restrictive measure (under the escalation procedure recommended in Chapter 17). The existing preventive measure should be suspended while an interim measure is in force (R122).

The court should review the ongoing justification for a preventive measure every three years

- 1.184 The court should periodically review the ongoing justification for a preventive measure (R123–R130).
- 1.185 Periodic court reviews are essential for compliance with human rights standards. Monitoring and scrutinising the continued need for preventive measures will help ensure that measures can be brought to an end as soon as reoffending risks no longer justify the measure. The periodic court reviews are intended to facilitate progress to fewer restrictions and, ultimately, to safe and unrestricted life in the community.
- 1.186 Entrusting the review of the ongoing justification for a preventive measure to the courts will ensure a high degree of scrutiny and reflect the severity of preventive measures and the importance of the reviews. It will also address concerns that entrusting reviews solely to a body like the Parole Board does not comply with international human rights law.
- 1.187 Court reviews should occur within the first three years of the imposition of the measure and three years after the conclusion of the previous review thereafter. We have chosen three years as the review period because risk of reoffending can be more accurately predicted within that timeframe, as opposed to longer ones. It corresponds to the three-year timeframe with which the legislative tests for imposing preventive measures operate.
- 1.188 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. At each review, the court will consider the justification for the preventive measure afresh.
- 1.189 The courts should also have the same type of information as for imposition. The chief executive should submit the same number of health assessor reports as for the initial imposition of that preventive measure — one report for community preventive supervision or two reports for residential preventive supervision and secure preventive detention.
- 1.190 The four possible outcomes of a court review should be:
- (a) confirmation of the preventive measure;
 - (b) variation of the component special conditions;
 - (c) moving to a less restrictive measure; or
 - (d) termination of the preventive measure.
- 1.191 Where a court confirms a preventive measure, the court should review a person's treatment or supervision plan to examine why insufficient progress was made and what might be altered.

A Review Authority should complement court reviews

- 1.192 Alongside court reviews on a three-yearly basis, the new Act should provide for an independent, multi-disciplinary Review Authority to conduct reviews annually (R131–R141). Regular review by a specialised body is an efficient way to ensure that restrictions are proportionate to the risks a person poses. It will enable timely responses to changes in their risk profile while subject to a preventive measure.

- 1.193 The Review Authority will be based on the models of the review panel under the PPO Act and the Parole Board. We recommend that the Review Authority, like the Parole Board, should be established as an independent statutory entity.
- 1.194 Like court reviews, the Review Authority should review the ongoing justification of a preventive measure by applying the legislative tests used to impose preventive measures. The Review Authority should conclude a review by confirming the measure, confirming the measure but varying the special conditions to make them less restrictive or directing the chief executive to apply to the relevant court to consider terminating the measure.
- 1.195 The Review Authority should be able to regulate its own procedure and have power to conduct hearings. The Review Authority should have broad powers to request relevant information from the chief executive, the relevant probation officer or the relevant facility manager.
- 1.196 We do not recommend that new health assessor reports should be prepared for each annual review. The Review Authority will, however, be able to scrutinise previous health assessor reports and documentation prepared by probation officers (for community preventive supervision) or facility managers and their staff (for residential preventive supervision and secure preventive detention). The inquisitorial nature of Review Authority hearings will assist in this task.

Termination between periodic reviews

- 1.197 The chief executive and the person subject to a preventive measure should be able to apply to the relevant court for termination of a measure in force (R142–R145). This will allow the court to respond to changes in a person’s risk profile between periodic reviews.
- 1.198 Unlike an application for a periodic court review, where the chief executive seeks a review without specifying the desired outcome, we recommend that the applicant should specifically seek to terminate the measure. This will allow the court to determine more efficiently whether a preventive measure should be terminated or not.

Variation between periodic reviews

- 1.199 It should also be possible for the chief executive or the person subject to a preventive measure to apply to the Review Authority for a variation of special conditions (R146–R148). This recommendation will allow the Review Authority to vary special conditions, including to make them less or more restrictive.
- 1.200 The purpose of this recommendation is to allow timely responses to 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 Authority did not have this power, any increase in restrictiveness — even if it is just an adjustment of one special condition — would require court proceedings. This would take longer, and it would be an unnecessary use of court resources.
- 1.201 The person subject to a preventive measure and the chief executive should be able to appeal the decision of the Review Authority to the court that originally imposed the measure. We make this recommendation because varying special conditions could significantly change the character of community preventive supervision or residential preventive supervision.

Transitional provisions (Chapter 19)

- 1.202 In Chapter 19, we consider transitional arrangements to implement these reforms. This includes consideration of how the new Act should apply to people who committed a qualifying offence before the new Act comes into force (retrospective application).
- 1.203 We recommend that Ara Poutama should consider when the new Act should commence when work for the preparation of the Bill is under way (R149). We conclude that Ara Poutama, as the agency that we recommend should be responsible for implementing and administering the new regime, will be best placed to consider the appropriate time for when the new Act should come into effect.
- 1.204 Without making recommendations, we share some advice on the human rights implications of possible transitional provisions under the new Act.
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PART 1:

INTRODUCTORY MATTERS



CHAPTER 2

Introduction

INTRODUCTION

- 2.1 In this chapter, we:
- (a) set out the background to the review;
 - (b) explain the scope of our review and the process we have followed; and
 - (c) summarise the matters addressed in this Report.
- 2.2 Readers should be aware that some of the discussion in this Report includes references to serious offending, which may be distressing.

BACKGROUND TO THE REVIEW

- 2.3 The focus of this review has been the laws governing preventive detention, extended supervision order (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.
- 2.4 Consideration of these laws 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 and on whom the imposition of further restriction may result in a serious intrusion on their rights and freedoms.
- 2.5 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.¹
- 2.6 These criticisms prompted the Government to refer preventive detention and post-sentence orders to the Commission to review.
- 2.7 Subsequently, in *Attorney-General v Chisnall*, te Kōti Mana Nui | Supreme Court found that the aspects of ESO and PPO regimes that authorise detention impose unjustified

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

limitations on the right under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) to protection against second punishment.²

SCOPE

- 2.8 In accordance with our terms of reference for this review, published in July 2022, the Commission undertook to consider, 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.

OVERVIEW OF THE LAW RELATING TO PREVENTIVE MEASURES

- 2.9 The focus of this review has been 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).
- 2.10 We summarise the law governing each measure in the following section. We gave a more detailed background of the origins and history of each preventive measure in Chapter 1 of the Issues Paper for this review.³

Preventive detention

- 2.11 Preventive detention is a sentence that may be imposed for the purpose of protecting the community from those who pose a significant and ongoing risk to the safety of its members.⁴ It is the most restrictive measure that can be imposed.
- 2.12 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. People subject to preventive detention are detained in prison unless and until released on parole.
- 2.13 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.⁵ In making this assessment, the court

² *Attorney-General v Chisnall* [2024] NZSC 178.

³ 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 [1.1]–[1.86].

⁴ Sentencing Act 2002, s 87(1).

⁵ 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

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.⁶ 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.⁷ 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.⁸

- 2.14 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:⁹
- (a) to reflect the gravity of the offence; or
 - (b) for the purposes of the safety of the community in light of the person's age and the risk posed at the time of sentencing.
- 2.15 The New Zealand Parole Board (Parole Board) is responsible for deciding if and when a person sentenced to preventive detention 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 people.¹⁰
- 2.16 "Undue risk" requires the Parole Board to consider both the likelihood of further offending and its nature and seriousness.¹¹ 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.¹² Once released, 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.
- 2.17 In the year ending 30 June 2024:¹³
- (a) Five people were sentenced to preventive detention. All five of these sentences were imposed on the basis of sexual offending.

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).

⁶ Sentencing Act 2002, s 88(1)(b).

⁷ Sentencing Act 2002, s 87(4).

⁸ Sentencing Act 2002, s 87(4)(e).

⁹ Sentencing Act 2002, s 89(2).

¹⁰ Parole Act 2002, s 28(2).

¹¹ Parole Act 2002, s 7(3).

¹² Parole Act 2002, s 28(2)(a)–(b).

¹³ 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 from year ending June 2024 (11 October 2024).

- (b) The total number of people subject to preventive detention was 286. Of those, 81 people had been released from prison to 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 (231 people or 81 per cent).
- (d) The majority of people subject to preventive detention were aged 60 and over (109 people or 38 per cent).
- (e) Forty-seven per cent of those subject to preventive detention identified as Māori.
- (f) The majority of people subject to preventive detention were men. Only one woman has been sentenced to preventive detention since its introduction.

Extended supervision orders

- 2.18 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”.¹⁴
- 2.19 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”.¹⁵ 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 relevant sexual offence and/or a “very high risk” of committing a future relevant violent offence.¹⁶
- 2.20 In determining the required level of risk, the court must be satisfied that the person displays particular traits or behavioural characteristics as set out in the legislation.¹⁷ 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.¹⁸
- 2.21 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.

¹⁴ Parole Act 2002, s 107I(1).

¹⁵ 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.

¹⁶ Parole Act 2002, s 107I(2).

¹⁷ Parole Act 2002, s 107IAA.

¹⁸ Parole Act 2002, s 107I(2).

- 2.22 An ESO can be imposed for up to 10 years.¹⁹ Before an ESO expires, a court may impose a new, consecutive ESO.²⁰ 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.²¹ 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.²²
- 2.23 In the year ending June 2024:²³
- (a) ESOs were imposed on 28 people — 23 of these were for sexual offending and five for violent offending.
 - (b) The total number of people subject to an ESO was 183. The majority of ESOs were imposed on people who had been convicted for sexual offending (173 people or 95 per cent).
 - (c) The majority of people subject to an ESO were either aged 50–59 (45 people or 25 per cent) or 30–39 (45 people or 25 per cent).
 - (d) Of those subject to an ESO, 43 per cent identified as Māori.
 - (e) The majority of people subject to an ESO were men. We are only aware of one woman who has been made subject to an ESO since the regime began.

Public protection orders

- 2.24 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”.²⁴
- 2.25 The chief executive can apply to the court for a PPO before a person ceases to be subject to a sentence of imprisonment, an ESO or a protective supervision order.²⁵ 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.²⁶

¹⁹ Parole Act 2002, s 107I(4).

²⁰ Parole Act 2002, s 107C(1)(a)(iii).

²¹ Parole Act 2002, s 107RA(1)–(2).

²² Parole Act 2002, s 107RA.

²³ 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 from year ending June 2024 (11 October 2024).

²⁴ Public Safety (Public Protection Orders) Act 2014, s 4(1).

²⁵ 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.

²⁶ Public Safety (Public Protection Orders) Act 2014, s 13.

- 2.26 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.²⁷ In making this determination, the court must consider reports from two health assessors, one of whom must be a registered psychologist.²⁸
- 2.27 People subject to a PPO are detained in a secure residence. At present, Matawhāiti Residence, located within the grounds 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.²⁹ Residents may not leave without approval and must be under escort and supervision.³⁰ Although there are fewer statutorily imposed restrictions than for a person detained in prison, residents at Matawhāiti Residence 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.³¹ Residence managers have powers to make additional rules for the safe running of the facility and the safety of residents.³²
- 2.28 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.³³ A person subject to a prison detention order is detained in prison and treated in the same way as a person held in prison awaiting trial.³⁴
- 2.29 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.³⁵ 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.³⁶
- 2.30 Very few PPOs have been imposed to date. Only five people in total have been subject to PPOs since their introduction, and three of these orders were overturned on appeal. As of February 2025:³⁷
- (a) One person was detained at Matawhāiti Residence under a PPO.³⁸
 - (b) One person subject to a PPO was subject to a prison detention order.
 - (c) The qualifying offending in respect of one of these people was sexual offending, and violent offending in respect of the other person.

²⁷ Public Safety (Public Protection Orders) Act 2014, s 13(2).

²⁸ Public Safety (Public Protection Orders) Act 2014, s 9.

²⁹ *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 at [45].

³⁰ Public Safety (Public Protection Orders) Act 2014, ss 26 and 73.

³¹ Public Safety (Public Protection Orders) Act 2014, ss 63, 68 and 71–72.

³² Public Safety (Public Protection Orders) Act 2014, s 119.

³³ Public Safety (Public Protection Orders) Act 2014, s 85.

³⁴ Public Safety (Public Protection Orders) Act 2014, s 86.

³⁵ Public Safety (Public Protection Orders) Act 2014, ss 15–16.

³⁶ Public Safety (Public Protection Orders) Act 2014, s 93(1).

³⁷ 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.

³⁸ Another person was detained at the Matawhāiti Residence subject to an interim detention order pending the determination of a PPO application against them.

- (d) Both identified as Māori.
- (e) No women had been made subject to PPOs since the regime began.

OUR PROCESS

2.31 In 2021, the Minister responsible for the Law Commission asked us to review the law relating to preventive detention. Our terms of reference expanded the scope of the review to include ESOs and PPOs. We published an Issues Paper in 2023 and a Preferred Approach Paper in 2024, consulting on the content of each paper.

Identifying potential issues

2.32 We identified potential issues with the current law governing preventive measures through research and preliminary engagement with stakeholders. We examined relevant case law, commentary and human rights jurisprudence and analysed the law in comparable jurisdictions. We invited preliminary feedback on potential issues from experts and stakeholders, including from various Ara Poutama Aotearoa | Department of Corrections teams who administer preventive detention. We also set up an Expert Advisory Group to advise on the issues and the development of our recommendations, which met twice in the course of the review and provided feedback and advice on earlier drafts.

Approach to tikanga and te ao Māori

2.33 In accordance with long-established expectations for law reform work in Aotearoa New Zealand as well as our statutory obligation to take into account te ao Māori in our work,³⁹ we examined potential issues with the current law in relation to tikanga Māori and the Treaty. 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 and a working paper and hosted a wānanga with pūkenga tikanga. In 2024, we hosted a further 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.

Issues Paper

- 2.34 We published an Issues Paper in May 2023.⁴⁰ This set out the issues we had identified with the current law, presented our preliminary views and proposals for reform and invited feedback from stakeholders. The consultation period was open for eight weeks.
- 2.35 We received 39 submissions in total. Twenty-two of these submissions were by way of interviews with people subject to preventive detention, ESOs and PPOs. These interviews were aimed at understanding their experiences of preventive measures.⁴¹

³⁹ Law Commission Act 1985, s 5(2).

⁴⁰ 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).

⁴¹ A summary of the key themes to emerge from these interviews can be found alongside written submissions received on the project webpage <www.lawcom.govt.nz/our-work/public-safety-and-serious-offenders-a-review-of-preventive-detention-and-post-sentence-orders>.

Preferred Approach Paper

- 2.36 The analysis of submissions received on the Issues Paper informed the development of our proposals for reform. In addition to submissions received through consultation, we have continued to engage with other key stakeholders to receive feedback. We also took some initial proposals for reform to our Expert Advisory Group for feedback.
- 2.37 We published our proposals in a Preferred Approach Paper in July 2024.⁴² These proposals were detailed and technical in nature. We received feedback largely from practitioners, academics and other experts on this issue. Consultation was open for eight weeks.
- 2.38 We received 19 submissions in total. In formulating our final recommendations for this Report, we analysed all submissions received and developed our thinking to reflect many of the points raised.

OUR APPROACH

- 2.39 Our review takes as a starting point the objective of preventing harm to the community caused by serious sexual and violent offending. In Chapter 3, we stress the importance of this objective and conclude that preventive measures play a useful role in meeting it.
- 2.40 On the other hand, preventive measures authorise some of the most coercive exercises of state power known to New Zealand law. They enable the ongoing restriction or detention of people, potentially for life, beyond the time they have spent imprisoned for their past offending. The Supreme Court has described the preventive regimes as “extraordinary and truly exceptional measures for society to implement”.⁴³ The Court cautioned that “exceptional care” is required when constructing these regimes to minimise the curtailment of the rights of those subject to preventive measures, “lest we become accepting in our society that it is appropriate to simply warehouse people for broader societal ends, without due regard to their rights”.⁴⁴
- 2.41 This review was prompted by concerns from domestic courts and international bodies that New Zealand law does not give due regard to the rights of those subject to preventive measures.
- 2.42 Our review has, therefore, focused on how the law can meet its objectives of community safety while better ensuring consistency with domestic and international human rights laws. In this regard, we recognise that these two interests are not always mutually exclusive — a human rights-compliant approach may in fact support community safety. We return to this point in more detail in Chapter 5, where we outline our recommendation to reorient the law to facilitate a more humane and rehabilitative approach towards people subject to preventive measures. We also identified relevant aspects of tikanga Māori, which likewise supports a view that an approach that seeks to restore a person to their community and kin groups would better achieve community safety.

⁴² Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NLZC IP54, 2024) (Preferred Approach Paper).

⁴³ *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

⁴⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

- 2.43 The design of the law has also been a central focus of this review. Preventive measures are governed by three separate but interrelated statutory regimes. Each is aimed at the same community safety objective but seeks to achieve that purpose in different ways. We have identified instances where regimes could work together more coherently and efficiently.
- 2.44 Our overarching recommendation in this Report is that a new, single statute should replace existing legislation and provide for three new types of preventive measures. In our view, the recommendations will result in a more efficient and cohesive regime that meets its community safety objective consistently with human rights standards.

MATTERS ADDRESSED IN THIS REPORT

- 2.45 This Report contains 149 recommendations for reform.
- 2.46 Each chapter:
- (a) provides an overview of issues with the current law as identified in our Issues Paper;
 - (b) sets out our proposals for reform as presented in our Preferred Approach Paper;
 - (c) outlines the results of our consultation on our Preferred Approach Paper; and
 - (d) states our final conclusions and recommendations for reform.
- 2.47 This Report is divided into five parts:
- (a) Part 1 (Chapters 1 and 2) sets out introductory matters, including an executive summary of this Report and a brief overview of our approach and 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 recommendation for a single, post-sentence regime contained in a new Act to govern preventive measures.
 - (iii) In Chapter 5, we outline our recommendations 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 recommendations for the legislative tests the courts should apply for imposing a preventive measure.

- (ii) In Chapter 11, we consider the evidence of reoffending risk on which a court's decision should be based.
 - (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 recommendations 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 set out how the new Act might come into effect and how people already subject to preventive measures should be transitioned to the new Act.

TERMINOLOGY AND OTHER MATTERS

- 2.48 We refer to preventive detention, ESOs and PPOs collectively as “preventive measures” throughout this Report. We also use the same term to refer collectively to our proposed new preventive measures. We make it clear in discussion when we are talking about existing measures and when we are talking about our proposed new regime.
- 2.49 We received submissions in response to both the Issues Paper and the Preferred Approach Paper. We make it clear in our discussion whether we are talking about submissions to the Issues Paper or the Preferred Approach Paper. As is our usual practice, where we refer to or summarise a submission, we use the submitter's language as much as possible, with minor edits for readability.
- 2.50 When we discuss “proposals”, we are referring to the proposals we presented for consultation in the Preferred Approach Paper. When we discuss “recommendations”, we are referring to our final recommendations as presented in this Report.
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PART 2:

FOUNDATIONAL MATTERS



CHAPTER 3

The continuation of preventive measures in New Zealand law

INTRODUCTION

- 3.1 In this chapter, we explain a key conclusion on which this Report rests — that the law of Aotearoa New Zealand should continue to provide for some form of measures to prevent serious sexual and violent reoffending.
- 3.2 Across this Report, we discuss issues with the current law governing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs). Some of these issues concern how the law infringes fundamental rights and freedoms of those subject to these preventive measures. In later chapters, we make recommendations to address these matters. However, given the nature of these concerns, we start with the foundational question of whether there is a need for preventive measures in the first place.
- 3.3 Early in this review, we formed a preliminary view that preventive measures have an important role in protecting the community from those who pose a high risk of further serious sexual and violent offending. We have consulted on the basis that some form of preventive measures, including detention, should continue. The feedback we have received in consultation has confirmed this preliminary view.
- 3.4 At the end of this chapter, we recommend that the law of Aotearoa New Zealand should continue to provide for preventive measures. These measures should range from monitoring and supervision of high-risk individuals in the community to detention in a secure facility. We introduce the recommended preventive measures in this chapter and develop them in further detail in other chapters of this Report.

THE CASE FOR PREVENTIVE MEASURES

- 3.5 Several reasons, when taken together, support our view that the law of Aotearoa New Zealand should continue to provide for preventive measures.

Community safety is an important objective for the law to pursue

- 3.6 We start with the proposition that serious sexual and violent offending harms the community and so it is important that the state takes steps to prevent it.
- 3.7 Sexual and violent offending causes considerable harm. Victims of these offences suffer psychological, emotional and physical injuries. They experience significant trauma, which is likely to have a severely detrimental impact, from feelings of anger, shame and guilt through to mental health problems such as anxiety, post-traumatic stress disorder and depression.¹ The toll serious offending takes on victims affects the wider community.
- 3.8 During consultation in this review, several submitters emphasised the importance of preventive measures. For example, 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.
- 3.9 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. For example:²
- (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.³
 - (b) The Committee on the Elimination of Discrimination against Women has commented that the Convention on the Elimination of All Forms of Discrimination against Women requires states parties to provide “appropriate and accessible protective mechanisms to prevent further or potential violence”.⁴ Those mechanisms should include “risk assessment and protection”, which may involve “eviction, protection, restraining or emergency barring orders” against perpetrators.⁵
 - (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

¹ Tāhū o te Ture | Ministry of Justice *Te Rangahau o Aotearoa mā 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>.

² 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].

³ 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.

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

⁵ *General recommendation No. 35 on gender-based violence against women, updating general recommendation No 19* UN Doc CEDAW/C/GC/35 (26 July 2017) at [31]. See also *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No 2: Implementation of article 2 by States parties* UN Doc CAT/C/GC/2 (24 January 2008) at [18] and [22].

vulnerable situations whose lives are at particular risk because of “specific threats or pre-existing patterns of violence”.⁶

- 3.10 Given the harmfulness of serious offending and the responsibilities on the state to prevent it, we conclude that the prevention of sexual and violent reoffending is an important and legitimate objective of the law. The government should take steps to implement and maintain such laws, and the community should be entitled to expect the state to do so.

The criminal justice system is aimed at community safety

- 3.11 The importance and legitimacy of the community safety objective is reflected throughout Aotearoa New Zealand’s criminal justice system.
- 3.12 The need to protect the community from offenders who pose a risk of reoffending is recognised as a purpose and principle of Aotearoa New Zealand’s sentencing and parole regimes.⁷
- 3.13 Putting aside the preventive sentence and orders that are the focus of this review, some other means through which these regimes seek to protect the community include:
- (a) community-based sentences imposed at sentencing for up to two years;⁸
 - (b) determinate prison sentences;⁹
 - (c) extended minimum periods of imprisonment before a person becomes eligible for parole;¹⁰
 - (d) parole conditions that can last up to six months beyond the expiry date of a sentence of imprisonment;¹¹
 - (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;¹²
 - (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;¹³

⁶ United Nations Human Rights Committee *General Comment No 36. Article 6 (Right to Life)* UN Doc CCPR/C/GC/36 (3 September 2019) at [23]–[25].

⁷ See Sentencing Act 2002, s 7(1)(g); and Parole Act 2002, s 7(1).

⁸ 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: s 54B(2).

⁹ 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.

¹⁰ 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, deterring the offender or others from committing the same or a similar offence or protecting the community from the offender.

¹¹ Parole Act 2002, s 18(2).

¹² Criminal Procedure (Mentally Impaired Persons) Act 2003, s 24.

¹³ Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

- (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;¹⁴ 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.¹⁵
- 3.14 In addition, there are laws applying at other stages of the criminal justice process aimed at keeping the community safe from reoffending more generally.¹⁶

Specific preventive measures have long been seen as necessary to protect community safety

- 3.15 Alongside these various mechanisms, New Zealand parliaments over many decades have also seen the need to provide for more specific preventive sentences and orders to protect the public.¹⁷
- 3.16 Parliament introduced an early form of preventive detention in the Habitual Criminals and Offenders Act 1906. This was replaced by preventive detention under the Criminal Justice Act 1954, which continued (with some amendments) under the Criminal Justice Act 1985 and was eventually incorporated into the Sentencing Act 2002. Evidently, throughout these reforms, Parliament has considered there is a need to retain a specific sentence allowing for ongoing detention to address community safety concerns.
- 3.17 Although introduced more recently, ESOs have now been a means of addressing risks to community safety for more than two decades. The regime was introduced in 2004 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 and who were in the community and no longer subject to parole or release conditions.¹⁸ Ara Poutama had assessed people within its care and identified 107 people for whom an application for an ESO could potentially be made.¹⁹ The report of the select committee considering the proposed ESO legislation made particular note of individuals with a predisposition for child sex offending who had previously been detained in psychiatric institutions.²⁰ Several had gone on to commit serious sexual crimes against

¹⁴ Family Violence Act 2018, pt 3.

¹⁵ Family Violence Act 2018, s 79.

¹⁶ 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).

¹⁷ For a history of preventive detention, ESOs and PPOs in Aotearoa New Zealand, see 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), Chapter 1.

¹⁸ Ministry of Justice *Report for Cabinet Social Development Committee: Extended Supervision of Child Sex Offenders* (2003) at [13]; and Parole (Extended Supervision) and Sentencing Amendment Bill 2004 (88-2) (select committee report) at 3.

¹⁹ Parole (Extended Supervision) and Sentencing Amendment Bill 2004 (88-2) (select committee report) at 2.

²⁰ Parole (Extended Supervision) and Sentencing Amendment Bill 2003 (88-2) (select committee report) at 2–4.

children and, once released from their determinate sentences, continued to pose a risk to public safety.

- 3.18 For the introduction of PPOs in 2014, Ara Poutama held concerns arising from several incidents where people on ESOs had committed offences despite being subject to the most restrictive ESO conditions available.²¹ Those offences included an instance where the person had sexually offended against a 16-year-old girl.²² 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.
- 3.19 This history of preventive measures in Aotearoa New Zealand, in our view, demonstrates two things. First, preventive measures have been seen as serving a particular role in ensuring community safety that is not addressed by other aspects of the criminal justice system. Second, by their longevity, they are an established precedent for responding to reoffending risk.
- 3.20 These two observations are reinforced by our research into the laws in comparable jurisdictions. We have examined the approaches taken in New South Wales, Queensland, Victoria, Western Australia, Tasmania, South Australia, Northern Territory, England and Wales, Scotland, Ireland, Canada, Finland and Norway. Every jurisdiction provides for a form of supervision in the community for people considered at high risk of reoffending. Nearly all provide for secure detention as a preventive measure.

The courts have concluded in past cases that preventive measures were needed

- 3.21 Under the current law, a court can only impose a preventive measure if it has concluded there is a significant risk of reoffending. To impose preventive detention, the court must be satisfied the person is “likely” to commit another qualifying offence.²³ The thresholds for ESOs and PPOs focus on the “high” or “very high risks” of reoffending the person poses, coupled with whether they display certain traits and behavioural characteristics.²⁴
- 3.22 In addition to meeting the relevant risk thresholds, for preventive detention and PPOs, the court must have concluded that a person’s risk cannot be adequately managed in less restrictive ways.²⁵ This means that the courts will only order the imprisonment or secure detention of an individual if persuaded a determinate prison sentence and the availability of an ESO will not suffice. By way of example, there have been cases in which the courts have concluded that ESOs with the most restrictive conditions available were insufficient to protect community safety and so ordered the imposition of a PPO.²⁶

²¹ Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) at [17].

²² 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].

²³ Sentencing Act 2002, s 87(2)(c).

²⁴ Parole Act 2002, ss 107I(2) and 107IAA; and Public Safety (Public Protection Orders) Act 2014, s 13.

²⁵ For preventive detention see *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]. For PPOs see *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].

²⁶ *Chief Executive of the Department of Corrections v Waiti* [2024] NZHC 1682 at [125]–[126]; and *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305 at [79]–[83].

- 3.23 To determine that these tests are met, the court must consider expert psychological evidence, including any evidence elicited in cross-examination and any competing expert evidence presented by the defence.
- 3.24 These are high thresholds that must be met, and strong evidence is required. The fact courts have determined that the tests are satisfied on many past occasions is a strong indication that there are certain people who, if not subjected to some form of preventive measure (including, in some cases, detention), pose significant risks of committing further serious sexual or violent offences.

Studies in comparable jurisdictions indicate the effectiveness of preventive measures

- 3.25 We have located little research that has examined the effectiveness of preventive measures. That, however, is explicable mainly owing to the inability to compare what offending would occur if high-risk individuals were not subject to preventive measures. While general information about recidivism, including the rates of reoffending among those subject to preventive measures, is available, it is difficult to draw conclusions about what reoffending has been prevented.
- 3.26 Nevertheless, there are some studies in comparable jurisdictions that have examined the reoffending of those living in the community subject to preventive measures:
- (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.²⁷ 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 further sexual offences (four were considered “contraventions” and four were reconstructions).²⁸
 - (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 2018.²⁹ For the three reporting years between 2018 and 2021, there were, on average, 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 of a serious violent offence (an average of 0.3 per year).
- 3.27 These studies suggest that the reoffending rates for those subject to preventive measures was lower than expected for the type of high-risk individuals subject to the measure.

²⁷ 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(2) *Psychiatry, Psychology and Law* 310.

²⁸ 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(2) *Psychiatry, Psychology and Law* 310 at 317.

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

The results of consultation in this review confirm our views

- 3.28 In the Preferred Approach Paper, we put forward a preliminary conclusion that the law should continue to provide for preventive measures to protect the community from serious sexual or violent reoffending.³⁰ We framed this as a general proposition and explained that what those measures should be and how they should operate were matters requiring consideration. We were clear that significant reforms were necessary to ensure that preventive measures are consistent with human rights standards.
- 3.29 Almost all the submitters who responded agreed that the law should continue to provide for preventive measures.³¹ The reasons most often given were the importance of community safety. Several submitters, however, qualified their support. For example, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) explained that the need for a preventive measure in any case will turn on the particular risks posed by the individual and the strength of the evidence. The NZLS and the New Zealand Council for Civil Liberties mentioned the importance of the rehabilitative focus of preventive measures so that they are implemented to remove, to the extent possible, the punitive aspects of the current law.
- 3.30 The minority of submitters who disagreed with the proposal considered that preventive measures are a serious intrusion on various rights.³² Some said that, while it may be possible to justify supervision in the community, preventive measures in the form of detention are punitive and fundamentally inconsistent with human rights. One submitter said that the fact that preventive measures are a long-established and accepted feature of New Zealand law and overseas is not a sufficient reason to justify them.

THE DECISION IN *ATTORNEY-GENERAL V CHISNALL*

- 3.31 Since publication of the Preferred Approach Paper, te Kōti Mana Nui | Supreme Court released its decision in *Attorney-General v Chisnall*.³³
- 3.32 The Supreme Court's decision is of critical importance to this review. Of particular significance, the Court addressed the justification for restricting the rights and freedoms of people considered at high risk of serious reoffending. The decision supports our case for the continuation of preventive measures (albeit suggesting the need for significant caution in the design of any preventive regime).
- 3.33 The decision focused on how the ESO and PPO regimes engage the human rights protection not to be punished twice for the same offence under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). The Supreme Court noted that ESOs and PPOs are closely connected with the criminal justice system and have a severe impact on those subject to them, including detention in government-run facilities.³⁴ Because of

³⁰ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P1.

³¹ Bond Trust, Myra Crawford-Smith, Manaaki Tāngata | Victim Support, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Robert Simmonds, South Auckland Bar Association, The Law Association of New Zealand.

³² Dr Jordan Anderson, Dr Tony Ellis, Daniel Jackson.

³³ *Attorney-General v Chisnall* [2024] NZSC 178.

³⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [133]–[137].

these features, the Court concluded that the regimes authorised the imposition of penalties after a criminal conviction and sentence, thereby infringing the right to protection against second punishment.³⁵

- 3.34 The key issue in *Chisnall* was whether the limits the ESO and PPO regimes place on this right are reasonable and justified for the purposes of section 5 of the NZ Bill of Rights. The Supreme Court approached the question of justification by distinguishing between ESOs that allowed for supervised life in the community and ESOs and PPOs that authorised forms of detention. The Court also distinguished between the way in which the regimes applied retrospectively (to those whose qualifying offending occurred prior to the regimes coming into effect) and prospectively (to those whose qualifying offending occurred after the regimes came into effect).
- 3.35 The Supreme Court held that a post-sentence order that both authorises detention and is retrospective is incapable of justification under any circumstances.³⁶ Second punishment in the form of retrospectively imposed detention, the Court said, impinges on the core values underpinning the right.³⁷ To the extent the ESO and PPO regimes provide for such orders, they are in violation of the NZ Bill of Rights.
- 3.36 The Court then considered whether prospectively imposed ESOs and PPOs, or retrospectively imposed ESOs that do not involve detention, were reasonable and justified limits on the right to protection against second punishment. To undertake this inquiry, the Court applied an approach that asks the following questions:³⁸
- (a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
 - (b) Is the limiting measure rationally connected with its purpose?
 - (c) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
 - (d) Are the limits in due proportion to the importance of the objective?
- 3.37 On the first question, the Supreme Court described the purpose of protecting the public from people who are assessed as posing a significant risk of further serious sexual or violent offending as “clearly a legislative purpose of great societal importance”.³⁹ The Court reviewed the evidence used in support of the introduction of the ESO and PPO regimes, some of which is discussed earlier in this chapter.⁴⁰ It concluded that the purpose is of such importance it can justify some limitation of the section 26(2) right (including detention so long as it is not retrospective).⁴¹

³⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [133] and [138].

³⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [146] and [169(a)].

³⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [148].

³⁸ This methodology was adopted by te Kōti Mana Nui | Supreme Court in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [103]–[104].

³⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [205].

⁴⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [201]–[204].

⁴¹ *Attorney-General v Chisnall* [2024] NZSC 178 at [208].

- 3.38 In relation to the second question, the Supreme Court was satisfied that there is a rational connection between the restrictions the regimes impose and managing the risk of serious offending.⁴²
- 3.39 The Supreme Court concluded that the third and fourth tests were satisfied for ESOs that do not involve detention.⁴³ It reasoned that:⁴⁴
- (a) there is no less rights-intrusive alternative;
 - (b) probation officers responsible for administering the standard conditions of ESOs must do so in the least rights-intrusive manner; and
 - (c) while the restrictions are penal, they are not among the most severe category of penalty.
- 3.40 By contrast, the Supreme Court did not consider the third and fourth tests were satisfied in relation to those aspects of the PPO and ESO regimes that prospectively contemplate and authorise detention. The Court considered that it would be possible to design these regimes in a less rights-intrusive way.⁴⁵ Such an approach would need to be based on three pillars:⁴⁶
- (a) Achieving public protection by the least restrictive means possible.
 - (b) Minimising the punitive impact of the restrictions on the person subject to the ESO or PPO.
 - (c) Requiring mandatory provision of rehabilitation designed to meet the needs of the offender.
- 3.41 As we discuss in more detail in other chapters of this Report, the Supreme Court found that the current legislation governing ESOs and PPOs does not conform to these pillars. It was principally concerned that the current law:
- (a) fails to ensure any post-sentence detention is distinct from the circumstances and conditions of imprisonment;⁴⁷ and
 - (b) imposes insufficient duties to provide rehabilitative treatment or therapeutic support to those subject to ESOs and PPOs.⁴⁸
- 3.42 The Supreme Court therefore concluded there are “other plausible options” for meeting the objectives of the ESO and PPO regimes “which are likely to be less rights intrusive”.⁴⁹ Consequently, the Court held that the limits the prospective detention-authorising

⁴² *Attorney-General v Chisnall* [2024] NZSC 178 at [209]–[210], [253], [260] and [262].

⁴³ *Attorney-General v Chisnall* [2024] NZSC 178 at [256] and [260]. Te Kōti Mana Nui | Supreme Court made two qualifications to its finding that ESOs imposed justified limits on the s 26(2) right when they do not involve detention. First, it observed that the standard condition prohibiting contact with a person under the age of 16 may not be responsive to the risks posed by some people subject to ESOs (at [257]). Second, it recognised it had received limited evidence and argument as to the operation of the standard conditions on Mr Chisnall (at [258]).

⁴⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [256] and [260].

⁴⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [235]–[244].

⁴⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

⁴⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [241].

⁴⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [242]–[244].

⁴⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

aspects of the regimes impose on the protection against second punishment are not justified for the purposes of section 5 of the NZ Bill of Rights.⁵⁰

- 3.43 In summary, the Supreme Court’s judgment in *Attorney-General v Chisnall* affirms several of the reasons we give for why we consider preventive measures should continue under New Zealand law. In particular:
- (a) The Court described the protection of the community from serious sexual and violent reoffending as “of great societal importance”. The Court considered this objective so important it can justify some limit on human rights, including limits in the form of post-sentence detention.
 - (b) The Court was satisfied that preventive measures in the form of post-sentence supervision and detention operating within the wider criminal justice system are rationally connected to its community protection purpose.
 - (c) While finding that the current law respecting post-sentence detention is not well enough designed to meet human rights standards, the Supreme Court contemplated that a better designed law might be able to do so.

RECOMMENDED REFORMED PREVENTIVE MEASURES

- 3.44 Although we have concluded that preventive measures of some form should continue under the law of Aotearoa New Zealand, it is important to emphasise that, in our view, a significant overhaul of the current law is required. The Supreme Court in *Chisnall* stressed that, while preventive measures serve an important purpose, the supervision and detention of people beyond punitive prison sentences are “extraordinary and truly exceptional measures for society to implement”.⁵¹ It cautioned that:⁵²

... exceptional care is needed in constructing a protective regime in such circumstances to minimise to the extent possible the curtailment of rights, lest we become accepting in our society that it is appropriate to simply warehouse people for broader societal ends, without due regard to their rights.

- 3.45 The preventive measures we recommend in this Report should sit within a legal regime that has been constructed with the exceptional care called for by the Supreme Court to minimise to the extent possible the curtailment of rights. This echoes the feedback we received during consultation.
- 3.46 Throughout this Report, we address in depth the reforms that we think should be implemented to ensure preventive measures in Aotearoa New Zealand are human rights compliant. Specifically, we have aimed to ensure that the law provides adequate protection for the community while curtailing the rights of those subject to preventive measures to the least possible extent.
- 3.47 Where rights will unavoidably be limited by preventive measures, we have considered whether and how those limits can be considered justified in a free and democratic society. These include, for example, provisions to ensure the nature and conditions of the

⁵⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [261]–[262].

⁵¹ *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

⁵² *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

preventive measures are carefully matched to the person's risks and stronger entitlements to rehabilitative treatment and reintegrative support.

- 3.48 We detail these recommended provisions in later chapters. At this point, we summarise three types of preventive measure that the law should continue to provide within this reformed and rights-compliant framework.

Recommendations

R1

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.

R2

The preventive measures the law should provide for are:

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

Three types of preventive measures

- 3.49 We recommend that there should be three types of preventive measures. In order of the severity of the restrictions they will impose from least to most restrictive, the measures are:

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

- 3.50 These three measures are intended to form a gradation of measures at different levels of restriction from supervised life in the community at one end to detention in a secure facility at the other. In many ways, these measures resemble those provided for under the current law. However, as we explain further in Chapter 4 and Chapter 10, the three measures should form a more cohesive regime and enable the court to impose the appropriate and least severe measure to address the risks of reoffending.

- 3.51 We summarise the features of these preventive measures below but provide more detail on how they will operate in practice in later chapters.

Community preventive supervision

- 3.52 The least restrictive preventive measure we recommend will enable a person 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.

- 3.53 The main difference to the current law governing ESOs is that we recommend that no condition should be available under this measure that would result in the detention of the person. Restrictions that enable a person to reintegrate through life in the community

without detaining them are more easily justified according to the Supreme Court in *Attorney-General v Chisnall*. Conditions authorising detention should be reserved for residential preventive supervision or secure preventive detention.

- 3.54 We discuss our recommendations regarding the operation of community preventive supervision in Chapter 14.

Residential preventive supervision

- 3.55 We recommend that the law should provide for a form of detention that requires a person to be detained 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. It will serve as a useful reintegrative bridge for people whose risk of reoffending is too great to be left in the community without closer supervision.

- 3.56 Residential preventive supervision will be similar to the current practice of detaining people subject to ESOs through a combination of programme and residential restriction conditions.⁵³ A key difference is that residential preventive supervision should be a stand-alone preventive measure that is recognised as a form of detention. By providing for this form of detention as a separate measure, the court can tailor the specific conditions governing detention to the risks posed by the individual. Other protections can be put in place to ensure the minimal impairment of rights.

- 3.57 We discuss our recommendations regarding the operation of residential preventive supervision in Chapter 15.

Secure preventive detention

- 3.58 The law should continue to enable the detention of a person in a facility with security features designed to stop them from leaving as the most severe preventive measure. It should only be imposed where no less restrictive preventive measure would provide adequate community protection. We call this preventive measure “secure preventive detention”.

- 3.59 We acknowledge there are difficulties in determining whether secure detention is a justified means to prevent serious reoffending. However, in previous cases, the courts have been satisfied that the high legislative thresholds for preventive detention and PPOs have been met, including findings that less restrictive measures would provide insufficient protection for the community. The Supreme Court in *Attorney-General v Chisnall* also concluded that detention for community protection purposes could be a justified limit on human rights. We therefore conclude that the law should continue to provide for the ability to subject a person to secure detention. The legislation governing its imposition should require it to be a measure of last resort and only available when a court is satisfied that detention of this nature is justified by the nature and extent of the reoffending risks the person poses.

⁵³ See the discussion of this practice in *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 and in Chapter 15.

- 3.60 We recommend that, subject to key reforms set out in this Report, 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.
- 3.61 We discuss our recommendations regarding the operation of secure preventive detention in Chapter 16.
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CHAPTER 4

A single, post-sentence regime

INTRODUCTION

- 4.1 In this chapter, we set out our primary recommendation for the introduction of a new Act. The new Act should provide for a single statutory regime governing preventive measures. We recommend that the preventive measures provided for under this regime be imposed as post-sentence orders.
- 4.2 These recommendations respond to three key issues with the current law:
- (a) **Fragmentation of the law.** The current arrangement of three separate but interrelated regimes addressing the same policy objective creates difficulties. The legislation takes different approaches on key matters, particularly the tests for when a court should impose each preventive measure. Relatedly, the law does not facilitate the imposition of the most appropriate preventive measure in the circumstances as best it could. The fragmentation also causes procedural inefficiencies.
 - (b) **Problems with imposing preventive measures at sentencing.** Preventive measures imposed at sentencing, like preventive detention, rely on the court determining the likelihood a person will reoffend when they would otherwise finish a determinate prison sentence. It is likely that 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. We consider measures imposed towards the end of a person's sentence, like extended supervision orders (ESOs) and public protection orders (PPOs), to be preferable.
 - (c) **Human rights challenges to post-sentence orders under the current law.** The courts have confirmed that ESOs and PPOs are forms of punishment. Because they are imposed towards the of a person's sentence, they engage the right not to be punished twice for the same offence. Te Kōti Mana Nui | Supreme Court has held that the aspects of the ESO and PPO regimes that authorise detention are an unjustified limitation of this right.¹

¹ *Attorney-General v Chisnall* [2024] NZSC 178.

- 4.3 The options available to address the fragmentation issue will depend on whether preventive measures should sit within a sentencing or post-sentence regime or both. We therefore examine these two matters together in this chapter.
- 4.4 We conclude that a move to a single, post-sentence regime that is carefully designed to minimise interference with rights would address these issues.

ISSUES

Fragmentation of the current law

- 4.5 Despite sharing the same community safety objective, preventive detention, ESOs and PPOs are governed by separate, but interrelated, statutes.
- 4.6 The separation of the current law is largely a result of the historical development of the preventive measures. As we set out in the Issues Paper, preventive detention has long been part of Aotearoa New Zealand’s sentencing law.² 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.
- 4.7 The development of the law on ESOs and PPOs was reactive and favoured over reforms to existing measures. In 2004, ESOs were introduced through amendments to the Parole Act 2002 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.³
- 4.8 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.⁴ The Public Safety (Public Protection Orders) Act 2014 (PPO Act) was designed to be separate from preventive detention and ESOs. It was created as a “civil regime”, intended to be distinct from criminal proceedings.⁵

Disparities in tests and terminology

- 4.9 There are several inconsistent and illogical variations between the key provisions of the three regimes. As we discuss in Chapter 10, the thresholds for whether the court should

² For a historical overview of preventive detention in Aotearoa New Zealand, see 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 [1.3]–[1.36].

³ Office of the Minister for Justice *Paper for Cabinet Social Development Committee: Extended Supervision of Child Sex Offenders* (2003) at [10]–[15].

⁴ 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 [13], [17] and [21].

⁵ 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) at [49] that ESOs were penalties and infringed the protection against second punishment under s 26(2) of the New Zealand Bill of Rights Act 1990.

impose preventive detention, an ESO or a PPO differ and do not reflect the severity of the measure. While the tests for ESOs and PPOs require the risk that the person will reoffend to be “high” or “very high”, the much more restrictive sentence of preventive detention only requires the person 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.

- 4.10 Several submitters who responded to the Issues Paper agreed the variations across the regimes are problematic. For example, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted that “given the common purpose of the separate regimes, an approach with consistent terminology and coherently linked tests would be appropriate”.⁶

Fragmentation hinders the imposition of the appropriate preventive measure

- 4.11 Despite the separation of preventive detention, ESOs and PPOs into three statutory regimes, the courts attempt to apply the three regimes together in a cohesive way. 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. 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.⁷ Similarly, the courts will not impose a PPO if the risks posed by the respondent can be managed adequately under an ESO.⁸
- 4.12 The legislation does not, however, always facilitate the imposition of the least restrictive order as best it could and, in some instances, actively prevents it. In particular:
- (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. However, the end of the sentence may be many years in the future, making it difficult to assess how an ESO could address possible risks.
 - (b) 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 on ESO conditions. The availability of an ESO could, therefore, mean that the person could spend less time imprisoned. The legislation, however, precludes this option.⁹
 - (c) 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.¹⁰ Consequently, to the extent a PPO constitutes a less restrictive option than

⁶ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [4.16].

⁷ *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 [97]–[100].

⁸ *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]. See also *McCorkindale v Department of Corrections* [2019] NZCA 369 at [11] and [19].

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

¹⁰ Public Safety (Public Protection Orders) Act 2014, s 138.

preventive detention (which we consider it does), the PPO Act prevents the court from considering a PPO as an alternative.

Fragmentation causes procedural inefficiencies

- 4.13 When Ara Poutama applies for a PPO or an ESO in the alternative, the Parole Act prohibits the court from hearing the ESO application until it has determined the PPO application.¹¹ However, to determine a PPO application, the court must consider the efficacy of an ESO to ensure a PPO would be the least restrictive measure available. This requires the court to receive information on the conditions to which a person might be made subject under an ESO.¹² The requirement for ESOs and PPOs to be determined in separate hearings is unnecessarily duplicative.
- 4.14 In *Chisnall v Chief Executive of the Department of Corrections*, te Kōti Pira | Court of Appeal expressed dissatisfaction with this approach, saying that, given the need to always consider less restrictive alternatives before making a PPO, it was “somewhat artificial” to hear the applications separately.¹³
- 4.15 In addition, PPOs must be made through te Kōti Matua | High Court’s civil originating application procedure. 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 for them. It may also mean that different representation is required for PPO proceedings and closely linked ESO proceedings.

Problems with imposing preventive measures at sentencing

- 4.16 A court imposes preventive detention as a sentence at the time of conviction for a criminal offence. We identify several problems of imposing preventive measures at this point in time.

Risk assessments at sentencing are less accurate

- 4.17 The legislative tests for preventive detention require the court to assess at sentencing the likelihood that the person will reoffend if released when the determinate sentence expires.¹⁴ 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 release into the community is imminent. As a result, if the law continues to require an assessment of risk at the time of sentencing, 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.
- 4.18 Studies on recidivism identify time periods in which most people who are at risk of reoffending after release from prison are most likely to reoffend. We understand that most literature considers that a period of five to seven years is the relevant period for

¹¹ Parole Act 2002, s 107GAA(2).

¹² *Chisnall v Department of Corrections* [2019] NZCA 510 at [65]–[68]; and *Douglas v Chief Executive of the Department of Corrections* [2024] NZCA 634 at [78].

¹³ *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402 at [15].

¹⁴ Sentencing Act 2002, s 87(2)(c).

sexual offending and two to five years for violent offending.¹⁵ Risk assessments and tools devised for this purpose are based on these periods. They are not suited to assess risk beyond the relevant periods.

- 4.19 In addition, more may be known about the person when their risk is assessed towards the end of their sentence. In contrast, assessments at sentencing cannot consider changes in dynamic factors such as how a person may respond to treatment while in prison.¹⁶ Whether 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.¹⁷

Imposing indeterminate preventive measures at sentencing can cause feelings of hopelessness

- 4.20 Indeterminate sentences can have severe impacts on people serving those sentences. As we discussed in the Issues Paper, the House of Commons Justice Committee has examined the issue in relation to indeterminate sentences of imprisonment for public protection (IPP sentences), which formerly operated in England and Wales.¹⁸ The Committee reported that the sentence and conditions attached to it caused psychological harm.¹⁹ The Committee observed:²⁰

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.

- 4.21 The United Kingdom Ministry of Justice has reported that, since 2006, there have been 86 self-inflicted deaths among people serving IPP sentences.²¹ The rate of self-harm is twice that of individuals serving life sentences.²²
- 4.22 These findings echo feedback we received in engagement and consultation in this review. The people we spoke with who are on indeterminate sentences described how they felt hopeless 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 that they were “freaking out”. One person explained that the

¹⁵ Lucy Moore *Literature Review – Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 17.

¹⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [228].

¹⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [228].

¹⁸ House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (28 September 2022).

¹⁹ House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (28 September 2022) at [48]–[59].

²⁰ House of Commons Justice Committee *IPP sentences: Third Report of Session 2022–2023* (28 September 2022) at [58]. See also Independent Monitoring Boards *The impact of IPP sentences on prisoners' wellbeing* (May 2023).

²¹ 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 1.7. See also 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.

²² 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.

indeterminate nature of preventive detention meant it was “hard to look forward”. One person described how he felt he could never free himself from his past offending.

- 4.23 We recognise that any preventive measure of an indeterminate nature may give rise to feelings of hopelessness regardless of whether it is imposed at sentencing or later. However, we consider this issue is heightened when the measure is imposed as a sentence that can never be discharged, like preventive detention. The imposition prejudices how a person’s risk profile may change during their prison sentence. We anticipate too that measures imposed at sentencing are more likely to be perceived and experienced as ongoing punishment for past offending. We discuss this issue further in Chapter 5.

Preventive detention fails to distinguish between the punitive and protective periods of preventive detention

- 4.24 New Zealand law governing preventive detention does not reflect international human rights jurisprudence.
- 4.25 The United Nations Human Rights Committee (UNHRC) has developed principles that a sentencing regime must meet to avoid arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR). These principles are based on the view that, when a criminal sentence involves extended detention for public protection, the detention comprises 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.²³ In the second and subsequent period, the person remains detained solely for preventive reasons.²⁴
- 4.26 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.²⁵
 - (b) Regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.²⁶
 - (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.²⁷
- 4.27 New Zealand law does not conform to these principles in two key respects.

²³ *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) at [5.2].

²⁴ *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].

²⁵ United Nations 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].

²⁶ *Rameka v New Zealand* (2003) 7 HRNZ 663 (UNHRC) at [7.3]; and United Nations 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].

²⁷ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3]; and United Nations 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].

- 4.28 First, the distinction between a punitive and preventive period within preventive detention is not reflected in the provisions of the Sentencing Act and the Parole Act. Rather, preventive detention is a single sentence without clearly defined periods within it. Indeed, any distinction between detention for punitive or preventive reasons is blurred by the requirement that the sentencing court must set a minimum period of imprisonment either to reflect the gravity of the qualifying offence or to provide for the safety of the community, whichever period is the longer.²⁸ This is consistent with the broader approach taken by the Sentencing Act that any sentence may be based on a blend of retributive and community protection purposes based on the principles listed under sections 7–8 of that Act.
- 4.29 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 the punitive period in different ways each time.²⁹
- 4.30 Second, people sentenced to preventive detention remain in prison conditions beyond the punitive component of the prison sentence. The UNHRC expressed concern with this approach in *Miller v New Zealand*.³⁰ In that 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 said there were serious concerns that the requirements for avoiding arbitrary detention were not met.³¹ It focused particularly on the protracted length of the individuals’ sentences and that the individuals remained in the same prison conditions throughout the preventive detention.³²
- 4.31 To date, the New Zealand courts have tended to take a narrower approach to the meaning of “arbitrary” for the purposes of section 22 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). They have said that the current system of preventive detention does not authorise arbitrary detention.³³
- 4.32 In the Issues Paper, we observed that the distinction between an initial punitive period and a second preventive period is now an established element of a rights-consistent

²⁸ Sentencing Act 2002, s 89.

²⁹ *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* UN Doc 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.

³⁰ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

³¹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

³² *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3]. We recognise that the United Nations Human Rights Committee took a different view in its later decision in *Isherwood v New Zealand* in finding that the complainant’s preventive period of detention was sufficiently distinct from the punitive period because he had been transferred to a low-security unit and had completed various rehabilitation programmes: *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.5]–[8.6].

³³ *Miller v New Zealand Parole Board* [2010] NZCA 600 at [70]. Of particular note, the courts have held that the conditions of detention cannot render a lawfully imposed detention arbitrary: *Miller v Attorney-General* [2022] NZHC 1832 at [82]. In *Attorney-General v Chisnall* [2024] NZSC 178, however, te Kōti Mana Nui | Supreme Court commented that this interpretation of s 22 of the New Zealand Bill of Rights Act 1990 is overly narrow (at [161]). It said that a “more generous” approach is to interpret s 22 in line with the intention that the New Zealand Bill of Rights Act 1990 is to affirm Aotearoa New Zealand’s commitment to the International Covenant on Civil and Political Rights. This would mean the notion of arbitrariness is to be interpreted more broadly to include elements of “inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality”.

approach to preventive detention at international law. We suggested that, if the law is to continue to provide for preventive detention, the law should 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.³⁴ We also expressed a preliminary view that people detained solely for reasons of community protection should be managed in different conditions to prisoners serving punitive sentences.

- 4.33 After our consultation periods closed, the Supreme Court released its decision in *Attorney-General v Chisnall*.³⁵ Although not a case involving preventive detention, the Court considered the least rights-intrusive way of achieving public protection through post-sentence detention under an ESO or a PPO. It held that, among other things, the ESO and PPO regimes would need to minimise the punitive impact on people subject to the orders.³⁶ The law should do this, it held, by including statutory recognition that the circumstances and conditions of detention be distinct from the circumstances and conditions of imprisonment, as required by the principles expressed by the UNHRC.³⁷
- 4.34 In our view, the Supreme Court's reasoning can be applied to any ongoing detention for public protection beyond a punitive criminal sentence, even if imposed at sentencing. We therefore consider the *Attorney-General v Chisnall* decision supports our views that reforms are required to align the law with the principles under the international human rights jurisprudence.

Post-sentence preventive measures engage the right to protection against second punishment

- 4.35 While there are significant problems with imposing preventive measures at sentencing, measures imposed after sentencing also pose human rights challenges that need to be addressed in the design of any post-sentence regime.
- 4.36 It is a fundamental principle of New Zealand law that a person should not be punished twice for the same crime. This is to ensure that defendants in criminal proceedings face punishment that is fair and proportionate and that they can live their lives without the threat of repeated harassment, embarrassment and expense.³⁸
- 4.37 The Supreme Court has confirmed in *Attorney-General v Chisnall* that ESOs and PPOs engage the right not to be punished twice for the same offence.³⁹ We discuss this case in more detail in Chapter 3. In this chapter, we identify four key points from the judgment that are relevant to whether, and if so how, post-sentence preventive measures can be rights compliant.

³⁴ Issues Paper at [3.54] and [12.39]–[12.42].

³⁵ *Attorney-General v Chisnall* [2024] NZSC 178.

³⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

³⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [241].

³⁸ *Mitchell v Police* [2023] NZSC 104, [2023] 1 NZLR 238 at [37]–[39].

³⁹ *Attorney-General v Chisnall* [2024] NZSC 178.

Any post-sentence measures are likely to be a form of second punishment

- 4.38 First, post-sentence preventive measures in any form are likely to engage the protection against second punishment under section 26(2) of the NZ Bill of Rights. The Supreme Court held that the ESO and PPO regimes authorise the imposition of penalties because of:⁴⁰
- (a) the connection between an ESO or a PPO and the prior conviction of a qualifying offence;
 - (b) the administration of the regimes by institutions and people working in the criminal justice system — the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) and probation service;
 - (c) the impact ESOs and PPOs have on people subject to them because of the severe restriction of their rights and freedoms, including detention in government-run facilities; and
 - (d) the similarity ESOs and PPOs have with sentencing responses, namely detention and parole conditions.
- 4.39 These aspects of the regime are hard to avoid. Any regime designed to prevent high-risk individuals from reoffending would, in our view, necessarily involve severe restrictions on rights and freedoms. As we explain in greater detail in Chapter 8, there are good reasons to require qualifying offending as a key eligibility criterion. There are also good reasons for Ara Poutama and the probation service to remain involved in the administration of the regimes, as we explain in Chapter 13. The key question is whether any limits a post-sentence regime places on the section 26(2) right can be justified.

Post-sentence measures that enable supervised life in the community are a justified limit on the right not to be punished twice

- 4.40 Second, the Supreme Court held that the aspects of the ESO regime that subject people to supervision in the community without detaining them authorise limits on the section 26(2) right that are justified for the purposes of section 5 of the NZ Bill of Rights.⁴¹ The Court reasoned that there is no less rights-intrusive alternative, that appropriate safeguards are in place and that these measures are not among the most severe penalties.⁴²

Post-sentence detention under the current law is not justified

- 4.41 Third, the Supreme Court held that the aspects of the ESO and PPO regimes that authorise post-sentence detention constitute limits on the section 26(2) right that are not justified.
- 4.42 In reaching this conclusion, the Court distinguished between the way the regimes authorise detention both retrospectively (for people whose qualifying offending occurred before the regimes were introduced) and prospectively (for people whose qualifying offending occurred after the regimes were introduced).

⁴⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [133]–[137].

⁴¹ *Attorney-General v Chisnall* [2024] NZSC 178 at [256] and [260].

⁴² *Attorney-General v Chisnall* [2024] NZSC 178 at [256] and [260].

- 4.43 The Court held that the retrospective imposition of post-sentence detention is such a severe intrusion on the protection from second punishment that it is incapable of justification.⁴³
- 4.44 In relation to the prospective post-sentence detention authorised by the regimes, the Supreme Court held that the limits on the section 26(2) right were not justified. The Court concluded that the law failed to achieve its community safety objective through the least rights-intrusive approach available.⁴⁴ The Court identified three “pillars” of a less rights-intrusive approach that are not reflected in the current law.⁴⁵
- (a) First, the regimes must achieve protection by the least restrictive means possible. The Supreme Court noted that the architecture of the regimes limited this ability. It was also concerned that the conditions relating to detention imposed under ESOs and PPOs were not set by the courts but rather by the New Zealand Parole Board (Parole Board) and the chief executive, respectively.⁴⁶
- (b) Second, the regimes must minimise the punitive impact of the restrictions on the person subject to the ESO or PPO. The Court held that the regimes failed in this regard, principally because “[t]here is no significant statutory recognition of the need to ensure the circumstances and conditions of detention [under the ESO and PPO regimes] are distinct from the circumstances and conditions of imprisonment”.⁴⁷
- (c) Third, the regimes must require mandatory provision of rehabilitation designed to meet the needs of the offender. The Court held that rehabilitation and a therapeutic approach did not “lie at the core of either regime”.⁴⁸ There is no statutory obligation to provide rehabilitative treatment or therapeutic support to those subject to ESOs. The PPO Act qualifies the chief executive’s obligation to provide rehabilitation to instances where there is “a reasonable prospect of reducing risk to public safety” posed by the person subject to the PPO.⁴⁹ The Court also observed that rehabilitation is not one of the express purposes of either regime.⁵⁰

Post-sentence measures that authorise prospective detention are capable of justification

- 4.45 Fourth, because the Supreme Court found that the current law authorises unjustified limitations on the NZ Bill of Rights protection not to be punished twice, there is a strong case for reform. The *Attorney-General v Chisnall* decision demonstrates that a post-sentence regime can be designed in a way that imposes only justified limits on the right not to be punished twice. The law will need to authorise detention only for people whose qualifying offending occurred after the regimes came into force. The regime will need to conform to the three pillars identified in the judgment.

⁴³ *Attorney-General v Chisnall* [2024] NZSC 178 at [146]–[148].

⁴⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [235]–[244].

⁴⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

⁴⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [240].

⁴⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [241].

⁴⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

⁴⁹ Public Safety (Public Protection Orders) Act 2014, s 36.

⁵⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [243].

RESULTS OF CONSULTATION

A new Act

- 4.46 To address the issues from the fragmentation of the current law, we proposed in the Preferred Approach Paper that the law governing preventive measures should be consolidated under a single regime and a new Act should be enacted for this purpose.⁵¹
- 4.47 Most submitters agreed that it is best to locate the law governing preventive measures within one coherent and comprehensive statute.⁵² Submitters said that one new Act has the benefits of being:
- (a) more coherent;
 - (b) better at enabling the imposition of the most appropriate and least restrictive preventive measure;
 - (c) more accessible to the public; and
 - (d) more efficient in terms of legislative design.
- 4.48 Two submitters opposed the proposal. The Law Association of New Zealand (TLANZ) submitted that the three current preventive measures should continue and are best provided for under separate legislation. Similarly, the South Auckland Bar Association thought that retaining the current measures within separate statutory regimes offers a more specialised focus.

A post-sentence regime

- 4.49 In the Preferred Approach Paper, we recognised that imposing preventive measures at sentencing or post-sentence both unavoidably involve significant trade-offs.⁵³ We expressed the view that it was preferable for all preventive measures under the new Act to be imposed only as post-sentence orders.⁵⁴ Our reasons for preferring a post-sentence regime over the imposition of preventive measures at sentencing included:⁵⁵
- (a) the greater accuracy of risk assessments at the end of a prison sentence;
 - (b) the benefits of determining the most appropriate and least restrictive measure adequate to address that risk among all options at the same point in time;
 - (c) the ability to focus exclusively on the rehabilitative needs of the offender together with the safety of the community, which cannot be done at sentencing because of the wider objectives of sentencing; and
 - (d) the detrimental impact of indeterminate prison sentences on those subject to them.

⁵¹ Preferred Approach Paper, P3 and P4.

⁵² Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, Te Kāhui Tātari Ture | Criminal Cases Review Commission, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁵³ Preferred Approach Paper at [4.66].

⁵⁴ Preferred Approach Paper, P5.

⁵⁵ Preferred Approach Paper at [4.51].

- 4.50 Most submitters who responded to this proposal agreed that preventive measures should be imposed as post-sentence orders.⁵⁶
- 4.51 The Bond Trust submitted that it is wrong to sentence a person to prison because of the belief they may reoffend. It would mean imprisoning them for a crime not yet committed.
- 4.52 The NZLS agreed that the current split of measures across sentencing and post-sentence, as well as between criminal and civil processes, can hinder the court from imposing the most appropriate and least restrictive measure for the person concerned. The sequencing therefore undermines the ability of the preventive regimes to comply with human rights obligations.
- 4.53 On the accuracy of risk assessment, the Royal Australian and New Zealand College of Psychiatrists and the NZLS agreed with the problems with determining risks of reoffending at sentencing that we identified in the Preferred Approach Paper. They submitted that risk assessments should be made closer to the time when the community may be exposed to the risk and after the offender has had the opportunity to benefit from in-depth mental health and disability assessments and rehabilitative intervention. The NZLS said that risk assessment performed closest to the point of potential release will ensure that up-to-date information informs decision-making on risk rather than information regarding the gravity of the offence tainting that decision-making at the front end of sentence imposition.
- 4.54 The New Zealand Council for Civil Liberties thought it was unacceptable for the law to enable assumptions that no one will benefit from treatment while in prison. The NZLS added that post-sentence measures go some way to remedying hopelessness felt by offenders sentenced to preventive detention by allowing them to access and benefit from rehabilitation before their risk of reoffending is assessed.
- 4.55 On the other hand, criminal lawyers from Te Tari Ture o te Karauna | Crown Law submitted that assessing risk at the end of a sentence is not necessarily more accurate. The person will have been in a controlled prison environment for years, thereby limiting a health assessor's ability to assess risk. In some cases, they said, conducting risk assessment at sentencing may be more accurate.
- 4.56 TLANZ and the South Auckland Bar Association did not agree with the proposed post-sentence regime. They supported the retention of the current preventive measures in their current statutory regimes. TLANZ submitted that the UNHRC's decision in *Miller* did not criticise the imposition of indeterminate sentences. Rather, the decision emphasised that those subject to preventive detention need to be managed in a different environment to a punitive sentence once they enter the protective period of the sentence. TLANZ thought, however, that it was appropriate for ESOs to be post-sentence orders because risk assessments are better suited for imposing preventive measures post-sentence.
- 4.57 The South Auckland Bar Association considered it important for human rights that a sentenced prisoner has certainty about their sentence.

⁵⁶ Bond Trust, Myra Crawford-Smith, Te Kāhui Tātari Ture | Criminal Cases Review Commission, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Royal Australian and New Zealand College of Psychiatrists.

A notification mechanism

- 4.58 In the Preferred Approach Paper, we proposed that the court should have the ability, when sentencing people upon conviction of a qualifying offence, to notify them of the possibility they will be made subject to a preventive measure at their sentence expiry. We suggested this was a way of partially mitigating the concern that post-sentence measures engage the right not to be subject to second punishment.
- 4.59 The submitters who supported the proposal observed that the mechanism may help offenders realise that they may be made subject to a preventive measure and incentivise them to engage in treatment or rehabilitation offered to avoid it.⁵⁷ The NZLS emphasised that the notification must be only informative and not determinative of any future outcome.
- 4.60 Most submitters who addressed this proposal, however, were apprehensive.⁵⁸ Common concerns included the following:
- (a) Notifications would not address the second punishment issue because, while they may provide warning, they do not change the nature of the preventive measure.
 - (b) Notifications may have a predetermining effect. A notification may mean Ara Poutama is more likely to seek, and a court more likely to impose, a preventive measure.
 - (c) The availability of notifications may create an expectation that notification will first be given if a preventive measure is to be imposed, thereby leading to fairness issues if a court imposes a measure without prior notification having been given.
 - (d) Ara Poutama may take the view that people who have received notification should not be prioritised for rehabilitative treatment while in prison because they will have that opportunity once subject to a preventive measure. Conversely, Ara Poutama may prioritise for treatment those who have received notification, creating fairness issues for people who have not received notification.
- 4.61 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service suggested that, while there potentially should be a warning, it should be given in all cases where a person is eligible for a preventive measure. The warning should be a precondition for a later application. It also said that there needs to be a clear obligation on Ara Poutama to provide rehabilitation, during their sentence, to people who could be subject to an application for a preventive measure at the end.
- 4.62 Criminal lawyers from Crown Law presented an alternative proposal to “amplify the notification mechanism” described in the Preferred Approach Paper. They suggested that the court should be able to impose a “presumptive preventive measure order” when sentencing a person and specify which of the three measures would apply. The sentencing court should then review the order at the end of the person’s sentence and either confirm or vary the order. We discuss this option in further detail at the end of this chapter.

⁵⁷ Myra Crawford-Smith, criminal lawyers from Te Tari Ture o te Karauna | Crown Law, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

⁵⁸ Dr Jordan Anderson, criminal lawyers from Te Tari Ture o te Karauna | Crown Law, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

RECOMMENDATIONS

R3 A new statute should be enacted to govern all preventive measures (the new Act).

R4 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.

R5 All preventive measures should be imposed as post-sentence orders. For preventive measures sought against an eligible person subject to a prison sentence in Aotearoa New Zealand for a qualifying offence, the new Act should require applications 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.

R6 A court sentencing an eligible person to imprisonment following conviction for a qualifying offence should give written notice to the person to inform them of their eligibility to have a preventive measure sought against them.

A new Act to govern preventive measures

- 4.63 We recommend that a new statute should be enacted to be a comprehensive source of law to govern all preventive measures we introduce in Chapter 3 (the new Act). 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. In Chapter 10, we recommend revised tests for imposing the preventive measures to achieve this. It would allow for a determination within a single hearing, addressing some of the practical and procedural issues noted above.
- 4.64 The introduction of a new, stand-alone statutory regime would also enable the legislation to state its own purpose and principles. Unlike the current law, the purposes applying to preventive measures under the new Act would not be coloured by the different (albeit overlapping) objectives of the Sentencing Act and Parole Act. Of particular importance, 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.
- 4.65 Most submitters who addressed this proposal in the Preferred Approach Paper agreed with the repeal of the current law and the replacement new Act.⁵⁹ TLANZ and the South

⁵⁹ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, Te Kāhui Tātari Ture | Criminal Cases Review Commission, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service. Submitters who did not agree with the repeal of the current law governing preventive measures were South Auckland Bar Association, Christine Staples, The Law Association of New Zealand.

Auckland Bar Association, however, supported the continuation of preventive detention, ESOs and PPOs in the current statutes. While each measure has its differences and particular focus, ultimately, in our view, these measures share the paramount aim of protecting the community from reoffending as expressed in similar terms by their governing legislation.⁶⁰ As described above, the courts attempt to apply the regimes together by refusing to impose preventive detention or a PPO when an ESO would adequately protect the community. We do not agree that the roles of each of the current preventive measures are so distinct that they cannot or should not be brought together under the same statute.

- 4.66 We have also 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.⁶¹ Furthermore, a new Act would underscore the break from the current legislative settings and better effect the reorientation of the law we recommend in Chapter 5.

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

- 4.67 Because of our recommendation that a new statute should be enacted to govern all preventive measures, we recommend that the legislation governing preventive detention, ESOs and PPOs be repealed.
- 4.68 As we set out below, we favour a post-sentence regime. Consequently, some core aspects of the law governing ESOs and PPOs, which are also post-sentence orders, should be carried forward into the new Act. We detail these aspects further in later chapters.
- 4.69 We do not, however, consider indeterminate detention under prison conditions beyond a punitive sentence to be an appropriate way of addressing the risks a person may reoffend. As explained above, 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 ICCPR for failing to meet the requirements of reasonableness, necessity and proportionality.⁶²
- 4.70 As noted, the Supreme Court in *Attorney-General v Chisnall* emphasised that, in the context of post-sentence regimes, there should be statutory recognition that ongoing detention for public protection must be distinct from the circumstances and conditions of imprisonment.⁶³ The Court viewed this distinction as essential for minimising the punitive impact of the regimes so as to ensure that detention is a minimal and proportionate limit on the right to protection against second punishment. We consider the Court's reasoning could be applied to the way detention for preventive purposes engages other rights

⁶⁰ Sentencing Act 2002, s 87(1); Parole Act 2002, s 107(1); and Public Safety (Public Protection Orders) Act 2014, s 4(1).

⁶¹ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [3.1]:

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.

⁶² *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)* UN Doc CCPR/C/GC/35 (16 December 2014).

⁶³ *Attorney-General v Chisnall* [2024] NZSC 178 at [227(d)], [233] and [241].

affirmed under the NZ Bill of Rights. For example, the failure to minimise the punitive impact of the regime in this way could be relevant to how preventive detention engages the right to protection against arbitrary detention and the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.⁶⁴

- 4.71 We are also mindful of the impacts on those sentenced to indeterminate imprisonment highlighted above. 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. We also note the possible feelings a person may have towards being subjected to lifelong restrictions before any changes to their behaviour and risk during their time in prison can be taken into account.
- 4.72 For these reasons, we do not consider that imprisonment beyond a punitive prison sentence is either a humane or a proportionate means of achieving the community protection objective. While we think post-sentence secure detention should continue to be available as a preventive measure under the new Act, we recommend that the current law providing for indeterminate imprisonment through a sentence of preventive detention be repealed and not continued.

An entirely post-sentence regime

- 4.73 We conclude that all preventive measures should be imposed as post-sentence orders. Specifically, we recommend 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 current law governing ESO applications.⁶⁵ Different rules on timing should apply to people convicted of offences overseas who come to Aotearoa New Zealand. We discuss those rules in Chapter 9.
- 4.74 Our reasons for recommending an entirely post-sentence regime are as follows:
- (a) As discussed above, assessing a person's reoffending risk upon release from a determinate prison sentence is likely to be more accurate if done towards the end of their prison sentence rather at sentencing. That is for two reasons:
 - (i) First, 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) Second, assessments of reoffending risk towards the end of a person's prison sentence can take into account changes in dynamic factors such as how a person may respond to programmes and treatment while in prison.⁶⁶ Whether 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.

⁶⁴ New Zealand Bill of Rights Act 1990, ss 9 (right not to be subject to torture or cruel treatment) and 22 (liberty of the person).

⁶⁵ 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.

⁶⁶ See *Attorney-General v Chisnall* [2024] NZSC 178 at [228].

Consequently, we are concerned that assessments of risk at sentencing may not identify people who are considered at high risk of reoffending. Conversely, they may cause the unnecessary imposition of measures on people who, at the end of a punitive prison sentence, are not at high risk of reoffending or who could be managed in less restrictive ways.

- (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. However, 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 possible options 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 towards the end of a prison 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 and lifelong parole restrictions can have significant psychological effects on people. While the post-sentence preventive measures we recommend are still indeterminate in nature (discussed further in Chapter 18), we consider they can be better implemented in a way as to mitigate feelings of hopelessness and despair.
- (e) The Supreme Court in *Attorney-General v Chisnall* confirmed that, if very carefully designed, a post-sentence detention regime can constitute a justified limit on the right not to be punished twice for the same offence.
- (f) Most submitters who addressed this matter during consultation supported an entirely post-sentence regime.

4.75 Lastly, comparable jurisdictions provide for a mix of at-sentencing and post-sentence regimes. The laws of some jurisdictions such as England and Wales,⁶⁷ Scotland⁶⁸ and Canada⁶⁹ 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.⁷⁰ Australian jurisdictions all have post-sentence preventive regimes,⁷¹ and most of them also have preventive measures that can

⁶⁷ For example, Sentencing Act 2020 (UK), ss 254–259, 279–282 and 285.

⁶⁸ Criminal Procedure (Scotland) Act 1995, s 210F.

⁶⁹ Criminal Code RSC 1985 c C-46, s 752.01.

⁷⁰ 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.

⁷¹ 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).

be imposed at sentencing.⁷² Given the diversity of approaches, it is difficult to discern trends or best practices for the law in Aotearoa New Zealand to follow.

Relationship between a post-sentence regime and parole

- 4.76 The ordinary rules governing the release of prisoners on parole will remain in place alongside our recommended post-sentence regime. Under those rules, the Parole Board considers whether prisoners eligible for parole should be released depending on whether they pose an “undue risk to the safety of the community”.⁷³ This 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’s consideration of whether to seek a preventive measure.
- 4.77 Our recommendation will allow for the imposition of preventive measures even when a person has been released on parole. Consistent with the current law, the chief executive should be able to seek a preventive measure up to the date when the individual ceases to be subject to any release conditions.⁷⁴ This approach goes some way to addressing concerns raised in consultation that a person’s risk may not be fully apparent in the controlled environment of prison. It provides a limited but useful opportunity for a person to live in the community on parole and for Ara Poutama to respond if it transpires the person presents risks that justify a preventive measure.

Possible concerns with removing preventive detention at sentencing

- 4.78 We have considered several possible arguments against moving to an entirely post-sentence regime.
- 4.79 First is the argument 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.
- 4.80 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 of post-sentence measures should provide further assurances that community safety will be considered and high-risk offenders appropriately managed.
- 4.81 Second, in the absence of preventive detention at sentencing, the courts might sentence people they would have otherwise sentenced to preventive detention to long determinate sentences for reasons of community protection. A purpose of the

⁷² 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.

⁷³ Parole Act 2002, s 28(2).

⁷⁴ Parole Act 2002, s 107F(1)(a).

Sentencing Act is “to protect the community from the offender”.⁷⁵ In some cases, the courts have imposed determinate sentences of greater severity for community protective reasons than would otherwise have been justified.⁷⁶

- 4.82 There are some reasons for concern about long prison sentences, especially if a person’s risk to the community can be managed in other ways (such as detention in facilities that are not prison). For example, there is limited evidence to support a relationship between longer prison sentences and lowering recidivism.⁷⁷ On the contrary, the prison environment is more likely criminogenic rather than rehabilitative.⁷⁸
- 4.83 It is unclear whether moving to an entirely post-sentence regime will result in people spending longer periods in prison on determinate sentences. 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 — a long period of imprisonment.
- 4.84 We note, too, the possible criticism that, under our recommendations, a person could serve a long determinate sentence and then be further detained pursuant to secure preventive detention. But a person presenting this level of risk would, under the current law, either remain in prison subject to preventive detention or, if on a determinate sentence, be further detained under a PPO.
- 4.85 Lastly, the arguments against repealing preventive detention outlined above 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.⁷⁹ 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

- 4.86 The post-sentence regime we recommend is likely to amount to second punishment for the purposes of the NZ Bill of Rights. The regime will share several characteristics with ESOs and PPOs, which the Supreme Court identified as punitive in *Attorney-General v Chisnall*. Shared characteristics will include:⁸⁰
- (a) the prerequisite of a conviction for a qualifying offence (see Chapter 8);
 - (b) Ara Poutama being responsible for the administration of the regime (see Chapter 13);
- and

⁷⁵ Sentencing Act 2002, s 7(1)(g).

⁷⁶ 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.

⁷⁷ See for example Tadhg Daly and Matthew McClennan *Three Strikes Law: Evidence Brief* (Tāhū o te Ture | Ministry of Justice, December 2018); and Tāhū o te Ture | Ministry of Justice *Impact Summary: Repeal of the three strikes Law* (4 March 2021) at 4–5.

⁷⁸ 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].

⁷⁹ Sentencing Act 2002, s 7(1)(g).

⁸⁰ See *Attorney-General v Chisnall* [2024] NZSC 178 at [133]–[137].

- (c) the similarity of preventive measures with detention and parole conditions in the criminal justice system (see Chapters 14–16).
- 4.87 The right to protection against second punishment is highly important in a free and democratic society. As the Supreme Court explained, post-sentence preventive measures are “extraordinary and truly exceptional measures for a society to implement”.⁸¹ The Court emphasised that exceptional care is needed when constructing such a regime.⁸²
- 4.88 Nevertheless, we remain of the view, for the reasons given throughout this chapter, that imposing preventive measures towards the end of person’s sentence is preferable to imposing them at sentencing.
- 4.89 As noted above, it is possible to construct a prospective post-sentence regime that will limit the protection against second punishment no more than justified under section 5 of the NZ Bill of Rights. The post-sentence regime we recommend should, in the following ways, embody the three pillars the Supreme Court identified to ensure the regime is the least rights-intrusive regime possible:⁸³
- (a) **Achieving public protection by the least restrictive means possible.** In Chapter 10, we recommend that the legislative tests for imposing a preventive measure (including any special conditions of that measure) should expressly require the court to be satisfied that:
- (i) having regard to the nature and extent of the risk the person poses, the preventive measure is the least restrictive measure adequate to address that risk; and
 - (ii) 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.

In Chapter 13, we recommend that those exercising powers under the new Act when administering the terms and conditions of preventive measures should have regard to, among other things, the principle that people’s rights and freedoms should be limited no more than is necessary.

In Chapter 18, we recommend that preventive measures in force should be reviewed every three years by the court and annually by a specially constituted Review Authority. The reviews should examine the continuing justification for the preventive measure and whether the person could be moved to a less restrictive measure or be free of preventive measures altogether.

- (b) **Minimising the punitive impact of restrictions.** In Chapters 15 and 16, we recommend that the new Act require that detention pursuant to residential preventive supervision or secure preventive detention be in facilities that are separate from prison. We recommend, too, that the Act require the rooms to be materially different to prison cells and provide detainees with privacy and a reasonable level of comfort.

⁸¹ *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

⁸² *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

⁸³ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

- (c) **Mandatory provision of rehabilitation.** In Chapter 5, we explain that an express purpose of the new Act should be to support a person considered at high risk of reoffending to safe and unrestricted life in the community. We explain this purpose should necessarily include the provision of adequate rehabilitative treatment and reintegrative support.

This purpose is supported by the recommendations we make in Chapter 13 that the new Act provide people subject to preventive measures with an entitlement to receive rehabilitative treatment and reintegrative support. We recommend a corresponding duty on Ara Poutama to ensure sufficient rehabilitative treatment and reintegration support is available.

Notification at sentencing

- 4.90 Another way of addressing some concerns relating to the right not to be subject to second punishment is for people at sentencing to be notified of the possibility they will be made subject to a preventive measure at their sentence expiry.
- 4.91 One of the underlying purposes of the right not to be punished twice is to achieve 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.⁸⁴ A notice that a person is eligible for a preventive measure may not change the nature of post-sentence preventive measures, nor will it remove a person's anxiety about being made subject to them. It will, however, give fair warning of the possibility.
- 4.92 We therefore recommend that, when sentencing an eligible person to imprisonment upon conviction of a qualifying offence, the court should give written notice to the offender. The notice should alert the person to the fact they satisfy the eligibility requirements for a preventive measure to be sought against them (although whether or not a measure would be imposed would depend on satisfaction of the legislative tests). It may be desirable to include express provision in the new Act that a failure to give notice does not preclude the later imposition of a preventive measure.
- 4.93 This recommendation differs from our proposal in the Preferred Approach Paper, which was that the notification should be a discretionary power available to the court. Most submitters to the Preferred Approach Paper identified problems if notification was given on a discretionary basis. In particular, submitters thought that notification may inappropriately predetermine whether a measure should be sought and imposed. This is especially concerning because a court's decision to give notification would not be informed by health assessor reports on a person's risk of reoffending. Submitters also highlighted issues arising if a measure was sought against a person in cases where they had not received notification.
- 4.94 Given this feedback, we have adopted the approach taken in New South Wales. Under that regime, 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".⁸⁵ Similarly, our recommendation will result in all people eligible for a preventive measure receiving notice, regardless of whether they are likely candidates for a measure.

⁸⁴ *Mitchell v Police* [2023] NZSC 104, [2023] 1 NZLR 238 at [37]–[39].

⁸⁵ Crimes (High Risk Offenders) Act 2006 (NSW), s 25C(1).

- 4.95 We recognise the limitations of this approach. We anticipate that several thousand people will receive notice each year, even though a small minority of that number would be realistic candidates for a preventive measure. A standard notice issued to many people may diminish the impact of any warning it attempts to offer. It may also mean that many people will receive notice, which may cause them to be concerned, unnecessarily. We expect that, in practice, a person's counsel and possibly Ara Poutama staff will have an additional role in explaining to people who are realistic candidates that a preventive measure may be sought against them. Notification may provide a useful prompt.
- 4.96 Additionally, compared to a targeted approach to notification based on an assessment of a person's risk, blanket notification will not help identify people with particular needs for rehabilitative treatment while serving their prison sentence. Consequently, in practice, Ara Poutama will need to continue to manage access to rehabilitative treatment through its own processes.
- 4.97 Despite these limitations, we consider that there is still value in attempting to give eligible people warning through notification to all people being sentenced to imprisonment for a qualifying offence.

Alternative options

- 4.98 To address the issues relating to fragmentation of the current law and the timing of the imposition of preventive measures, we have considered alternative options. For completeness, we set out here two leading options and our reasons for not favouring them.

Secure preventive detention at sentencing

- 4.99 One option is that:
- (a) community preventive supervision and residential preventive supervision should be imposed as post-sentence measures; but
 - (b) secure preventive detention should be imposed at sentencing to take effect after the person has served a "punitive" prison sentence.
- 4.100 A possible argument in favour of this approach might be 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.
- 4.101 We do not favour this approach for the following reasons:
- (a) As the Supreme Court confirmed in *Attorney-General v Chisnall*, post-sentence detention can be a justified limitation on the right to protection from second punishment if properly designed. The judgment means that the case for this approach falls away.
 - (b) 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.
 - (c) Community preventive supervision and residential preventive supervision will also 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.

- (d) 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.⁸⁶ 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.
- (e) 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 under the current law, present problems.

Presumptive orders at sentencing

- 4.102 A second option is that presented by criminal lawyers from Crown Law in their submission on the Preferred Approach Paper. Their suggestion was that the court, when sentencing a person for a qualifying offence, should have the power to impose a “presumptive preventive measure order” and specify which of the three measures would apply. The sentencing court should then review the order at the end of the person’s sentence and either confirm or vary the order.
- 4.103 If, when the sentenced person became eligible for parole, the Parole Board considered they no longer posed an undue risk, they could be released on parole. The form of that parole would be the presumptive preventive measure, if the presumptive measure is a residential or community order. If the presumptive order was for secure preventive detention, there should continue to be a finite prison sentence to reflect the seriousness of the offending. Subsequently, the court could confirm the presumptive order or order that the person transition down to a residential order.
- 4.104 This approach, the lawyers said, would address the second punishment issues with a post-sentence regime. It would provide meaningful incentives for those subject to orders to engage with rehabilitative treatment in order to transition out of prison life and towards lesser restrictions.
- 4.105 The criminal lawyers from Crown Law also suggested that, if an offender was not subject to a presumptive preventive order but poses sufficient risk at the end of their sentence, Ara Poutama should still be able to make an application for a preventive measure.
- 4.106 We do not favour this option for the following reasons:
- (a) The option would still allow for post-sentence orders alongside the orders imposed at sentencing. It therefore combines both sets of issues associated with imposition at sentencing and post-sentence. We also envisage considerable difficulty in determining when it would be appropriate for a court to impose a post-sentence order when a presumptive order had not been made at sentencing.
 - (b) As we detail in later chapters, we recommend that preventive measures be administered pursuant to various mechanisms to better align the regime with human rights standards. For instance, we recommend in Chapter 13 that preventive measures be administered pursuant to a set of specific guiding principles, that people on preventive measures have greater entitlements to rehabilitative treatment and

⁸⁶ We discuss the ability to escalate people from one preventive measure to a more restrictive measure in Chapter 17.

reintegrative support and that people on preventive measures be managed according to a care and treatment plan that maps their progress towards unrestricted life in the community. We do not think preventive measures administered this way can be neatly grafted into the parole regime as this option envisages. It would require moving people from the parole regime to a preventive measure once parole is granted, thereby creating discrepancies with offenders who remain in the mainstream criminal justice system. Alternatively, it would mean considerably altering the parole regime to accommodate the recommended preventive measure, which we consider unfeasible.

CHAPTER 5

Reorienting preventive measures

INTRODUCTION

- 5.1 In this chapter, we consider the issue that the current law does not facilitate the humane treatment of people subject to preventive measures.
- 5.2 Preventive measures aim to protect the community from people considered at 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. 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 We conclude that the law should be reoriented towards a more rehabilitative and reintegrative approach. We recommend that the new Act should contain a purpose clause that makes clear the core policy underlying the reformed regime. We also identify where our recommendations in other chapters of this Report will contribute to the reorientation of the law. Lastly, we recommend that there continue to be the ability to consider a person for care and treatment under mental health or intellectual disability legislation.

ISSUES

- 5.4 The three preventive regimes involve some of the most severe restrictions that may be imposed on people under New Zealand law. Subjecting an individual to any of them has the potential to severely impact the rights and wellbeing of that person.
- 5.5 In the Issues Paper and Preferred Approach Paper, we identified parts of the current regimes where reform could facilitate the more humane treatment of people subject to preventive measures.¹ In the following section, we recap these issues.

¹ 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); and Chapter 5 of *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper).

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.²
- 5.7 Indeterminate detention in prison for reasons of community safety exposes people to the detrimental effects of prison for longer periods of time than those imprisoned on determinate sentences. 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.³ The prison environment negatively affects physical and mental health generally.⁴ The isolation, overcrowding, victimisation and poor physical environment of prisons likely contributes to the deterioration in the mental health of prisoners.⁵ Prisons have been described as “toxic environments” in which antisocial behaviour is often reinforced by criminally minded peers.⁶
- 5.8 A report from the Chief Ombudsman, *Kia Whaitake | Making a Difference*, has reinforced many of these concerns.⁷ The report sheds light on what the Chief Ombudsman describes as a failure of Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) to ensure the “fair, safe, and humane treatment” of those within prisons.⁸ 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;

² 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 from year ending June 2024 (11 October 2024). 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.

³ 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).

⁴ 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.

⁵ Andrew Carroll and others “No involuntary treatment of mental illness in Australian and New Zealand prisons” (2020) 32(1) *Journal of Forensic Psychiatry & Psychology* 1 at 3–4.

⁶ Jeremy Skipworth “The Australian and New Zealand prison crisis: Cultural and clinical issues” (2019) 53(5) *Australian and New Zealand Journal of Psychiatry* 472 at 472.

⁷ Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023).

⁸ Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [505].

- (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; and
 - (g) insufficient protection against inter-prisoner violence and sexual assault.
- 5.9 The five people we spoke with during consultation who were subject to preventive detention and had been released on parole told us their periods in prison before release were 17 years, 20 years, 24 years, 27 years and 30 years, respectively. Two people were in their late 60s when released from prison on parole. One was aged 81 years when released from prison.
- 5.10 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. It found that one in five people imprisoned on preventive detention were aged 65 or older.⁹ Forty 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 inadequate access to necessary rehabilitation programmes or individual psychological treatment, difficulty accessing suitable accommodation on release and the absence of family, whānau or community support.
- 5.11 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.¹⁰ Mr Vincent successfully applied for judicial review of the Parole Board's decision to decline his release from prison. At that stage, he was aged 83 and suffering from dementia. Had he not been sentenced to preventive detention, he would have received a finite sentence of under 10 years.
- 5.12 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 conditions to offenders serving punitive sentences.¹¹ We discuss this jurisprudence further in Chapter 4.
- 5.13 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.

Insufficient provision of rehabilitative and reintegrative treatment

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

⁹ Te Tari Tirohia | Office of the Inspectorate *Thematic Report: Older Prisoners* (Ara Poutama Aotearoa | Department of Corrections, August 2020) at [175]–[179].

¹⁰ *Vincent v New Zealand Parole Board* [2020] NZHC 3316.

¹¹ United Nations 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.

Deferral of treatment for people subject to preventive detention

- 5.15 First, rehabilitative treatment for people imprisoned on preventive detention is usually deferred until they are eligible to be considered for parole. Ara Poutama refers 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.¹² 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 sentence. Several people complained that they felt inadequately prepared for release when they became eligible to be considered for parole.
- 5.16 These issues are relevant to the key underlying objective of achieving community safety. The Chief Ombudsman has commented that Ara Poutama adopts a view of public safety that is too narrow and often focused exclusively on containment for community and/or staff safety. The Chief Ombudsman suggested adopting a different understanding of public safety:¹³
- 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.
- 5.17 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”.¹⁴ Against that legislative background, the courts have accepted that Ara Poutama may prioritise people on preventive detention for treatment only when their parole eligibility approaches.¹⁵ The courts have also accepted arguments from Ara Poutama that no programmes have been available relevant to the prisoners’ needs¹⁶ or that prisoners have been considered unsuitable for certain programmes, for example, because of their learning difficulties.¹⁷
- 5.18 Jurisprudence under the ICCPR holds that the “preventive” period of detention must be “aimed at the detainee’s rehabilitation and reintegration into society”.¹⁸ The state has a

¹² 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].

¹³ Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [326].

¹⁴ Corrections Act 2004, s 52.

¹⁵ See for example *Smith v Attorney-General* [2020] NZHC 1848 at [26] and [122].

¹⁶ *Miller v New Zealand Parole Board* [2010] NZCA 600 at [156]–[157].

¹⁷ *Miller v Attorney-General* [2022] NZHC 1832 at [131]–[137].

¹⁸ United Nations 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].

duty to provide the necessary assistance to “allow detainees to be released as soon as possible without being a danger to the community”.¹⁹ Otherwise, the detention will be considered arbitrary for the purposes of article 9 of the ICCPR.

- 5.19 Despite those general propositions, 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.²⁰ 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.²¹ 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.²² Similarly, in *Isherwood v New Zealand*, the UNHRC noted the several opportunities for Mr Isherwood to attend programmes after becoming eligible for parole.²³ The UNHRC also recognised the treatment and assistance he had received — being employed in the prison, receiving pastoral care and psychological assistance and completing two rehabilitation programmes.

A greater focus on rehabilitation would make preventive measures less rights-intrusive

- 5.20 Te Kōti Mana Nui | Supreme Court has held in *Attorney-General v Chisnall* that the aspects of the extended supervision order (ESO) regime that authorise detention and the entire public protection order (PPO) regime are inconsistent with human rights standards because, among other things, they fail to provide for adequate rehabilitation and therapeutic support, among other reasons.²⁴
- 5.21 The Court examined whether the limits the regimes place on the right to protection against second punishment were justified in a free and democratic society for the purposes of section 5 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). As part of this inquiry, the Court considered whether a regime could be designed in a less rights-intrusive way that would still address the risk high-risk offenders pose to the public.
- 5.22 The Supreme Court held a less rights-intrusive approach would focus on rehabilitation and have a therapeutic underpinning.²⁵ This would require the “mandatory provision of rehabilitation” designed to meet the needs of the people subject to preventive measures.²⁶ The Court reasoned that the rehabilitative focus was “critical because rehabilitation enables the individual to address the causes of the offending, thereby

¹⁹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2].

²⁰ *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC); and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

²¹ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2].

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

²³ *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.2]. See also *Dean v New Zealand* CCPR/C/95/D/1512/2006 (17 March 2009) at [7.5] in which the detained person had refused to participate in rehabilitative treatment.

²⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [235]–[237] and [242]–[243].

²⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [234]. Te Kōti Mana Nui | Supreme Court relied on the approach taken in Germany discussed in the case *Ilseher v Germany* [2018] ECHR 991 (Grand Chamber) at [49], [195] and [227].

²⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

minimising the extent and length of any restraint”.²⁷ It added that a rehabilitative focus would also distinguish the regimes “more clearly” from punishment.²⁸

5.23 The Supreme Court found that rehabilitation and a therapeutic approach does not “lie at the core” of the ESO and PPO regimes.²⁹ The Court listed the following reasons:

(a) There is no statutory obligation on the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) to provide rehabilitative or therapeutic support to those subject to an ESO.³⁰

(b) Although there is a statutory obligation on the chief executive to provide rehabilitation to those subject to PPOs, the obligation is qualified because they are only required to do so where there is “a reasonable prospect of reducing the risk to public safety” posed by the person subject to the PPO.³¹ The Court explained that this qualification is based on the likely benefit to the community rather than the person subject to the PPO, suggesting “an overly narrow view of what amounts to rehabilitation”.³²

(c) Rehabilitation is not one of the express purposes of the legislation governing ESOs or PPOs.³³

5.24 The Court concluded that there were “other plausible options” with a stronger focus on rehabilitation that would likely be less rights-intrusive than the PPO regime and the detention-authorising aspects of the ESO regime.³⁴ As a result, it found that the PPO regime and the detention-authorising aspects of the ESO regime were inconsistent with the NZ Bill of Rights.

5.25 The Supreme Court’s judgment in *Attorney-General v Chisnall* reinforces the views we expressed in the Issues Paper. We explained that a question for reform 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.³⁵

5.26 We said 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.³⁶ 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

²⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [236].

²⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [236].

²⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [242]–[243].

³⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

³¹ Public Safety (Public Protection Orders) Act 2014, s 36.

³² *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

³³ *Attorney-General v Chisnall* [2024] NZSC 178 at [243].

³⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [235] and [244].

³⁵ Issues Paper at [3.61]–[3.62].

³⁶ Issues Paper at [3.71]–[3.73].

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 needs and people with complex behavioural conditions

- 5.27 In the Issues Paper, we noted that preventive detention, ESOs and PPOs are often imposed on people who:³⁷
- (a) present with both diagnosed and undiagnosed brain, behavioural or mental health needs; and
 - (b) themselves have been a victim of adverse experiences, particularly sexual abuse and other types of violence.
- 5.28 We suggested this adds weight to the argument that the preventive regimes should be predominantly therapeutic and rehabilitative.
- 5.29 Our 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.³⁸ A 2016 study found that 91 per cent of prisoners had a lifetime diagnosis of a mental health or substance use disorder.³⁹ It also found that 62 per cent of prisoners had a diagnosis of mental disorder in the past 12 months.⁴⁰
- 5.30 In his report *Kia Whaitake | Making a Difference*, the Chief Ombudsman noted statistics from Ara Poutama that:⁴¹
- (a) 41 per cent of men in prison have both (comorbid) mental health and substance addiction issues;
 - (b) 61 per cent of men in prison 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; and
 - (d) 40 per cent of men in prison have a lifetime diagnosis of post-traumatic stress disorder.
- 5.31 The reports from the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions have also documented the strong links between people who experienced abuse and who are later imprisoned. The Commission commented on how experiences in care caused survivors to learn behaviours of abuse

³⁷ Issues Paper at [3.63]–[3.69].

³⁸ 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.

³⁹ 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.

⁴⁰ 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.

⁴¹ Peter Boshier *Kia Whaitake | Making a Difference* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, June 2023) at [162].

and violence.⁴² The Commission’s *Care to Custody: Incarceration Rates* report states that one in five, and sometimes as many as one in three, individuals placed in social welfare residential care between 1950 and 1999 went on to serve a criminal custodial sentence later in life.⁴³

- 5.32 We do not have the ability in this review to comprehensively assess the prevalence of these factors among people 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 needs 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.⁴⁴ This is not surprising given that at least some of these conditions may affect a person’s ability to regulate their behaviour and appreciate the consequences of their actions.⁴⁵
- 5.33 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:⁴⁶
- (a) over 77 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).
- 5.34 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 a preventive measure is sought has been a victim of adverse experiences, particularly sexual abuse and other types of violence.⁴⁷ 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.

⁴² Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Whanaketia Part 5: Impacts* (25 June 2024) at 40–42.

⁴³ Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Care to custody: Incarceration Rates* (August 2022) at 1 and 8.

⁴⁴ Issues Paper at [3.64].

⁴⁵ 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).

⁴⁶ Marianne Bevan “New Zealand prisoners’ prior exposure to trauma” (2017) 5(1) *Practice: The New Zealand Corrections Journal* 8 at 11 and 16–17.

⁴⁷ Issues Paper at [3.69].

Again, these considerations reinforce the preliminary view we expressed in the Issues Paper that rehabilitation and therapeutic support should be a central focus of the preventive regimes.

A culture of monitoring and compliance

- 5.35 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. The issue is evident in several ways.
- 5.36 First, a particular complaint we have heard 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. A review by the Solicitor-General of the prosecutorial functions of Ara Poutama reinforces these concerns.⁴⁸ Probation officers commonly justify a decision to charge someone for breaching conditions by referring to “the need to hold the offender to account” without considering why a criminal charge best reflects the public interest in the particular case.⁴⁹ They often give inadequate consideration to warnings for breaches of conditions, and prosecution is the preferred response for many probation officers.⁵⁰ We discuss this issue further in Chapter 17.
- 5.37 Second, another recurring complaint we heard is the failure of probation services always to build positive relationships with people subject to ESOs or on parole from preventive detention. People 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 are essential for successful rehabilitation.⁵¹ 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

⁴⁸ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at 6–7, 54 and 80–82.

⁴⁹ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [13] and [150].

⁵⁰ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [8]–[11].

⁵¹ Jennifer L Skeem and Devon L L Polaschek “High Risk, Not Hopeless: Correctional Interventions for People at Risk for Violence” (2020) 103(3) *Marquette Law Review* 1129 at 1135 and 1145. See also 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 non-blaming 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.

same material. One interviewee said he had had 18 different probation officers since his ESO began in 2019.

- 5.38 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.⁵² 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.⁵³

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

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

RESULTS OF CONSULTATION

- 5.40 In the Preferred Approach Paper, we proposed several reforms to reorient the law to facilitate a more humane and rehabilitative approach towards people subject to preventive measures.
- 5.41 We proposed that the new Act should contain a purpose clause. Those purposes should include that the central objective of the new Act should be to 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.⁵⁴
- 5.42 Most submitters who addressed this proposal agreed with the proposed purposes we set out for the new Act.⁵⁵ Te Kāhui Ture o Aotearoa | New Zealand Law Society agreed that the new Act should articulate the purposes and principles underlying preventive

⁵² 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].

⁵³ 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.

⁵⁴ Preferred Approach Paper, P7.

⁵⁵ Bond Trust, Myra Crawford-Smith, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

measures. It said that those purposes and principles should be differentiated from those of the Sentencing Act 2002. Some submitters said it is important for the legislation to recognise that not all serious sexual and violent reoffending can be prevented⁵⁶ and that not all people subject to preventive measures are capable of rehabilitation.⁵⁷

RECOMMENDATIONS

- 5.43 We conclude that the law should be reoriented to facilitate a more humane and rehabilitative approach towards people subject to preventive measures. This was strongly supported by submitters. Since publication of the Preferred Approach Paper, the Supreme Court's decision in *Attorney-General v Chisnall* has reinforced our preliminary view that a regime that does not centre on rehabilitation will not be consistent with human rights protections.
- 5.44 We make several recommendations below to effect this reorientation. Those recommendations are supported by the recommendations we make in Chapter 4 that there should be a new Act to govern preventive measures. The creation of the new Act will provide an opportunity to reset the law governing preventive 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.
- 5.45 We also recommend in Chapter 4 that preventive detention as a sentence should be abolished. The issues canvassed in this chapter reinforce the case to abolish preventive detention as a sentence. 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. As discussed, international human rights jurisprudence and the Supreme Court's judgment in *Attorney-General v Chisnall* provides that people detained solely for preventive reasons should be managed in different conditions to prison, otherwise the detention is inconsistent with human rights standards. Consequently, 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.

The purposes of the new Act

R7

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.

⁵⁶ Bond Trust, The Law Association of New Zealand.

⁵⁷ Criminal lawyers from Te Tari Ture o te Karauna | Crown Law.

5.46 We recommend that the new Act include a purpose section that expresses the reorientation the legislation is intended to achieve. 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.⁵⁸ They can also prevent interpreters from looking to other places to make their own policy and purposes.⁵⁹ The Legislation Design and Advisory Committee has commented that:⁶⁰

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.

5.47 The first purpose that we recommend 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.

5.48 The second purpose 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 rehabilitation and reintegration to life in the community. We consider the terminology of “restoration” in the recommended purpose provision best describes 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.

5.49 A more restorative approach will 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 Report, 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. The provision of treatment and support to

⁵⁸ 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>.

⁵⁹ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 311–312.

⁶⁰ 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>.

people who are detained or restricted beyond a punitive prison sentence is critical to avoiding the arbitrary detention of those individuals or an unjustified interference with their right to protection against second punishment. Other rights are also likely to be engaged.⁶¹

- (c) **Supporting needs.** The prevalence of disability, mental health needs and complex behavioural conditions among those subject to preventive measures reinforces the importance of supporting the needs of these individuals.

- 5.50 We recognise, as put by some submitters, that full restoration may be a long-term or perhaps unrealistic goal for some individuals. In our view, however, that does not detract from its importance as a central objective and aspiration of the Act. The Supreme Court, too, countered this objection in *Attorney-General v Chisnall*. It said that doubts that some people will not benefit from rehabilitation “should not remove the obligation to work with them”. The Court reasoned that “assessments are not infallible and do change over time” for some people.⁶²
- 5.51 The Supreme Court also recognised that “rehabilitation ... may not be possible where, for example, a person has an untreatable personality disorder”. However, the Court said, “it may be possible to educate and support them to avoid situations in which reoffending could occur”. That may have the benefit of increasing the amount of liberty they may have while subject to a preventive measure.⁶³
- 5.52 Lastly, we recommend that the purposes of the new Act communicate that the regime is to ensure that restrictions on a person are limited to 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 that it should be an overarching purpose of the entire statutory regime.

Recommendations elsewhere in this Report to provide a more humane and rehabilitative focus to preventive measures

- 5.53 Several other recommendations across this Report 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.
- 5.54 The preventive measures we recommend should operate under reformed law 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 later chapters. 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 needs or behavioural conditions.

⁶¹ We identify other rights that are likely to be engaged by preventive measures in Chapter 3.

⁶² *Attorney-General v Chisnall* [2024] NZSC 178 at [237].

⁶³ *Attorney-General v Chisnall* [2024] NZSC 178 at [237].

- 5.55 In Chapter 6, we recommend that the court should consider placing the person subject to a preventive measure within the care of a Māori group or a member of a Māori group. This recommendation recognises that facilitating a person's rehabilitation may be achieved most successfully in an environment that prioritises important aspects of tikanga, supports relationships with whānau and builds the person's mana and respect for their tapu.
- 5.56 In Chapter 13, we recommend a series of reforms to ensure that people who are subject to preventive measures are offered rehabilitative treatment and reintegration support. Entitlements to treatment and support should be greater than those under the current law. We also recommend in Chapters 15 and 16 that people subject to residential preventive supervision or secure preventive detention be entitled to participate in therapeutic, recreational, cultural and religious activities, regardless of the rehabilitative and reintegrative effect these activities may have for the person.
- 5.57 One of our recommendations 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. The plan should map 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).
- 5.58 We also recommend 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 purposes, the principles provision will guide those exercising powers over people subject to preventive measures. The principles are generally aimed at recognising that people subject to preventive measures should have as much autonomy and quality of life as possible and their rights should only be 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

Background

- 5.59 As discussed above, there are people subject to preventive measures who are disabled or who have mental health needs or other complex behavioural conditions. Our other recommendations to reorient the law towards 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.
- 5.60 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 needs or intellectual disabilities. For clarity, our discussion and recommendations below use terminology from the current law, although we recognise that this terminology may be outdated.

- 5.61 The Mental Health (Compulsory Assessment and Treatment) Act 1992 provides for compulsory treatment for people assessed as being “mentally disordered”.⁶⁴ If assessed as being mentally disordered, the person may be made subject to a compulsory treatment order.
- 5.62 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 in hospital rather than prison to receive treatment.
- 5.63 The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 provides for the compulsory treatment and rehabilitation in respect of a person with an “intellectual disability”.⁶⁵ If assessed as having an intellectual disability, the person may be made subject to a compulsory care order.
- 5.64 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.⁶⁶ If a court orders that a compulsory care order be imposed over a prisoner, the prisoner must be detained in a secure facility.⁶⁷
- 5.65 These processes within the Mental Health (Compulsory Assessment and Treatment) Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act can provide an avenue 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 Public Safety (Public Protection Orders) Act 2014 (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 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 or section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act.

⁶⁴ 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.

⁶⁵ 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. 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%”.

⁶⁶ 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.

⁶⁷ Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 63.

- 5.66 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 2003.⁶⁸ 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.⁶⁹
- 5.67 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 or 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 one of those Acts.⁷⁰

Results of consultation

- 5.68 We proposed in the Preferred Approach Paper that the law continue these pathways to enable a person subject to a preventive measure to receive care and treatment under the Mental Health (Compulsory Assessment and Treatment) Act or Intellectual Disability (Compulsory Care and Rehabilitation) Act.⁷¹ There were mixed views on the proposal.
- 5.69 Some submitters agreed.⁷² The Royal Australian and New Zealand College of Psychiatrists (RANZCP) explained that individuals with psychiatric illness or intellectual disability must not be subject to punitive responses but instead be supported through high-quality treatment and management that provides evidence-based, ethical pathways to recovery and development.
- 5.70 Some submitters questioned whether these pathways were needed within a preventive regime.⁷³ They explained that a person's fitness to plead because of mental health or intellectual disability issues should have been assessed before sentencing. One submitter did recognise, however, that the pathways might be helpful for people who may not have been properly assessed at sentencing.⁷⁴

⁶⁸ Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 25–26.

⁶⁹ For a discussion on the co-existence of an ESO and compulsory care order, see *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2024] NZSC 47 at [55]–[57].

⁷⁰ 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.

⁷¹ Preferred Approach Paper, P8–P11.

⁷² Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Royal Australian and New Zealand College of Psychiatrists.

⁷³ South Auckland Bar Association, The Law Association of New Zealand.

⁷⁴ The Law Association of New Zealand.

- 5.71 We proposed that, if a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act or a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act is imposed on a person subject to a preventive measure, the preventive measure should be suspended. However, 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. This will continue the current law in respect of ESOs.
- 5.72 Some submitters did not agree with this approach.⁷⁵ They said that it would be inappropriate to subject people to the supervision of probation officers when they need a different type of care. In contrast, the RANZCP submitted that it is essential that probation officers consider the necessity for ongoing conditions. It explained that these matters fall outside the responsibilities of health professionals. Involving probation officers would ensure a coordinated approach to managing individuals' needs and addressing any risk factors that might arise. Other submitters agreed with the proposal but expressed concern at probation officers exercising discretion as to whether to activate conditions.⁷⁶ These submitters suggested instead that only a court should have power to reactivate conditions.

Recommendations

R8

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.

R9

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.

⁷⁵ Bond Trust, New Zealand Council for Civil Liberties, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁷⁶ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

R10

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 regarded as being detained in a prison under an order of committal.

R11

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. The Review Authority (see R131–R141) should annually review any reactivated conditions.

- 5.73 We recommend 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.
- 5.74 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.⁷⁷ These provisions apply to people detained in prison pursuant to an order of committal. To adapt these processes to preventive measures, it is necessary to deem those subject to a preventive measure or against whom a preventive measure is sought, to be in prison (without, of course, requiring their actual imprisonment).
- 5.75 In addition, we recommend that the chief executive should have power to make applications on their own initiative rather than only in response to the court's direction.
- 5.76 These recommendations 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. Although, as some submitters identified, a person's suitability for treatment within these regimes will usually have been considered before conviction and sentencing, there remains the possibility that there are people within the criminal justice system who ought to be considered through these pathways rather than made subject to a preventive regime.

⁷⁷ We also recommend that if, after consideration, the chief executive of Ara Poutama Aotearoa | Department of Corrections 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 Kōti Pīra | Court of Appeal's comments in *Pori v Chief Executive of the Department of Corrections* [2023] NZCA 407 at [33].

- 5.77 Implicit in our recommendation is our conclusion that the preventive regimes should not be fundamentally revised to apply only to those with recognised mental health conditions or intellectual disability. The Supreme Court in *Attorney-General v Chisnall* recently considered that suggestion but concluded such an approach was not a viable alternative to the current preventive regimes.⁷⁸ It reasoned that basing a preventive measure on the existence of mental health conditions or intellectual disabilities would entail a reworking of the mental health and disability legislative regimes, greatly expanding them, and seemingly without clinical justification. It also reasoned that “not all offending is attributable to mental illness or intellectual disability, and nor is a propensity to offend always diagnostic of mental illness or intellectual disability”.⁷⁹
- 5.78 We recognise that the regimes under the Mental Health (Compulsory Assessment and Treatment) Act and Intellectual Disability (Compulsory Care and Rehabilitation) Act have their own issues. At the time of this Report, a Bill to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act is before Parliament.⁸⁰ There have also been calls for wider reviews and reforms of the way the justice system relates to disabilities.⁸¹ In light of these developments, our recommendations 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.
- 5.79 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 recommend that the preventive measure should be suspended. This reflects the current position in respect of ESOs and PPOs.⁸² We also recommend 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.⁸³ 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.⁸⁴

⁷⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [224].

⁷⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [224].

⁸⁰ Mental Health Bill 2024 (871).

⁸¹ *Making Disability Rights Real: Whakatūuru Ngā Tika Hauātanga 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.

⁸² Parole Act 2002, s 107P(3); and Public Safety (Public Protection Orders) Act 2014, s 139.

⁸³ See Parole Act 2002, s 107P(3)(a).

⁸⁴ See *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [37]–[38]. 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 of Ara Poutama Aotearoa | Department of Corrections 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].

5.80 Some submitters thought decisions to reactivate conditions should be made by the court rather than probation officers. We acknowledge the concern that probation officers may not have the relevant experience to impose and manage conditions for people requiring care and treatment for reasons of mental health or intellectual disability. We do not, however, recommend court involvement. Te Kōti Whānau | Family Court has jurisdiction for making compulsory care orders and compulsory treatment orders. The Family Court is not well placed to decide which conditions of a preventive measure are appropriate to reactivate because it is not familiar with that area of law. Alternatively, the court that imposed the preventive measure could consider whether to reactivate conditions. However, that approach would be a considerable use of court resources for a relatively minor decision. We think the better approach is to leave the matter in the hands of probation officers. This will continue the current law pending any wider reforms. To provide additional oversight, however, we recommend that any conditions that have been reactivated should be subject to Review Authority reviews every year. If the Review Authority considers that conditions have been reactivated or supervised inappropriately, it should have jurisdiction to vary or suspend the condition. We discuss the Review Authority's role and powers further in Chapter 18.

CHAPTER 6

Te ao Māori and the preventive regimes

INTRODUCTION

- 6.1 In this chapter, we consider issues with the current law relating to tikanga Māori and te Tiriti o Waitangi | Treaty of Waitangi (the Treaty). We conclude 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 the Treaty.
- 6.2 In response to both these issues, we recommend that the new Act should require the court to consider whether a person subject to a preventive measure should be placed into the care of a Māori group such as their hapū or iwi.

BACKGROUND

Tikanga

- 6.3 Tikanga means the right way of doing things.¹ It includes a system of values and principles that govern relationships in te ao Māori (the Māori world). It is a source of rights, obligations and authority. Tikanga is lived and practised by iwi, hapū, whānau and other Māori communities.²
- 6.4 In recent reports, Te Aka Matua o te Ture | Law Commission has explained the constitutional significance of tikanga and its relevance to law reform in terms of:³
- (a) its status as the first law of Aotearoa;

¹ It derives from the word tika, which means right or correct: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 29.

² See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.8].

³ 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].

- (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.
- 6.5 The Law Commission Act 1985 directs the Commission, when making its recommendations, to have regard to te ao Māori (which includes tikanga).⁴ The kind of recommendations the Commission makes in respect of tikanga can differ substantially depending on the scope and nature of a particular review.⁵ In this review, the Commission is proposing a new statutory regime to manage reoffending risks posed by some people. For this purpose, we have considered the extent to which the new Act should recognise or support the operation of tikanga within te ao Māori.

Tikanga relating to community safety and offending

- 6.6 To explore the relevant tikanga, we commissioned a working paper and hosted two wānanga with tikanga experts, the first in October 2022 and the second in January 2024. We invited feedback on our explanation of tikanga in the Issues Paper, which members of Te Hunga Rōia Māori o Aotearoa | Māori Law Society thought was broadly helpful. It is nevertheless 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 different to the Western worldview. Tikanga concepts cannot be explained readily in English. Our focus in this review is on preventive measures and our discussion of tikanga is limited to this context.
- 6.7 Definitions of unacceptable behaviour according to tikanga are naturally drawn from the values and principles that underpin tikanga. 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.⁶
- 6.8 We begin with whakapapa. Moana Jackson has said that tikanga is a “reiteration of the values and significance of whakapapa”.⁷ 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

⁴ Law Commission Act 1985, s 5(2)(a). In addition, the Legislation Design and Advisory Committee Guidelines for good legislation advise those designing legislation to consider tikanga and to ensure new legislation is, as far as practicable, consistent with tikanga. See Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 19 and 29–30.

⁵ See 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 [2.127] where the Commission recommended weaving together tikanga Māori with other values to make new law for all New Zealanders.

⁶ 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].

⁷ 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].

- roles, shared responsibilities and obligations.⁸ Whanaungatanga, or familial obligations, strengthens these connections.⁹
- 6.9 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.¹⁰ Tapu is closely associated with mana, which is a broad concept representing a person’s authority and associated responsibilities, reputation and influence.¹¹ A person can enhance, maintain or diminish their mana through their actions — particularly in relation to the collective.¹²
- 6.10 Whanaungatanga denotes that the individual is secondary to the collective.¹³ Tikanga requires people to act in ways that strengthen and maintain relationships with others and with te taiao.¹⁴ Maintaining balance between all these aspects is one of the key ideals in tikanga Māori.¹⁵ This may be achieved by utu — sometimes referred to as “the principle of reciprocity” encompassing what needs to happen to achieve the state of ea (satisfaction).¹⁶ Relevantly, it has been suggested that public safety is achieved “when the functioning of communities and whānau reflects a collective sense of wellbeing”.¹⁷
- 6.11 Hara¹⁸ is an offence “primarily resulting from the violation of tapu” or any action that disrupts relational stability.¹⁹ The definitions of hara have arisen from a framework of social relationships based on group rather than individual concerns, meaning the impact of offending is experienced by the victim and the victim’s wider whakapapa.²⁰

⁸ Tāmami 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).

⁹ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 337.

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

¹¹ 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.

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

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

¹⁴ 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.

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

¹⁶ 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.

¹⁷ Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 12. See also Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 28.

¹⁸ Also denoted by the word hē.

¹⁹ 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].

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

- 6.12 Committing a hara also negatively affects the mana of the person who committed the hara as well as their associated whakapapa groups.²¹ Offending may disrupt an offender's tapu or diminish their mana to such an extent that they enter a state of rōrā (powerlessness), also referred to as being mana kore — having no mana and effectively living without purpose.²²
- 6.13 Referring to past practices, Jackson has explained that 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 whānau”.²³ 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.²⁴
- 6.14 Resolving the causes of a dispute or reasons for committing a hara was the preserve of rangatira (chiefs), supported by their whānau or hapū.²⁵ Responses were grounded in the need to restore the relationship damaged by the wrong and achieve a state of ea — denoting that the required response had been completed and a resolution reached.²⁶ In these respects, responsibility for the offending was a collective concern:²⁷
- An offender could not be isolated as solely responsible for wrongdoing; a victim could never be isolated as bearing alone the pain of an offence. There was a collective, rather than an individuated criminal responsibility, a sense of indirect as well as direct liability.
- 6.15 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.²⁸
- 6.16 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”.²⁹ For example, pana was not necessarily permanent and could, in some cases, end when the banished person

²¹ 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.

²² 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). For examples, see Issues Paper at [2.13]–[2.14].

²³ 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.

²⁴ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 13.

²⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of Te Paparahi o Te Raki Inquiry — Part 1, Volume 1* (Wai 1040, 2023) at 272.

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

²⁷ Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 28.

²⁸ 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.

²⁹ Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 2.

was prepared to make amends.³⁰ 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”.³¹ The notion of imprisonment and removing a person entirely from their community was “simply unknown — in a very real sense it would have been culturally incomprehensible”.³²

- 6.17 Returning to the present, we have been told that the obligations and responsibilities of whakapapa are reciprocal.³³ Therefore, where a person’s relationship with their community has been broken through offending, the community is not solely responsible for resolution as 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.³⁴

Te Tiriti o Waitangi | Treaty of Waitangi

- 6.18 The Treaty is recognised as a foundation of government in Aotearoa New Zealand³⁵ and of “constitutional significance” to the modern New Zealand state.³⁶ 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:³⁷

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.

- 6.19 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.³⁸

³⁰ 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].

³¹ 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].

³² 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].

³³ *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).

³⁴ Tāmami 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).

³⁵ 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.

³⁶ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

³⁷ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [7].

³⁸ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 28–32.

6.20 The Commission has examined the significance of the Treaty to the development of the law in Aotearoa New Zealand in several recent reports.³⁹ 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

6.21 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 grant the Crown kāwanatanga. The English text provides that the chiefs 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.⁴⁰
- (c) Article 3 of the Māori text provides that the Crown agrees to protect Māori and give Māori the same rights and duties of citizenship as the people of England.⁴¹ A similar undertaking is conveyed in article 3 of the English text, in which the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.⁴²

6.22 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.⁴³ It reached this view based on these circumstances of signing, debate and discussion and because such precedence is consistent with the *contra proferentem* 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.⁴⁴

³⁹ 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 [2.6]–[2.28]; Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death* (NZLC R145, 2021) at [2.54]–[2.67]; and Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at [3.8]–[3.24].

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

⁴¹ I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

⁴² 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.

⁴³ See for example Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims* (Wai 215, 2010) at 148; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Report 1991* (Wai 27, 1991) at 223.

⁴⁴ 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].

Te kāwanatanga me te tino rangatiratanga

- 6.23 Kāwanatanga, referenced in article 1 of the Māori text, has been translated as government or governorship.⁴⁵ The Tribunal has said that governance “includes the power to make laws for peace and order.”⁴⁶ It has explained that, at the time the Treaty was signed, both Māori and Pākehā were concerned with the lawlessness of whalers and traders and of the fights that followed, the effects of inter-tribal musket warfare and the prospect of further settlement or invasion by foreign powers.⁴⁷ That is why the Treaty opens by talking of the need for “Peace and Good Order” and the “evil consequences which must result from the absence of necessary Laws and Institutions”. The Tribunal has therefore concluded that Māori would have understood the Treaty as “a promise of internal peace and security through the authority of the Queen.”⁴⁸ In its *Te Paparahi o Te Raki* report, the Tribunal also suggested that, in 1840, rangatira would have expected kāwanatanga to be exercised in relation to non-Māori only.⁴⁹
- 6.24 Kāwanatanga is relevant to this review because keeping communities safe from serious offending is part of the Crown’s promises to ensure internal peace and security. In our view, these promises include making laws to protect the community from people who pose risks of serious reoffending. 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.⁵⁰
- 6.25 Tino rangatiratanga, referenced in article 2 of the Māori text, has been translated to mean the unqualified exercise of chieftainship.⁵¹ The Tribunal has said that the guarantee of tino rangatiratanga requires the Crown to allow Māori to manage their own affairs in a way that aligns with their customs and values.⁵²

⁴⁵ 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.

⁴⁶ 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

⁴⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 66.

⁴⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 66.

⁴⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 419.

⁵⁰ 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.

⁵¹ I H 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.

⁵² 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.

6.26 Rangatiratanga embodies the authority and responsibilities of a rangatira to maintain the welfare and defend the interests of their people.⁵³ It can also involve the authority and responsibilities of the people themselves, including iwi, hapū, whānau and non-tribal groups.⁵⁴ Traditionally, the authority and responsibilities of rangatiratanga have included managing antisocial behaviour. According to Jackson:⁵⁵

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.

6.27 Tino rangatiratanga is relevant to this review because of the rangatira and collective decision-making responsibilities arising from the need to address the risks of serious 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.

6.28 In these respects, kāwanatanga and tino rangatiratanga both have roles to play in the criminal justice context. In relation to the interplay between them, the Tribunal has commented that:⁵⁶

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

6.29 Treaty principles can assist in understanding the modern and specific application of the Treaty. Although 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 be negated or reduced”.⁵⁷ Rather, the principles “enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.⁵⁸

6.30 We have analysed the Tribunal's significant work over the years in relation to Māori and criminal justice, including its application of the principles of partnership, active protection,

⁵³ 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.

⁵⁴ 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.

⁵⁵ 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 42.

⁵⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26.

⁵⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

⁵⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386. In this Final Report, 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.

equity and options in relation to the design and operation of the criminal justice system. We consider these principles are relevant to this review as follows:⁵⁹

- (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.⁶⁰ The Tribunal stressed the importance of Māori “being at the table” to design and implement strategies, programmes and initiatives for addressing these issues.⁶¹ 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.⁶²
- (b) The principle of active protection encompasses an obligation on the Crown to actively protect Māori people, resources and cultural practices.⁶³ 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.⁶⁴ 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.⁶⁵
- (d) The principle of options is concerned with the choices open to Māori.⁶⁶ The Treaty envisages the protection of tribal authority, culture and customs and confers the same rights and privileges as British subjects on individual Māori. Māori are free to

⁵⁹ See Issues Paper at [2.36]–[2.56].

⁶⁰ 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.

⁶¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 62.

⁶² *Ināia Tonu Nei Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 16.

⁶³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005) at 12.

⁶⁴ 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. 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: Te Aka Matua o te Ture | Law Commission *The Treaty of Waitangi and Maori Fisheries: Mataitai Nga Tikanga Maori me te Tiriti o Waitangi* (NZLC PP9, 1989) at 89–90.

⁶⁵ 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); and Tāhū o te Ture | Ministry of Justice *NZCVS key stories 2023 (Cycle 6)* (June 2024) at 30–33. The 2023 survey found that, despite decreases in the proportion of Māori adults experiencing crime, in 2023, Māori adults were still “significantly more likely than the New Zealand average to experience a higher number of incidents, more interpersonal violence and be highly victimised” (at 32–33).

⁶⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

pursue either or both of these.⁶⁷ 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 possible⁶⁸ and are properly resourced.⁶⁹

- 6.31 Consistent with these principles, Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group has concluded 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”.⁷⁰

ISSUES

The law does not enable Māori to live in accordance with tikanga

- 6.32 As set out above, tikanga offers several important values and principles for how unacceptable behaviours and community safety are managed within te ao Māori. The current law, however, fails to recognise or support the operation of this tikanga. We consider this problematic, because it means Māori are unable to live — and in this context, receive care and support for their rehabilitation — in accordance with their values. In particular, there is no statutory expectation or guidance about when a person should be considered for placement with their own whakapapa (or how that placement could occur) in order to be managed and cared for according to relevant tikanga.
- 6.33 For some years, Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) has been working to reorient the corrections system by prioritising and embedding kaupapa Māori approaches in its practices.⁷¹ Although these efforts may improve Ara Poutama practices, we do not consider they can enable Māori to truly live in accordance with tikanga.
- 6.34 First, preventive regimes under the current law and tikanga are irreconcilable. Indeterminate prison sentences, detention in the PPO residence or the potentially severe restrictions of an ESO isolate people from their communities and inhibit meaningful relationships with iwi, hapū and whānau. The restrictions preclude the fundamental expectations of whakapapa and whanaungatanga from being fulfilled. They may also be

⁶⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁶⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata 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.

⁶⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 46.

⁷⁰ 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.

⁷¹ *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (19 August 2019).

seen as a perpetuation of punishment⁷² and continue to negatively impact a person's mana, tapu and mauri.

- 6.35 At the same time, 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. They suggested, however, that this type of separation should have a rehabilitative focus and be a last resort.⁷³
- 6.36 Second, enabling Māori to live in accordance with tikanga and the exercise of tino rangatiratanga are 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. The reconnection cannot be achieved by embedding kaupapa Māori approaches within Ara Poutama practices.
- 6.37 In the Issues Paper, we asked whether the law relating to preventive detention, ESOs and PPOs is failing to enable Māori to live in accordance with tikanga.⁷⁴ All submitters who responded to the question either agreed with our preliminary view that the law does not enable Māori to do this or highlighted further problems with the law regarding its incompatibility with tikanga.⁷⁵ Members of Te Hunga Rōia described the conclusion that the current preventive regimes are inconsistent with tikanga as “inevitable”.⁷⁶

The law does not give effect to obligations under the Treaty

- 6.38 We also consider that the current law does not give effect to the Crown's obligations to Māori under the Treaty. In *Tū Mai te Rangī*, the Tribunal concluded that tino rangatiratanga demands Māori be substantially involved in maintaining the safety of Māori communities through the successful rehabilitation and reintegration of offenders.⁷⁷ 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.
- 6.39 In addition, the overrepresentation of Māori subject to preventive detention and ESOs engages the principle of equity.⁷⁸ 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 2024, 47 per cent of those sentenced to preventive detention identified as Māori and 43 per cent of those subject to ESOs identified as Māori.⁷⁹ This is significantly higher than Māori

⁷² 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].

⁷³ Ināia Tonu Nei *Hui Māori Report* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, July 2019) at 22.

⁷⁴ Issues Paper, Question 3.

⁷⁵ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [6.47]–[6.49].

⁷⁶ Preferred Approach Paper at [6.47].

⁷⁷ 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.

⁷⁸ There have been too few people subject to PPOs for statistical analysis.

⁷⁹ 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 from year ending June 2024 (11 October 2024).

population rates. According to the 2023 census, Māori make up 19.6 per cent of Aotearoa New Zealand's population.⁸⁰

- 6.40 The prison environment negatively affects physical and mental health generally.⁸¹ The isolation, overcrowding, victimisation and poor physical environment of prisons likely contributes to the deterioration in the mental health of prisoners.⁸² Prisons have been described as “toxic environments” in which antisocial behaviour is often reinforced by criminally minded peers.⁸³ We discuss the detrimental effects of the prison environment further in Chapter 5.
- 6.41 The disproportionate rate of Māori subject to preventive detention means that these effects 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”.⁸⁴
- 6.42 Most submitters to the Issues Paper agreed the law fails to give meaningful effect to the Crown's Treaty obligations.⁸⁵ The Chief Ombudsman referred to recent United Nations Optional Protocol to the Convention Against Torture (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, although 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.

RESULTS OF CONSULTATION

- 6.43 In the Issues Paper, we suggested that the law should make greater provision for Māori-led and Māori-designed initiatives for managing people at risk of serious reoffending.⁸⁶ In the Preferred Approach Paper, however, we departed from the concept of “Māori-designed and Māori-led initiatives” for two reasons.
- 6.44 The first is that, on reflection, it does not sufficiently signal the intended potential for devolution and may instead perpetuate the current model of government-instigated

⁸⁰ The census provides counts of Māori in two ways: Māori descent and Māori ethnicity. Māori descent is based on whakapapa while affiliation to the Māori ethnic group is a self-determined cultural affiliation. In the 2023 census, people of Māori descent made up 19.6 of the population, and 17.8 per cent identified as having Māori ethnicity: “2023 Census population counts (by ethnic group, age, and Māori descent) and dwelling counts” (13 September 2024) Stats NZ <www.stats.govt.nz>.

⁸¹ Hunga Kaitirotiro 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.

⁸² Andrew Carroll and others “No Involuntary Treatment of Mental Illness in Australian and New Zealand Prisons” (2020) 32 *Journal of Forensic Psychiatry and Psychology* 1 at 3–4.

⁸³ Jeremy Skipworth “The Australian and New Zealand Prison Crisis: Cultural and Clinical Issues” (2019) 53 *Australian and New Zealand Journal of Psychiatry* 472 at 472.

⁸⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 25.

⁸⁵ Preferred Approach Paper at [6.50].

⁸⁶ Issues Paper at [2.68]–[2.76].

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.

- 6.45 Second, our change in approach follows the wānanga we held in January 2024 at which participants suggested the approach should better recognise and respect Treaty relationships with the Crown, which are not adequately captured by generic references to “Māori” led and designed initiatives.
- 6.46 In the Preferred Approach Paper, we proposed instead that the new Act should require the court to consider whether a preventive measure should be administered by placing the person “within the care of a Māori group”. We listed, as examples of Māori groups, an iwi, hapū, whānau, marae and a group with rangatiratanga responsibilities in relation to the person.⁸⁷
- 6.47 Several submitters addressed the proposal. Most expressed broad agreement with it.⁸⁸ Of the submitters that were supportive of the proposal, only Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) gave detailed reasons. It agreed that the current law fails to give meaningful effect to the Crown’s Treaty obligations and that reform should strive to remedy this. It also observed that research has shown that Māori within the criminal justice system start from a position of disadvantage. Within this context, the NZLS supported the proposed legislative shift towards a more rehabilitative approach, developed in active partnership with Māori, to align preventive measures more closely with Treaty and human rights obligations. It said placement of a person within the care of a Māori group, led by Māori, would go some way to achieving this.
- 6.48 The Law Association of New Zealand welcomed the proposal but said any placement under the care of a Māori group should be voluntary and culturally appropriate.
- 6.49 On the other hand, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service sounded a warning regarding the highly specialised treatment required for many of the people who are subject to preventive measures. It said the court’s priority should be to place the person in the most appropriate facility for their needs. It sought reassurance that Māori groups would not be held to a lower standard than other people and groups responsible for care. It said the groups referred to in the proposal need to be properly equipped to deal with high-risk offenders. It also said that, if the proposal has a place at all, it could only see it working in relation to the measures with lower levels of restrictiveness.
- 6.50 Two submitters conveyed reservations about whether law reform in this area was capable of meeting the Crown’s Treaty obligations. Dr Jordan Anderson commented that tino rangatiratanga should not be a mere consideration of the court given Māori retain rangatiratanga over tāngata whenua. Te Hunga Rōia supported the proposal but expressed doubts that a structural devolution of power would occur to such an extent that hapū might be in a position to act independently to take care of and responsibility for offenders.

⁸⁷ Preferred Approach Paper, P12.

⁸⁸ Bond Trust, Chief Ombudsman, Myra Crawford-Smith, Te Kāhui Tātari Ture | Criminal Cases Review Commission, Te Hunga Rōia Māori o Aotearoa | Māori Law Society, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Royal Australian and New Zealand College of Psychiatrists, South Auckland Bar Association, The Law Association of New Zealand.

RECOMMENDATION

The implications of a focus on rehabilitation and reintegration

- 6.51 Before setting out our primary recommendation to address the issues raised in this chapter, we note that the recommendations we make in other chapters to enhance rehabilitation and reintegration in a new Act may have implications for both tikanga and the Crown's Treaty obligations. As a participant in our January 2024 wānanga suggested to us, reforms to instil a more humane approach with a rehabilitative and reintegrative focus will directly benefit Māori who are subject to preventive measures.
- 6.52 We anticipate this focus will align the law closer with tikanga Māori. This is because (as we explain above) tikanga is concerned with, among other things, working alongside a person who has committed a hara to reawaken their tapu and restore their relationship with their community. As a participant at the wānanga explained, however, it is not difficult for reforms to align with tikanga better than the current law — the bar is low.
- 6.53 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 a commitment to Māori involvement in the design and implementation of preventive measures. The principle of options entails ensuring choices are available to live in te ao Māori. We conclude the Crown's obligations under the Treaty mean the new Act should include specific mechanisms that secure Māori involvement to counter the disproportionate effects of preventive regimes on Māori people. It is also reasonable to conclude that the greater involvement of Māori to deliver rehabilitation in a culturally aligned way is more likely to be effective.⁸⁹
- 6.54 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.⁹⁰ This is the case here — during consultation, we discerned a clear desire among Māori to take greater responsibility for managing people at risk of reoffending.

Administration of preventive measures by iwi, hapū, whānau and other groups

R12

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.

⁸⁹ See generally Armon Tamatea and Tansy Brown "Culture and offender rehabilitation in New Zealand: Implications for programme delivery and development" in K McMaster and D Riley (eds) *Effective Interventions with Offenders — Lessons Learned* (Steele Roberts, Wellington, 2011) 168.

⁹⁰ 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.

- 6.55 We recommend that the best way the law can enable Māori to live according to tikanga and facilitate tino rangatiratanga within the confines of a state-imposed preventive regime is by requiring the court to consider whether to place a person into the care of a Māori group. That group should have primary responsibility for the person subject to the measure. They should be responsible to 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);
or
 - (c) manage secure facilities (for people subject to secure preventive detention).
- 6.56 The text of the recommendation refers to the placement of a person within the care of a Māori group or a member of a Māori group. We consider the new Act should recognise the group’s collective responsibility for the person being cared for as much as possible. As we explain above, reconnecting a person with their whakapapa is central to their rehabilitation and reintegration pursuant to tikanga.
- 6.57 We have drawn on the way the Sentencing Act 2002 and the Parole Act 2002 define “programmes” by listing iwi, hapū, whānau or marae as relevant types of Māori group. Some feedback from consultation raised concern that the whānau level grouping would be too large and vague, and its variable scope may complicate the process of assigning care and ensuring accountability. We agree removing whānau could make placements more straightforward and acknowledge that hapū (in particular) often represent whānau interests. However, we prefer to retain whānau as a relevant group within the recommended provision for two key reasons. First, it avoids the need for groups to establish their type of identity. We are mindful of the Tribunal’s observations in its *Te Whanau o Waipareira* report that it is neither desirable nor possible to “create a checklist of the ingredients for the recognition of a Māori group” for Treaty purposes.⁹¹ Second, the capacity of a given whānau should be able to be assessed on a case-by-case basis. This is consistent with the approach taken in the Sentencing Act and Parole Act, which, as we have noted, include whānau.
- 6.58 We have also included “a group with rangatiratanga responsibilities” in the list of Māori groups on the basis the new Act should 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.⁹² In its *Te Whanau o Waipareira* report, it concluded that Te Whānau 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

⁹¹ Te Rōpū Whakamana i Te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at [3.4].

⁹² 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].

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.⁹³

- 6.59 As we explain in Chapters 13–16, our recommendations envisage that a probation officer or facility manager should discharge certain responsibilities specified in the new law. For example, in Chapter 13, we recommend that a probation officer or facility manager should be responsible for devising and implementing a treatment and supervision plan in respect of each person who is subject to a preventive measure. Where a person is placed into the care of a Māori group, these responsibilities would be imposed on and fulfilled by a person from that group, or a probation officer could be assigned to work with the group.
- 6.60 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 do not therefore see the recommendation as instituting a lower (or higher) standard of care. Instead, it creates opportunities for wider and more effective participation in the provision of care.
- 6.61 We 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 we discuss further in Chapter 12, we consider that wider participation in proceedings by family, whānau and others should also be permitted.
- 6.62 Our recommendation is deliberately flexible to accommodate different ways preventive measures might be delivered, different levels of capability for undertaking this work and different kinds of government resourcing and support that may be necessary to ensure successful delivery and development of capability.
- 6.63 For example, we envisage Māori groups might administer preventive measures pursuant to tikanga. 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 a context that is inherently Māori. The recommendation recognises the role of Māori groups but does not specify whether any particular tikanga should be applied.
- 6.64 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 recommendation recognises that a person may need to be separated from the community due to the level of risk they pose and that the court will necessarily consider the suitability of a proposed placement in terms of managing that person's risk. 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.

⁹³ Te Rōpū Whakamana i Te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at [3.4].

6.65 At the institutional level, different approaches should also be possible depending on the capabilities and preferences of different Māori groups. A risk explained to us during consultation was that reform may be poorly implemented if Māori groups are not resourced and supported to take the lead. Another issue, also raised in submissions, is that some people subject to preventive measures require specialised treatment, and some groups will need time to build their expertise to manage those people and administer the relevant measures. We think the recommendation 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 who 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 determined by each group, provided again they have the capacity to ensure community safety.

The limitations of reform in the state law context of the criminal justice system

6.66 We recognise the recommended provision for Māori involvement will continue to sit within the framework of state law. It will require an order of the court, which must be satisfied that administration of the preventive measure by a Māori group provides adequate protection of the community. Further, the group will require support and resourcing from government. As some submitters made plain, our recommendation will not achieve tino rangatiratanga for the Māori groups involved. However, we think it will go some way by accepting the role of these groups in creating and delivering new pathways forward for offenders.

6.67 We also recognise that legislative reform alone will not achieve the goals of the recommendation. 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 enable Māori groups to take the lead. It will also depend on the desire of Māori groups to take on responsibilities in this area. Some submitters were sceptical about the capacity of Ara Poutama to implement any devolution of operational responsibility for managing reoffending risks. The Chief Ombudsman, for example, commented in relation to Ara Poutama that he has "observed a concerning lack of appropriate cultural provision for Māori, as well as insufficient cultural competence and capability to work in partnership with Māori". We hope Ara Poutama will address these issues and work with Māori groups to design best practices for commissioning their involvement to achieve the goals of the reformed regime.

6.68 We also note the concern of participants at the wānanga in January 2024 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, 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 adequate support and progressed to become offenders themselves. The wider systemic failings in 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.

- 6.69 Given the wider context, some participants at the wānanga were concerned by our proposal to promote Māori involvement in a preventive regime that 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. It seemed to suggest that these failures could, as an afterthought, be remedied by making a post-sentence regime more tikanga and Treaty-compliant.
- 6.70 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 introduce Māori participation and tikanga in post-sentence preventive measures, which are imposed at such a late stage in an otherwise damaging system.
- 6.71 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 recommendations for reform that improve the law governing preventive measures as best they can.
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PART 3:

ELIGIBILITY



CHAPTER 7

Age of eligibility

INTRODUCTION

- 7.1 In this chapter, we consider at what age a person should be eligible for a preventive measure. We recommend that, under the new Act, preventive measures should only be imposed on people aged 18 or over.
- 7.2 We use the term “young adult” to include people aged between 18 and 25.¹ We use the term “young person” to include people aged between 14 and 18 and the term “children” to refer to people under the age of 14.² This reflects current usage of these terms in the criminal and youth justice system in Aotearoa New Zealand.

BACKGROUND

Preventive detention

- 7.3 Under the current law, a person can be sentenced to preventive detention if they were aged 18 or over at the time of committing a qualifying offence.³ This minimum age of eligibility for preventive detention has decreased over time. Between 1954 and 1987, the minimum age was 25. In 1987, it was lowered to 21. It was again lowered to the current age of 18 as part of sentencing reforms in 2002.⁴ The government has previously justified

¹ 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 of 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.

² See Oranga Tamariki Act 1989, s 2 definition of “child” and “young person”.

³ Sentencing Act 2002, s 87(2)(b).

⁴ 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) at [5.4]–[5.6]. As discussed in Chapter 1 of the Issues Paper, these reforms were a response to a 1999 law and order referendum.

lowering the age of eligibility because adults of any age are capable of committing offences that present a risk to the community.⁵

- 7.4 We are not aware of anyone below the age of 20 receiving a sentence of preventive detention. In the period 2012–2024, five people aged 20–24 were sentenced to preventive detention (less than five per cent of all new preventive detention sentences). The majority of preventive detention sentences (90 per cent) were imposed on people aged 30 or over.⁶

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 or older at the time of the application.⁷
- 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.
- 7.7 In practice, these measures have been applied to only a small number of younger individuals. A person is only eligible for an ESO or a PPO if they have been convicted and sentenced to imprisonment for qualifying offending, but the circumstances in which young people can be sentenced to imprisonment are limited.⁸
- 7.8 For the period 2012–2024, two individuals under the age of 20 and 21 people aged 20–24 had an ESO imposed. The majority of ESOs (94 per cent) were imposed when a person was aged 25 or over.⁹ We are aware of two cases in which ESOs have been imposed where the qualifying offending, conviction and sentencing occurred before the person turned 18.¹⁰ All PPOs imposed have been on people aged 25 or over.

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

⁶ 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 from year ending June 2024 (11 October 2024).

⁷ Public Safety (Public Protection Orders) Act 2014, s 7(1).

⁸ Youth justice policy and legislation reflect that children and young people should be excluded from the criminal justice process so far as is consistent with the public interest: see Nessa Lynch *Youth Justice in New Zealand* (online ed, Thomson Reuters) at [2.3]–[2.5]. Few children and young people are sentenced in an adult court and eligible to receive sentences of imprisonment. Between 2019 and 2024, only five per cent of children and young people with finalised charges were convicted and sentenced in an adult court: Tāhū o te Ture | Ministry of Justice *Finalised charges for children and young people in any court* (17 September 2024). In circumstances where those under 18 are dealt with in the adult jurisdiction, the Sentencing Act 2002 provides that a court cannot impose a sentence of imprisonment on a person if they were under 18 years of age at the time of committing the offence unless they were convicted of 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.

⁹ 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 from year ending June 2024 (11 October 2024).

¹⁰ 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 offended while under the age of 18 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.

YOUNG ADULTS AND PREVENTIVE DETENTION

- 7.9 In the Issues Paper, we expressed a preliminary view that preventive detention, as it is currently imposed, is not an appropriate measure for responding to the risks of serious reoffending by young adults who have been convicted of serious sexual or violent offending. Our focus was on preventive detention as the same concerns do not arise in relation to ESOs and PPOs. We highlighted two particular issues:¹¹
- (a) **The difficulties of accurately assessing young adults' long-term risk of reoffending.** Research shows that important functions of the brain relating to judgement and impulsivity continue to develop throughout adolescence well into a person's 20s.¹² Predicting at the time of sentence the risk of reoffending following release is therefore challenging because a young adult's risk profile may change significantly during the sentence.¹³ This has been acknowledged by the courts in determining whether to impose preventive measures on young adults.¹⁴
 - (b) **The harmfulness of indeterminate prison sentences on young adults.** Evidence suggests that indeterminate sentences of imprisonment generally are harmful for those subject to them. While there is limited direct research on the experiences of younger people subject to preventive detention or indeterminate sentences, there is reason to suggest that they may be particularly harmful when imposed on young people and young adults.¹⁵ This harm has been recognised by te Kōti Pira | Court of Appeal.¹⁶
- 7.10 Most submitters to the Issues Paper agreed that imposing an indeterminate sentence such as preventive detention on those aged 25 or under is inappropriate.¹⁷ People we spoke with during consultation who were subject to indeterminate sentences described how young people's experience of indeterminate sentences is particularly severe. They said a better approach would be to provide them with supervision and support as a response to their offending rather than impose an indeterminate sentence. However, other submitters maintained that an indeterminate sentence such as preventive detention

¹¹ Issues Paper at [5.26]–[5.43].

¹² 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.

¹³ 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.

¹⁴ For example, in *Grant v R*, te Kōti Pira | Court of Appeal quashed a sentence of preventive detention that was imposed for offending that the appellant committed when he was aged 18 and 19. 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: *Grant v R* [2017] NZCA 614 at [48]–[49] and [55]–[57]. 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 aged 15. While the mandatory risk factors were met, the High Court noted at [80] the limitations of the risk assessment tools given the respondent's relative youth.

¹⁵ Melanie Merola "Young offenders' experiences of an indeterminate sentence" (2015) 17 *Journal of Forensic Practice* 55.

¹⁶ *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [181]–[190].

¹⁷ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [7.17].

may be appropriate for those under 25 in exceptional cases where there are no other options to manage the risk to community safety.¹⁸

RESULTS OF CONSULTATION

- 7.11 In the Preferred Approach Paper, we proposed repealing preventive detention and imposing all preventive measures as post-sentence orders under a new Act.¹⁹ This meant that, rather than considering the appropriate age to impose preventive detention, our focus shifted to whether the new preventive measures should include a minimum age requirement.
- 7.12 We proposed that the new Act should set a minimum age of eligibility for preventive measures at 18 years.²⁰ This age limit should apply at the time that a measure is imposed rather than at the time an offence is committed. This would mean that people who commit a qualifying offence when they are under 18 may be eligible, provided they are aged 18 or over when the preventive measure is imposed.²¹
- 7.13 We sought feedback from submitters on this proposal. Some submitters agreed without further comment.²² One submitter thought that preventive measures should apply to people under the age of 18.
- 7.14 Other submitters disagreed with the proposal and were concerned that setting eligibility at 18 would not sufficiently account for the differences between younger and older offenders. They stressed that a person does not reach cognitive and neurological maturity until they are in their mid-20s.
- 7.15 Of the submitters who disagreed, some said that preventive measures should not apply at all to people under the age of 25.²³ The Law Association of New Zealand thought that a scenario where a risk assessment was carried out on an individual under the age of 25, having committed a qualifying offence when under the age of 18, was “unstable ground” for the imposition of a preventive measure. It described setting the age of eligibility at 18 as a disproportionate response to a small number of younger people who offend repeatedly and seriously.
- 7.16 Dr Jordan Anderson preferred that the age of eligibility match the age of full neurological development — 25 years. Similarly, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service maintained that only those who committed qualifying offending when they were 25 or older should be eligible. However, both these submitters were prepared to accept 18 as an absolute minimum on the basis that it applied to both the age of imposition and the age at the time of offending. They supported a rule that no one who committed a qualifying offence before the age of 18 is eligible.²⁴ Other submitters also supported a

¹⁸ Preferred Approach Paper at [7.17]–[7.20].

¹⁹ Preferred Approach Paper, P3, P4 and P5.

²⁰ Preferred Approach Paper, P13.

²¹ Preferred Approach Paper at [7.23]–[7.24].

²² Bond Trust, criminal lawyers from Te Tari Ture o te Karauna | Crown Law.

²³ Myra Crawford-Smith, New Zealand Council for Civil Liberties, The Law Association of New Zealand.

²⁴ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service also suggested 20 years as another alternative that would be consistent with the current law about the treatment of those in custody on remand, see Criminal Procedure Act 2011, s 175.

minimum age of 18 for eligibility on the basis that a person should not be eligible in respect of offences that were committed before reaching that age.²⁵

- 7.17 We also heard from an individual on parole from preventive detention. Their feedback underlined what we had previously heard from interviewees about the harmfulness of preventive measures on young people. They said the age restrictions for indeterminate sentences such as preventive detention should be more forgiving. They thought that preventive detention was an “end of the line” sentence that should not be imposed too early in a person’s life.

RECOMMENDATION

R13 To be eligible for a preventive measure, the new Act should require that a person is aged 18 years or older at the time of an application.

- 7.18 We conclude that preventive measures should only be imposed on people aged 18 or over.
- 7.19 Our recommendation recognises that a very small group of young adults may present a high risk of serious reoffending.²⁶ Preventive measures may therefore be necessary and justified to address concerns for community safety. We did not receive feedback that questioned or disagreed with this proposition.
- 7.20 At the same time, we recognise that the severity of preventive measures means they are inappropriate for children and young people. Therefore, we conclude that a person should only be eligible for preventive measures if they are aged 18 or over. This is consistent with existing practice and norms that exclude those under 18 from criminal justice approaches that apply to adults.²⁷ It is also consistent with the current age of eligibility for a PPO.²⁸
- 7.21 The age of eligibility we recommend applies at the time a preventive measure is applied for, 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 some submitters supported a higher age of eligibility based on the evidence about the neurological development of young people and young adults. That evidence suggests that the commission of a qualifying offence by a person under the age of 25 may not be

²⁵ Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

²⁶ 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.

²⁷ 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.

²⁸ 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.

indicative of a risk of serious reoffending. We consider, however, that the objective of protecting the community from serious sexual or violent reoffending would be undercut if young adults were not eligible for preventive measures. We remain concerned about the possibility of excluding people aged 18–25 who pose risks of reoffending that otherwise meet the legislative tests for the imposition of preventive measures. That omission may invite ad hoc solutions to address public safety concerns such as the imposition of overly lengthy sentences on this group.

- 7.22 Finally, throughout this Report, we emphasise that preventive measures under the new Act must focus on rehabilitation and reintegration to life in the community. Evidence suggests younger people generally respond well to rehabilitative and reintegrative intervention.²⁹ If, at the end of a determinate sentence, they pose a high risk of reoffending, preventive measures provide access to rehabilitative and reintegration resources.
- 7.23 In practice, we do not think our recommendation is materially different to the current law. Very few young adults are subject to ESOs. Preventive measures will only apply to those subject to a sentence of imprisonment following conviction for a qualifying offence, and the circumstances in which young people are sentenced to imprisonment are limited. Imposing preventive measures at the end of a sentence provides an opportunity for a person to mature neurologically and engage in rehabilitation before their risk of reoffending is considered.
- 7.24 Also, while qualifying offending means a person is eligible for a preventive measure, ultimately our recommended legislative tests determine 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.
- 7.25 We recognise that our recommendation may engage concerns similar to those about applying preventive detention to young adults. Young adults could potentially be subject to forms of indeterminate detention (see our discussion of residential preventive supervision and secure preventive detention in Chapters 15 and 16). However, we consider that the problems with imposing indeterminate detention on this age group are alleviated by other aspects of our recommended approach, in particular:
- (a) Risk assessment will be conducted shortly before the person would otherwise be released into the community (see Chapter 4). It will examine the immediate risks a person presents to the community rather than what risks they may present many years into the future.
 - (b) The legislative tests we recommend (see Chapter 10) require that the court impose restrictions that are proportionate to the nature of the person's risk of reoffending.
 - (c) Preventive measures should be subject to annual reviews by a Review Authority as well as reviews by a court every three years (see Chapter 18). The Review Authority may decide that the preventive measure is no longer justified, triggering further review by the court. These periodic reviews will ensure restrictions are in place no longer than necessary and enable a responsive approach to changes in a person's risk profile.

²⁹ 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.

- (d) Our recommended approach is designed to ensure the availability of rehabilitative treatment and reintegration support (see Chapter 13). 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 of facilities.
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CHAPTER 8

Qualifying offences

INTRODUCTION

- 8.1 In this chapter, we consider what offending should make a person eligible for a preventive measure under the new Act. We address the following:
- (a) The role of qualifying offences as a threshold for eligibility for a preventive measure. We conclude that the new Act should continue to require that a person be convicted and sentenced to imprisonment for committing a particular offence in order to be eligible for a preventive measure.
 - (b) Whether the qualifying offences should be the same for all preventive measures. We conclude that this should be the case.
 - (c) What offences should be qualifying offences under the new Act. We recommend that most qualifying offences for the current regimes should continue as qualifying offences under the new Act, including certain imprisonable offences under the Films, Videos, and Publications Classification Act 1993 (FVPC Act). We conclude that the offence of strangulation or suffocation should be included as a qualifying offence. We recommend that the offences of incest, bestiality and accessory after the fact to murder should be removed as qualifying offences.
 - (d) What future offending should a person be at risk of committing for a preventive measure to be imposed on them (further qualifying offences). We recommend that all qualifying offences under the new Act should also be further qualifying offences, with the exception of certain imprisonable FVPC Act offences, attempts and conspiracies to commit a qualifying offence and certain Prostitution Reform Act 2003 offences.

BACKGROUND

- 8.2 Under the current law, a person must have been convicted and sentenced to prison for committing one of certain serious or violent offence to be eligible for preventive detention, an extended supervision order (ESO) or public protection order (PPO).¹ These offences are listed in the relevant legislation. We refer to these offences collectively as

¹ In addition, a person can qualify for an ESO if Subpart 3 of Part 2 of the Returning Offenders (Management and Information) Act 2015 applies to them, which does not require a conviction for a serious sexual or violent offence. We discuss this in Chapter 9.

“qualifying offences”.² Appendix 1 of this Report sets out the relevant qualifying offences under the current regimes.

- 8.3 To impose preventive detention, an ESO or a PPO, a court must also be satisfied that the person poses a risk of committing a similar offence in the future. We refer to this potential future offending as “further qualifying offences”.³ Under the existing legislation, most qualifying offences are also further qualifying offences.

QUALIFYING OFFENCES FOR THE PURPOSES OF ELIGIBILITY

Issue

- 8.4 In the Issues Paper, we said that requiring a conviction for a qualifying offence was a practical way of identifying those who may be eligible for a preventive measure.⁴ We acknowledged, though, that a list of qualifying offences is a blunt tool for identifying eligibility.⁵ A conviction and prison sentence for a previous offence is not necessarily an accurate indicator of the seriousness of a person’s offending due to the way offences are framed and charged. For example, prosecutorial decisions about charging or plea arrangements may result in someone being convicted on a lesser charge. There may also be other equally or more serious offenders in the community who have not been detected or there is insufficient evidence to lay charges.

Results of consultation

- 8.5 In the Preferred Approach Paper, we proposed that the new Act should continue to require that a person has been convicted of a qualifying offence to be eligible for a preventive measure.⁶ The primary reason was the relevance of previous offending to the risk of future offending. In addition, an approach that clearly defines in the legislation when someone may be eligible for a preventive measure provides clarity and certainty about when someone will be considered for a preventive measure.⁷
- 8.6 All submitters who responded to the proposal that the new Act should continue to require that a person has been convicted of a qualifying offence to be eligible for a preventive measure supported it.⁸ Dr Jordan Anderson said it would be “wildly inappropriate” to consider any other potential grounds for eligibility and that conviction for a qualifying offence could be the “only” entry point to a preventive measure.

² 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”.

³ Sentencing Act 2002, s 87(2)(c); Parole Act 2002, s 107(2)(b)(i)–(ii); and Public Safety (Public Protection Orders) Act 2014, s 13(1)(b).

⁴ 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 [6.9].

⁵ Issues Paper at [6.13].

⁶ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P14 and [8.54]–[8.59].

⁷ Preferred Approach Paper at [8.56].

⁸ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

- 8.7 Although they agreed with the proposal, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service emphasised that qualifying offences must be of sufficient gravity to be a threshold for eligibility rather than merely providing an indicator of risk. To achieve this, they both suggested that, in addition to being convicted of a qualifying offence, a person should also be sentenced to a term of imprisonment to be eligible for a preventive measure. Both submitters suggested the relevant sentence should be a term of imprisonment of two years or over.⁹

Recommendation

R14

To be eligible for a preventive measure, the new Act should require that a person has been subject to a sentence of imprisonment for a conviction of a qualifying offence.

- 8.8 We conclude that the law should continue to base eligibility on a conviction and prison sentence for a qualifying offence. There was a general consensus among submitters that this is the correct approach.
- 8.9 In our view, a conviction for a qualifying offence is rationally connected to the aims of the preventive regime.¹⁰ Previous offending is one of the most stable and significant predictors of future offending.¹¹ The qualifying offences listed in the new Act can focus on serious offending from which the community should be protected.
- 8.10 Our recommendation will also ensure that eligibility for preventive measures is clearly defined in statute. Such clarity is important for limiting the scope of regime given that it involves serious impositions on people's rights and freedoms.
- 8.11 A conviction for a qualifying offence would not, on its own, automatically lead to the imposition of a preventive measure. Whether or not the individual poses a risk that justifies the imposition of a preventive measure will be determined through the legislative tests for imposition (see Chapter 10).

CONSISTENCY OF QUALIFYING OFFENCES ACROSS THE REGIME

Issue

- 8.12 Appendix 1 of this Report sets out the relevant qualifying offences for preventive detention, ESOs and PPOs. For the most part, qualifying offences are the same across the three existing regimes. There are, however, some differences:
- (a) Three offences relating to indecent acts are qualifying offences for an ESO but not for preventive detention or a PPO:

⁹ Te Kāhui Ture o Aotearoa | New Zealand Law Society referred to a "long-term" sentence. We take this to refer to the definition of "long-term sentence" as "a determinate sentence of more than 24 months imposed on or after the commencement date": Parole Act 2002, s 4 definition of "long-term sentence".

¹⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [209] and [224].

¹¹ Preferred Approach Paper at [8.57], citing 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]; and *Attorney-General v Chisnall* [2024] NZSC 178 at [133], [209] and [224].

- (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 a 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 the act of attempting an offence is a separate offence on its own account.¹²
- (e) Offences under the FVPC Act are qualifying offences for ESOs only.

8.13 In the Issues Paper, we expressed the view that many of these differences were without apparent rationale.¹³ We expressed a preliminary view that it would be desirable for preventive measures to sit together as a single, coherent regime.¹⁴ Using a single list of qualifying offences for eligibility for all preventive measures would support that approach. It would also ensure that the courts could impose the most appropriate and least restrictive measure.¹⁵

8.14 The majority of submitters to the Issues Paper supported this approach, largely due to a preference for consistency across the regimes and to allow the courts to consider the least restrictive preventive measure necessary.¹⁶ Others disagreed and supported an approach that would have different qualifying offences for different measures so that only the most serious offending gives rise to eligibility for the most restrictive preventive measures.¹⁷

Results of consultation

8.15 In the Preferred Approach Paper, we proposed that, under the new Act, qualifying offences should be the same for all preventive measures.¹⁸ This aligned with our preferred approach for a single, post-sentence regime to address the existing fragmentation of the law and support imposition of the most appropriate and least restrictive measure. We considered that a single list of qualifying offences for all preventive measures would support that approach and promote clear and consistent application of the law.

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

¹³ Issues Paper at [6.18]. They may be the result of the fragmented development of the preventive detention, ESO and PPO regimes, which we discuss in Chapter 4.

¹⁴ Issues Paper at [6.19]–[6.20].

¹⁵ Issues Paper at [6.19]–[6.22].

¹⁶ Preferred Approach Paper at [8.24]–[8.26].

¹⁷ Preferred Approach Paper at [8.25].

¹⁸ Preferred Approach Paper, P15 and [8.65].

- 8.16 Most submitters supported this proposal.¹⁹ The NZLS and Dr Jordan Anderson commented that the current approach had created inconsistencies that had led to confusing and divergent outcomes. Dr Anderson considered that consistency was a “minimum expectation” in any system of preventive measures.
- 8.17 The Public Defence Service acknowledged the potential benefit of such an approach. However, both it and the South Auckland Bar Association disagreed with the proposal because of their views on what offences should be included as qualifying offences (discussed in more detail below). Both submitters were concerned that this proposal would result in insufficiently serious offences being included as qualifying offences for the most restrictive preventive measures. The Public Defence Service considered that, if the more minor offences proposed are to continue to be included as qualifying offences, they should only qualify an offender for the least restrictive preventive measure. Additionally, and without expressing a clear view on the proposal, The Law Association of New Zealand (TLANZ) urged a “cautious approach” in determining which offences should be included as qualifying offences.

Recommendations

R15

Qualifying offences should be the same for all preventive measures.

- 8.18 We conclude that there should be a single set of qualifying offences for eligibility for all preventive measures under the new Act. In Chapter 4, we recommend that there should be a new Act to govern all preventive measures. One of the main reasons for this approach is that it will address the current fragmentation of the law, which hinders, and sometimes actively prevents, the imposition of the most appropriate and least restrictive measure. A single set of qualifying offences for eligibility will facilitate the court to impose the least restrictive measure appropriate to respond to the risk a person poses.
- 8.19 We acknowledge the concern of some submitters that this approach will mean someone who may have committed comparatively less serious offending will still be eligible for the most restrictive preventive measures. We remain of the view that all the qualifying offences we recommend for the new Act can involve behaviour that causes considerable harm to the community, warranting their inclusion as qualifying offences. We discuss this further below in relation to specific offences.
- 8.20 Additionally, the legislative tests we recommend and, therefore, the justification for imposing a preventive measure are 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 to base eligibility for a particular measure solely on the type and nature of qualifying offending. Our recommendation for a single list of qualifying offences, applied alongside our recommended legislative tests (see Chapter 10), ensures that risk of reoffending remains the primary consideration. The legislative tests for imposition should ensure that the

¹⁹ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

necessary and appropriate measure is imposed in the circumstances, taking into account a range of relevant factors in that assessment.

R16

Qualifying offences should continue to focus on sexual and violent offending.

- 8.21 We conclude that the law governing preventive measures should continue to focus on the prevention of sexual and violent reoffending. This focus should be reflected in the qualifying offences that make someone eligible for a preventive measure.
- 8.22 The reason for this is the seriousness of these types of offences. As we note above, the harm posed to the community by the risk of reoffending must be sufficiently serious to justify making someone eligible for a preventive measure. There is no single agreed definition in the literature of what is meant by “serious”. What is deemed to be serious will depend on the audience or purpose for which that determination is being sought.²⁰ It may be assessed on the basis of common sense or intuitive judgements about what is serious, quantitative assessment and classification by assigning a harm value to offences,²¹ concepts of harm, culpability and the values society wishes to protect²² or by reference to maximum penalties for offences (on the basis of a prior judgement that these reflect the relative seriousness of an offence).²³
- 8.23 Regardless of how seriousness is understood, there is general agreement in policy and legislative contexts that sexual or violent offending is always serious. This is because sexual or violent offending causes direct interpersonal harm to victims.²⁴
- 8.24 The qualifying offences for the preventive detention, ESO and PPO statutes, which all target sexual and violent offending, reflect this consensus. We do not propose departing from this approach. Furthermore, with the exception of some specific offences discussed further below, submitters have not raised concerns about the broad scheme of qualifying offences. This suggests a tacit acceptance that most of the offences currently targeted by the regimes are sufficiently serious. Accordingly, we conclude that the current

²⁰ 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) at 3.

²¹ 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].

²² 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.

²³ Te Aka Matua o te Ture | Law Commission *Maximum Penalties for Criminal Offences* (NZLC SP21, 2013). See discussion at [2.3]–[2.10].

²⁴ Lucy Moore *Literature Review – Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 3–4.

qualifying offences target appropriately serious sexual and violent offences and should continue under the new Act.

QUALIFYING OFFENCES TO BE INCLUDED IN THE NEW ACT

- 8.25 Having determined that conviction and imprisonment for a qualifying offence should continue to make a person eligible for a preventive measure, the question then becomes which specific offences should be qualifying offences for the purposes of the new Act.
- 8.26 In the Issues Paper, we expressed a preliminary view that, overall, the current regimes appropriately target a relatively small number of serious sexual and violent offences.²⁵ We considered, however, that there may be some offences that could be added or removed. Our discussion below sets out in more detail which existing qualifying offences should continue to be qualifying offences, which offences should be newly included and which should be removed.

Continuation of existing qualifying offences — indecent assault, attempts and conspiracies and Prostitution Reform Act 2003 offences

Issues

- 8.27 We have heard concerns that some qualifying offences are insufficiently serious to justify making a person eligible for a preventive regime. The argument is that the consequences of those measures are out of proportion to the seriousness of the offending.²⁶ In the Issues Paper, we drew particular attention to indecent assault as an example of an offence that can vary significantly in terms of seriousness.²⁷ Some submitters to the Issues Paper supported the continued inclusion of indecent assault on the basis that it can cover very serious offending that would justify making someone eligible for a preventive measure and that less serious offending could be filtered out by the courts considering the facts of each case.²⁸ Other submitters opposed its inclusion on the basis that it could capture far less serious offending.²⁹
- 8.28 Some submitters also suggested that attempts and conspiracies to commit a qualifying offence are less serious than the qualifying offences themselves and that these could be removed.³⁰
- 8.29 Additionally, we drew attention in the Issues Paper to some offences under the Prostitution Reform Act that are qualifying offences if committed by a New Zealand citizen or resident overseas but not if committed domestically.³¹ These are the offences of contracting with or causing or encouraging a person under 18 to provide sexual services or receiving payment derived from commercial sexual services provided by

²⁵ Issues Paper at [6.5].

²⁶ Issues Paper at [6.7]–[6.17].

²⁷ Issues Paper at [6.15]–[6.16].

²⁸ Preferred Approach Paper at [8.31].

²⁹ Preferred Approach Paper at [8.32].

³⁰ Preferred Approach Paper at [8.50].

³¹ Preferred Approach Paper at [8.17(j)].

someone under 18.³² We observed that this seemed inconsistent.³³ Submitters on this issue agreed there should be a consistent approach between overseas and domestic offending but suggested these offences should not be included as qualifying offences in the new Act.³⁴ This was because, as some of these offences were strict liability (covering situations where an offender was unaware that the person they were contracting with was under 18), it would be unfair to expose someone to a preventive measure in these circumstances.

Results of consultation

- 8.30 In the Preferred Approach Paper, we proposed that, to be eligible for a preventive measure under the new Act, a person must have been convicted of one of the offences that we now set out in Appendix 1 of this Report.³⁵
- 8.31 We reiterated our view that qualifying offences for the current regimes are appropriately targeted at serious sexual and violent offending and did not consider significant reform was needed.³⁶ We noted that, under this proposal, offences that are currently qualifying offences for only some of the existing preventive measures would become qualifying offences for *all* preventive measures under the new Act. Subject to comments on the inclusion of specific offences, submitters to the Preferred Approach Paper did not raise objections to this general approach.
- 8.32 We proposed that indecent assault should remain a qualifying offence under the new Act. Two submitters, TLANZ and the Public Defence Service, opposed this approach. They were concerned that indecent assault is not always serious enough to justify making someone eligible for a preventive measure. The Public Defence Service said that, in reality, the majority of indecent assault charges involve minor offending. It noted that the previous three strikes legislation was repealed in part because it had been applied to incidents of indecent assault that were not sufficiently serious.³⁷
- 8.33 The Public Defence Service was also concerned the legislative tests might not prevent a court from imposing a preventive measure when the qualifying offending relates to less serious behaviour. It referred to the case of *Talatofi v Chief Executive of the Department of Corrections* as an example where the Kōti Pira | Court of Appeal found that an ESO had been inappropriately imposed on the basis of five convictions for indecent assault.³⁸ It considered that, although the law can mandate certain outcomes, there is always potential for error.
- 8.34 We also proposed that, under the new Act, an attempt or conspiracy to commit a qualifying offence should continue to be a qualifying offence. We reached this view on the basis that, although attempts and conspiracies do not entail the same level of actual

³² Prostitution Reform Act 2003, s 23(1) (maximum penalty seven years' imprisonment).

³³ Issues Paper at [6.34(j)].

³⁴ Te Kāhui Ture o Aotearoa | New Zealand Law Society. See discussion in the Preferred Approach Paper at [8.38].

³⁵ Preferred Approach Paper, P16.

³⁶ Preferred Approach Paper at [8.70]–[8.71].

³⁷ The Public Defence Service submission also referred to *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 as an example of a finding that the imposition of the maximum sentence for Mr Fitzgerald's third strike offence of indecent assault was disproportionate to the seriousness of the offence.

³⁸ *Talatofi v Chief Executive of the Department of Corrections* [2021] NZCA 258.

harm to the community, they can pre-empt extremely serious offending. We considered, therefore, that attempts or conspiracies can be an indicator of a risk of future serious reoffending in the same way as any other serious offending.³⁹

- 8.35 Only the Public Defence Service commented on this proposal, saying that attempts and conspiracies should not be qualifying offences. It reasoned that attempts and conspiracies do not entail the same level of harm. It would be problematic to include them as qualifying offences when the actual offence was not committed because the person decided not to go through with it.
- 8.36 Finally, we proposed that relevant offences under the Prostitution Reform Act, which are currently only qualifying offences if committed overseas, should be qualifying offences whether committed overseas or in Aotearoa New Zealand.⁴⁰ These offences can 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) and behaviour that is only preparatory (such as making arrangements for the provision of commercial sexual services without following through). We considered that both kinds of behaviour can be an indicator of the risk of future serious offending regardless of where it takes place.⁴¹
- 8.37 Only one submitter, the New Zealand Council for Civil Liberties (NZCCL), commented on this proposal. It raised concerns that some of these offences are strict liability, meaning that a person may be convicted even if ignorant that the person they were engaging with was under the age of 18. It considered that “offences committed by accident” should play no part in preventive measures.

Recommendation

R17

Qualifying offences should be those offences set out in Appendix 1 of this Report.

- 8.38 We conclude that most qualifying offences for the current regimes should continue as qualifying offences in the new Act. This echoes our recommendation that qualifying offences under the new Act should continue to focus on sexual and violent offending.
- 8.39 We recommend that indecent assault should remain a qualifying offence. Although indecent assault covers a range of behaviour, we consider that it can involve behaviour that is very serious.⁴² Offending at the upper end of the scale can result in harm from which the community should be protected and, therefore, a preventive measure may be an appropriate response.

³⁹ Preferred Approach Paper at [8.75].

⁴⁰ These offences are contracting, causing or encouraging a person under 18 to provide sexual services or receiving payment derived from commercial sexual services provided by someone under 18 (Prostitution Reform Act 2003, s 23(1)).

⁴¹ Preferred Approach Paper at [8.78].

⁴² See for example *R v Shepherd* [2018] NZHC 389, where the charges of indecent assault included the offender following and grabbing the victim, forcefully removing her clothing and underwear, sucking on her breast and placing her hand on his penis.

- 8.40 We acknowledge the concerns of submitters that inclusion of indecent assault could capture lower-level offending that is not serious enough to justify a preventive measure. We emphasise that the inclusion of indecent assault as a qualifying offence will only trigger consideration of whether a preventive measure should be imposed. The qualifying offence does not automatically justify a preventive measure as the legislative tests for imposition still need to be met. We are confident that our recommended tests will exclude risks of reoffending relating to less serious behaviour. From our analysis of the case law, this is the approach already taken by the courts, which tend to impose ESOs only where the circumstances are serious enough to justify them.⁴³ We expect this will continue under the new Act.
- 8.41 We recommend that attempts and conspiracies and Prostitution Reform Act offences should remain as qualifying offences under the new Act.
- 8.42 Attempts or conspiracies are an indicator of the seriousness of an offence, even though no actual harm was caused. They can therefore be an indicator of risk of future offending. The fact that somebody was thwarted before they could follow through does not change the fact that an attempt or conspiracy can pre-empt extremely serious offending. For this reason, we conclude attempts and conspiracies should remain as qualifying offences for the purpose of eligibility. We take a different view, however, on their inclusion as a further qualifying offence, which we discuss in more detail below.
- 8.43 We also conclude that Prostitution Reform Act offences should remain as qualifying offences but be broadened so that they are qualifying offences regardless of whether they are committed domestically or overseas.⁴⁴ Whether done in the commission of another qualifying offence or preparatorily, the behaviour involved in this type of offending is an indicator of the risk of further serious offending, regardless of where it takes place.⁴⁵ However, as with attempts and conspiracies to commit qualifying offences, we do not recommend Prostitution Reform Act offences should be further qualifying offences. We return to this point in more detail below.

⁴³ See for example *Chief Executive, Department of Corrections v Maindonald* [2018] NZHC 946, where the Court declined an application for an ESO, finding that the defendant's sexually indecent acts were not sufficiently serious to justify its imposition.

⁴⁴ 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].

⁴⁵ See also the proposal to add these Prostitution Reform Act 2003 offences as qualifying offences for the purposes of child sex offender registration in the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill (86-1). The Regulatory Impact Statement from Ngā Pirihimana o Aotearoa | New Zealand Police states that this would correct the existing "anomaly" of these offences being qualifying offences only if committed overseas, an approach that "undermines the seriousness of the offence and fails to fully recognise the harm caused to the victim, and the risk to future victims": Ngā Pirihimana o Aotearoa | New Zealand Police *Regulatory Impact Statement: Amendments to the Child Protection (Child Sex Offender Government Agency Registration) Act 2016* (19 October 2022) at 30.

Continuation of existing qualifying offences — imprisonable offences under the Films, Videos, and Publications Classification Act 1993

Issue

- 8.44 A question arises as to whether imprisonable offences under the FVPC Act should remain as qualifying offences.
- 8.45 Some imprisonable offences under the FVPC Act are qualifying offences for an ESO but not for preventive detention or a PPO.⁴⁶ These offences relate to the making,⁴⁷ possession⁴⁸ or livestreaming⁴⁹ of an objectionable publication while knowing, or having reasonable cause to believe, that the publication is objectionable.⁵⁰
- 8.46 These offences involve the possession of child sexual abuse material.⁵¹ In contrast to other qualifying offences, these are all non-contact sexual offences. Any sexual offending involving actual contact with a child or young person would be captured by another qualifying offence.
- 8.47 We received little feedback at the Issues Paper stage on whether these offences should continue to be qualifying offences. One submitter considered they should be because they had already been deemed sufficiently serious to attract an ESO. They noted that the most serious offence within this group of offences, the making of an objectionable publication, attracts a maximum penalty of 14 years' imprisonment.⁵² Others did not consider these offences serious enough to warrant inclusion or felt that the potential links between non-contact and future contact child sexual offending should be considered further.⁵³

Results of consultation

- 8.48 In the Preferred Approach Paper, we proposed that the imprisonable offences under the FVPC Act that are currently qualifying offences for an ESO should be qualifying offences

⁴⁶ Issues Paper at [6.24].

⁴⁷ Films, Videos, and Publications Classification Act 1993, ss 123–124 (maximum penalty 14 years' imprisonment).

⁴⁸ Films, Videos, and Publications Classification Act 1993, s 131A (maximum penalty 10 years' imprisonment).

⁴⁹ Films, Videos, and Publications Classification Act 1993, s 132C (maximum penalty 14 years' imprisonment).

⁵⁰ Content is “objectionable” if 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 by or with children, or young persons, or both; (c) exploits the nudity of children, or young persons, or both. Parole Act 2002, s 107B(3). See also Films, Videos, and Publications Classification Act 1993, s 3.

⁵¹ We use the terminology of “child sexual abuse material” 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). 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 Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 5.

⁵² Preferred Approach Paper at [8.27].

⁵³ Preferred Approach Paper at [8.28]–[8.29].

for all preventive measures under the new Act.⁵⁴ Our initial conclusion on this point was finely balanced.⁵⁵

- 8.49 We observed that the relevant FVPC Act offences are, in contrast to other qualifying offences, non-contact offences.⁵⁶ On this basis, they may be seen as less serious than other qualifying offences. It would be at odds with the existing focus on direct interpersonal harm to treat FVPC Act offences as posing a harm that the community should be protected against through the imposition of a preventive measure.⁵⁷
- 8.50 More compelling to us was the relevance of these offences to the risk that a person may commit more serious, contact child sex offences in the future.⁵⁸ On this basis, we took the view that the relevant FVPC Act offences should be included as qualifying offences for the purposes of eligibility.⁵⁹
- 8.51 However, as we return to below, we did not consider that FVPC Act offences should be further qualifying offences.
- 8.52 Of the submitters who responded to this proposal, two were supportive.⁶⁰
- 8.53 One submitter, the Public Defence Service, did not agree FVPC Act offences should be qualifying offences. It said that these were neither serious enough to warrant inclusion nor relevant to the risk of reoffending. It viewed the available evidence as demonstrating a very weak link between FVPC Act offending and contact offending, noting that it suggests only a “possible” relationship, with very small actual recorded rates of progression from non-contact child sexual offending to contact child sexual offending. It also expressed concern that the inclusion of these offences would increase the number of people eligible for preventive measures due to the number of FVPC Act offences that are charged.
- 8.54 TLANZ agreed that FVPC Act offending may be relevant to the assessment of risk of future contact offending but said this did not necessarily mean FVPC Act offences should be qualifying offences. It suggested that these offences had been introduced to provide more serious penalties for this type of behaviour, but there had been no indication they were intended to be a threshold for preventive detention.

⁵⁴ As set out in Parole Act 2002, s 107B(3), these are offences 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”.

⁵⁵ See detailed discussion in the Preferred Approach Paper at [8.79]–[8.90].

⁵⁶ Preferred Approach Paper at [8.80].

⁵⁷ Preferred Approach Paper at [8.88].

⁵⁸ Preferred Approach Paper at [8.81].

⁵⁹ Preferred Approach Paper at [8.87].

⁶⁰ New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

Recommendation

R18 Imprisonable offences under the Films, Videos, and Publications Classification Act 1993 that are currently qualifying offences for an extended supervision order should be qualifying offences for all preventive measures.

- 8.55 We recommend that imprisonable FVPC Act offences that are currently qualifying offences for ESOs should remain qualifying offences under the new Act for all preventive measures.
- 8.56 Although these are non-contact offences, they are serious. As we stated in the Preferred Approach Paper, these types of offences cause significant harm to those depicted in the materials — not just the sexual violation at the time the content was created but psychological and emotional trauma in the long term. The harm can be exacerbated by the repeated and perpetual exposure of the content online.⁶¹ This has been recognised by the courts in considering these offences at sentencing.⁶² The Court of Appeal has also held that:⁶³
- The seriousness of non-contact offences is not lessened by the lack of direct contact; that depends on the circumstances of the offending in the particular case ... Whether the possession and creation of objectionable material constitutes serious sexual offending is an assessment to be made on the particular facts of the case and is not amenable to any fixed criteria such as whether it involved direct contact with the victim.
- 8.57 Our conclusion to include FVPC Act offences as qualifying offences is, however, primarily based on their relevance to the risk of future, more serious, contact offending. The community should be protected from the serious harm caused by contact offending through the imposition of a preventive measure.
- 8.58 Committing a non-contact FVPC Act offence is not always indicative of a risk of committing contact sexual offences in the future. 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 child sexual abuse material.⁶⁴ Internationally recorded rates of *progression* from non-contact to contact offending are low and range from 0 to 2.7 per cent.⁶⁵

⁶¹ Ateret Gewirtz-Meydan and others “The complex experience of child pornography survivors” (2018) 80 *Child Abuse & Neglect* 238–248 at 249; and Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Addressing Child Pornography and Related Offending* (August 2012) at [17].

⁶² See for example *R v Christian* [2023] NZHC 3509 at [20]; and *R v Fuller* [2024] NZDC 6589 at [20].

⁶³ *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [48].

⁶⁴ 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.

⁶⁵ 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

- 8.59 The available literature cautions against viewing any relationship between non-contact and contact child sexual offending as a straightforward or linear progression.⁶⁶ Rather, it points to a possible relationship or interaction between the two. Some offenders will only use the internet to engage in online sexual behaviours and facilitate sexual fantasy. Some, however, are driven by a desire to shift their engagement towards contact sexual offending.⁶⁷ Some people will engage in both non-contact and contact offending.⁶⁸
- 8.60 Importantly, the literature suggests it is possible to identify and distinguish between fantasy-driven and contact-driven offenders. The general consensus is that there are more differences than similarities between the two groups.⁶⁹ They present with distinct offending profiles and motivations as well as different criminogenic and treatment needs.⁷⁰ The literature distinguishes between particular characteristics of each group of offenders and identifies disparities relating to:⁷¹
- (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 child sexual abuse material, including how they collect and use these materials and their reasons for doing so.

others “Child sexual exploitation materials offenders: A review” (2018) 23 *European Psychologist* 130; and Jennifer A 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.

⁶⁶ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 70, 75 and 106.

⁶⁷ 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 *Archives of Sexual Behavior* 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.

⁶⁸ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 43.

⁶⁹ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 46.

⁷⁰ 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.

⁷¹ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 44.

- 8.61 Additionally, research suggests there are multiple factors that may increase the risk of a non-contact offender progressing to a contact offence.⁷² These can include:
- (a) access to children in an offline context, which may enable contact offending;⁷³
 - (b) criminal histories, with contact offenders and dual offenders being more likely to have a greater history of prior offending — in particular, of violent offending;⁷⁴
 - (c) an increased presence of antisociality such as “acting out and over-assertiveness”,⁷⁵ which has been described as “the key risk factor” in making the transition from non-contact internet offending to contact offending;⁷⁶ and
 - (d) possession and viewing of increased amounts of, and more extreme, child sexual abuse material.⁷⁷
- 8.62 The evidence suggests to us that it is possible to distinguish between those non-contact offenders who pose particular risks of also committing contact child sexual offences and those who do not. The inclusion of FVPC Act offences as qualifying offences will allow the courts to carry out that analysis in determining whether the imposition of a preventive measure is appropriate in the individual circumstances of each case.
- 8.63 This approach aligns with what was intended when FVPC Act offences were first brought within the scope of the ESO regime (which was itself, originally, only aimed at sexual offending). The select committee that recommended the inclusion of these offences as qualifying offences for ESOs did so with the intention of ensuring that:⁷⁸
- ... 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.
- 8.64 From our analysis of the available case law, we consider that, in practice, where the courts have imposed ESOs on the basis of FVPC Act offending, this has been because the person also has a history of contact child sexual offending. The relevance of the FVPC Act offending has therefore been to the risk of further contact offending.⁷⁹

⁷² Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 11.

⁷³ 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.

⁷⁴ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 10–11, 54, 71–72 and 75.

⁷⁵ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 55, 65, 72, 75 and 83.

⁷⁶ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 75.

⁷⁷ Risk Management Authority *Literature Review: A Review of the Risk Posed by Internet Offenders* (December 2018) at 11, 62, 75 and 82.

⁷⁸ Parole (Extended Supervision) and Sentencing Amendment Bill 2004 (88-2) (select committee report) at 10.

⁷⁹ See for example *Williamson v Department of Corrections* [2014] NZHC 98; *Clark v Chief Executive of Department of Corrections* [2016] NZCA 119 at [30]; and *Parsons v Chief Executive of the Department of Corrections* [2024] NZCA 338 at [38].

- 8.65 We acknowledge the concern of submitters that there is not a definitive link between non-contact and contact offending. We recognise too that it may not always be possible to be certain whether non-contact offending will escalate to contact offending. We consider, however, that the adverse consequences of missing offenders who can be identified as posing risks of committing contact child sexual offences outweigh the detriment of identifying a large cohort of offenders, many of whom will not pose a risk of committing future contact offending.
- 8.66 We also note the concern of submitters that this would have the effect of making eligibility too broad. We disagree. Current practice reflects a cautious approach to imposition of ESOs for FVPC Act offences. The 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.⁸⁰ In another case, *te Kōti Matua | High Court* 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”.⁸¹ We see no reason why this approach would not continue under the new Act.
- 8.67 For these reasons, we conclude that that the relevant FVPC Act offences should be qualifying offences but not further qualifying offences. We discuss this further below.

Inclusion of new qualifying offences

Issue

- 8.68 There are offences that are similar in nature and seriousness to current qualifying offences but are not currently qualifying offences. In the Issues Paper, we identified offences that might merit inclusion in a new regime for that reason:⁸²
- (a) Dealing in people under 18 for sexual exploitation, removal of body parts or engagement in forced labour.⁸³
 - (b) Wilfully infecting with disease.⁸⁴
 - (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.⁸⁵
 - (d) Female genital mutilation.⁸⁶
 - (e) Inciting, counselling or procuring suicide, where the victim then commits or attempts to commit suicide.⁸⁷

⁸⁰ *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [48].

⁸¹ *R v Christian* [2023] NZHC 3509 at [103].

⁸² Issues Paper at [6.34].

⁸³ Crimes Act 1961, s 98AA (maximum penalty 14 years' imprisonment).

⁸⁴ Crimes Act 1961, s 201 (maximum penalty 14 years' imprisonment).

⁸⁵ Crimes Act 1961, s 204 (maximum penalty 10 years' imprisonment).

⁸⁶ Crimes Act 1961, s 204A(2) (maximum penalty seven years' imprisonment).

⁸⁷ Crimes Act 1961, s 179(1) (maximum penalty 14 years' imprisonment).

- (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.⁸⁸
 - (g) Ill-treatment or neglect of a child or vulnerable adult in a manner likely to cause suffering, injury or adverse effects.⁸⁹
 - (h) Failure to protect a child or vulnerable adult from a risk of death, grievous bodily harm or sexual assault.⁹⁰
 - (i) Other FVPC Act offences punishable by imprisonment (including offences relating to material that is deemed 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).⁹¹
- 8.69 Most submitters to the Issues Paper opposed the inclusion of these offences as qualifying offences. Their reasons were that these offences are rare and repeat offending is unlikely or likely only in a very specific set of circumstances that could be addressed by less restrictive means than by the imposition of a preventive measure.⁹²
- 8.70 In addition to the list above, we drew attention to the offence of strangulation or suffocation, which is not currently a qualifying offence for any preventive measure.⁹³ We expressed a preliminary view that it should be a qualifying offence under the new Act.⁹⁴ On this, submitters to the Issues Paper were more evenly split. Some supported the inclusion of strangulation or suffocation as a qualifying offence on the basis that it represents serious behaviour and, in particular, is an indicator of a risk of future, more serious offending.⁹⁵ Others were concerned about the frequency with which strangulation or suffocation is charged and that this was not always representative of the seriousness of the assault. Its inclusion would mean exposing a far greater number of people, perhaps unfairly, to the preventive regimes and increase the number of applications for preventive measures.⁹⁶

Results of consultation

- 8.71 In the Preferred Approach Paper, we proposed that one new qualifying offence — that of strangulation or suffocation — should be added to the new Act.⁹⁷ We did so on the basis that strangulation or suffocation constitutes serious criminal behaviour and so represents a harm from which the community should expect to be protected.⁹⁸ Of particular significance, there is a link between strangulation or suffocation and an

⁸⁸ Crimes Act 1961, s 182 (maximum penalty 14 years' imprisonment).

⁸⁹ Crimes Act 1961, s 195 (maximum penalty 10 years' imprisonment).

⁹⁰ Crimes Act 1961, s 195A(1) (maximum penalty 10 years' imprisonment).

⁹¹ Films, Videos, and Publications Classification Act 1993, ss 3, 124, 127, 129, 131A and 132C (maximum penalties 1–14 years' imprisonment).

⁹² Preferred Approach Paper at [8.36]–[8.39].

⁹³ Preferred Approach Paper at [8.18]–[8.19].

⁹⁴ Issues Paper at [6.35]–[6.36].

⁹⁵ Preferred Approach Paper at [8.40].

⁹⁶ Preferred Approach Paper at [8.41].

⁹⁷ Preferred Approach Paper, P16.

⁹⁸ Preferred Approach Paper at [8.99].

escalation in the seriousness of offending.⁹⁹ We pointed to evidence that strangulation in the context of intimate partner violence is linked to a higher risk of a future fatal attack by the perpetrator on the victim. This was a key factor in the creation of strangulation or suffocation as a specific offence in 2018.¹⁰⁰

- 8.72 On this, submitters were again evenly split. Some supported its inclusion, either referring back to their earlier views at the Issues Paper stage or without further comment.¹⁰¹
- 8.73 Other submitters opposed its inclusion.¹⁰² These submitters expressed concern about the frequency with which it is charged and the risks of exposing a far greater number of offenders to preventive measures.
- 8.74 Some submitters also questioned whether the seriousness of this type of offending was sufficient to justify its inclusion as a qualifying offence. The Public Defence Service noted that the offence can capture relatively minor behaviour (such as momentary impediment to breathing or pressure on the neck “with no risk of harm”). This was also alluded to by the NZLS, which, while supportive of its inclusion, noted that, in practice, it is likely to be “similar to indecent assault”. It considered that a preventive measure should only be sought for offending involving strangulation or suffocation where there is a pattern of repeated conduct.
- 8.75 Additionally, some submitters queried whether the inclusion of this offence was rationally connected to the aim of protecting the community from serious reoffending. The Public Defence Service considered the “public safety risk” present in other qualifying offences did not arise in strangulation or suffocation, as it generally occurs in the context of intimate partner violence. The Public Defence Service further said that this type of offending arises from a specific context such as substance abuse or poor social conditions, which were outside the ambit of what a preventive measure could address. Another submitter agreed, noting that there are other approaches to preventing reoffending that can be explored, for example, rehabilitation programmes aimed at intimate partner violence and community support.
- 8.76 We did not propose including any of the other offences we identified in the Issues Paper as possible new qualifying offences under the new Act.¹⁰³ We found little support for this in the case law, literature or submissions to our review.¹⁰⁴ Furthermore, we did not identify any widespread concern about these offences not currently being qualifying offences, which suggests there is no problem in practice with a large number of serious offenders, posing a risk to the community, who are not being captured by the current regime.
- 8.77 No submitters to the Preferred Approach Paper commented on this proposal. TLANZ expressed a more general view that a cautious approach is required in determining which offences should be included as qualifying offences. This suggests general agreement with

⁹⁹ Preferred Approach Paper at [8.100].

¹⁰⁰ Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [8.2]–[8.5]. See also Ministry of Justice *Departmental Report: Family and Whānau Violence Legislation Bill* (9 September 2018) at [510]–[511].

¹⁰¹ Bond Trust, Te Tari Ture o te Karauna | Crown Law, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

¹⁰² Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

¹⁰³ See discussion in the Preferred Approach Paper at [8.91]–[8.97].

¹⁰⁴ Preferred Approach Paper at [8.91]–[8.93].

our view that these offences should not be added as qualifying offences under the new Act.

Recommendation

R19

The offence of strangulation or suffocation (section 189A of the Crimes Act 1961) should be a qualifying offence.

- 8.78 We conclude that the offence of strangulation or suffocation should be added as a qualifying offence under the new Act.
- 8.79 We disagree with the views of some submitters that this offence is not sufficiently serious to justify making someone eligible for a preventive measure. The severity of this type of offending was underlined by Te Aka Matua o te Ture | Law Commission in its report recommending the creation of a new offence of strangulation. The Commission concluded that the act of strangulation was “very serious criminal behaviour”.¹⁰⁵ This was described both in terms of the serious physical harm caused to a victim¹⁰⁶ 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”.¹⁰⁷ Various policy responses to strangulation reflect the harmfulness of the behaviour. The decision to create a stand-alone offence for strangulation or suffocation — with a maximum penalty of seven years’ imprisonment — 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.¹⁰⁸ Our view is that, on its own, this is a harm the community should reasonably expect to be protected from.
- 8.80 Additionally, the relevant harm of this offending also lies in the risk that it poses of an escalation in behaviour. Strangulation in the context of family violence is linked to higher risk of a future fatal attack by the perpetrator on the victim.¹⁰⁹ A 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.¹¹⁰ The under-recognition of this risk was a significant factor in the Commission’s decision to recommend the creation of a specific offence in 2016.¹¹¹ Again, this is a risk of harm from which the community should reasonably expect to be protected.
- 8.81 Some submitters did not consider that the inclusion of strangulation or suffocation as a qualifying offence was rationally connected to the aims of preventive measures to protect the *community* from the harm of reoffending. This is because the offence typically

¹⁰⁵ Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [1.14].

¹⁰⁶ Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.7]–[2.10].

¹⁰⁷ Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NLZC R138, 2016) at [2.16].

¹⁰⁸ New Zealand Government “Strong evidence for a new strangling offence” (press release, 8 March 2016).

¹⁰⁹ Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [8.2].

¹¹⁰ Jacquelyn Campbell and others *Research Results From a National Study of Intimate Partner Homicide: The Danger Assessment Instrument* (NCJ 199710, 2004).

¹¹¹ Te Aka Matua o te Ture | Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [8.2]–[8.5].

arises in the context of intimate partner violence.¹¹² We disagree. Strangulation in the context of family violence can pose a risk to the community at large. In contrast to incest (discussed below), which involves victims from a limited class, family violence behaviours can persist and repeat across multiple relationships, and it is not possible to clearly identify who might be affected in the future.¹¹³

- 8.82 Some submitters also considered that a preventive measure may be disproportionate to the seriousness of the offence and not appropriate in the context of family violence, which has unique underlying causes and behaviours. We agree that a preventive measure may not always be the appropriate response to offences of strangulation or suffocation, but this will be accommodated under our recommendations. The application of the legislative tests will determine when a preventive measure will be appropriate and justified.
- 8.83 The courts have adopted this approach in the context of family violence offences and ESOs. In *Department of Corrections v Gray*, which involved various counts of male assaults female involving Mr Gray and his partner, the Court declined to impose an ESO.¹¹⁴ This was partly on the basis that it would not be effective in protecting the public from the risk of serious family violence as 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.¹¹⁵ Some of the ESO conditions such as requiring a probation officer’s consent to a change of employment were not relevant to the risk at all. Additionally, if any risk began to manifest, there were other mechanisms that could be used to respond such as a current or future partner seeking a protection order.¹¹⁶ At the same time, the Court acknowledged that there may be other cases where the standard or special ESO conditions such as those relating to drug and alcohol consumption and prohibitions on residing at a particular address will be more relevant and effective.¹¹⁷
- 8.84 Some submitters were concerned that the inclusion of strangulation or suffocation as a qualifying offence would increase the number of people eligible for preventive measures under the new Act. In the five-year period between the financial years 2019/20–2023/24, 5,549 individuals were charged with strangulation or suffocation.¹¹⁸ Of those individuals, 1,069 (19 per cent) were sentenced to imprisonment following conviction.¹¹⁹
- 8.85 We acknowledge that the inclusion of strangulation or suffocation will widen the category of eligible people. However, due to the low rate of imprisonment, only a minority of those charged will be eligible for a preventive measure. Therefore, the effect of widening the

¹¹² Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

¹¹³ 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.

¹¹⁴ *Department of Corrections v Gray* [2021] NZHC 3558.

¹¹⁵ *Department of Corrections v Gray* [2021] NZHC 3558 at [56].

¹¹⁶ *Department of Corrections v Gray* [2021] NZHC 3558 at [59].

¹¹⁷ *Department of Corrections v Gray* [2021] NZHC 3558 at [59].

¹¹⁸ Tāhū o te Ture | Ministry of Justice *Justice data tables — offences related to family violence* (June 2024).

¹¹⁹ Tāhū o te Ture | Ministry of Justice *Justice data tables — offences related to family violence* (June 2024).

scope of the preventive regime will be limited. Because strangulation or suffocation is harmful criminal behaviour with a proven relationship to more serious offending, we are satisfied it is appropriate for those convicted and sentenced to prison for strangulation or suffocation to be eligible for preventive measures.

- 8.86 Finally, we do not recommend adding any other offences as qualifying offences under the new Act. There was no support from submitters for adding other offences. Although we consulted on a number of offences we considered were similar in nature and seriousness to existing qualifying offences, we favour a cautious approach.
- 8.87 We consider 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. As we explained in the Preferred Approach Paper, we have found little justification in the case law, the literature or submissions to our review. Most of the offences on which we consulted are rarely charged.¹²⁰ Furthermore, there was little concern among submitters about the exclusion of these offences from current qualifying offences for the preventive regimes. This suggests to us that the current regime is not failing to capture a significant group of serious offenders.

Removal of qualifying offences

Issue

- 8.88 Some existing qualifying offences may be ineffective or unnecessary to protect the community from serious reoffending. In the Issues Paper, we suggested that the offences of incest and bestiality could be removed as qualifying offences as they are not rationally connected to the aim of preventive measures — to protect the community from the risk of reoffending.¹²¹
- 8.89 In the case of incest, this offending has, by its nature, low rates of recidivism. Opportunities to reoffend are extremely limited and there is little risk to the community at large.¹²² The majority of submitters to the Issues Paper supported the removal of incest as a qualifying offence on this basis.¹²³
- 8.90 In the case of bestiality, we observed that it does not involve the commission of direct harm or threat of harm to another person nor necessarily pose a risk of future offending against people.¹²⁴ Responses on bestiality were more finely balanced. Some submitters supported its removal, agreeing with our reasoning that, as it does not involve harm to people, it is not rationally connected to the aim of protecting the community from serious

¹²⁰ Detailed charging statistics for these offences are not available in publicly available justice statistics. However, there are very few 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, no reported cases involving charges of impeding rescue under s 204, two reported cases involving charges of killing an unborn child under s 182 and nine reported cases involving charges of aiding and abetting suicide under s 179.

¹²¹ Issues Paper at [6.38]–[6.46] and [6.47]–[6.51].

¹²² Issues Paper at [6.45].

¹²³ Preferred Approach Paper at [8.45].

¹²⁴ Issues Paper at [6.48].

reoffending. Others considered bestiality to be disturbing behaviour that could be indicative of future offending.¹²⁵

Results of consultation

- 8.91 In the Preferred Approach Paper, we proposed removing three existing qualifying offences as qualifying offences under the new Act: incest, bestiality and accessory after the fact to murder.¹²⁶ We reached this view on the basis that none of these offences met our criteria for inclusion under the new Act in that they were not rationally connected to the aims of protecting the community from the harms caused by reoffending.
- 8.92 Most submitters agreed with the proposal to remove incest as a qualifying offence.¹²⁷ One submitter agreed that offenders do not generally pose a high risk to the community as incidents are isolated to familial relationships. The Bond Trust disagreed with the removal of incest but did not go into detail.
- 8.93 Most submitters also agreed with the proposal to remove bestiality as a qualifying offence.¹²⁸ One submitter disagreed and considered it should be retained as a qualifying offence given the perversity of the offence and the “high potential for reoffending”.
- 8.94 Most submitters supported the removal of accessory after the fact to murder as a qualifying offence, with no further comment.¹²⁹ Two submitters were less supportive, with one commenting that accessory after the fact to murder should be viewed as serious.¹³⁰

Recommendations

R20

The following offences should not be qualifying offences:

- a. Incest (section 130 of the Crimes Act 1961).
- b. Bestiality (section 143 of the Crimes Act 1961).
- c. Accessory after the fact to murder (section 176 of the Crimes Act 1961).

- 8.95 We conclude that the offences of incest, bestiality and accessory after the fact to murder should not be qualifying offences under the new Act. We do not consider them to be either necessary or effective in protecting the community from serious reoffending or sufficiently serious to justify making someone eligible for a preventive regime for the following reasons:

- (a) **Incest.** 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,

¹²⁵ Preferred Approach Paper at [8.116].

¹²⁶ Preferred Approach Paper at [8.112]–[8.121].

¹²⁷ Myra Crawford-Smith, 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.

¹²⁸ 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.

¹²⁹ 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.

¹³⁰ Myra Crawford-Smith, Robert Simmonds.

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”.¹³¹ Where the incestuous behaviour is non-consensual or involves a particularly vulnerable victim or a child or young person, the perpetrator will invariably be charged with other sexual offences that are qualifying offences. Given the narrow and finite pool of potential victims (incest is only an offence within particular degrees of familiar relationships),¹³² opportunities to reoffend are extremely limited and there is little risk to the community at large. Submitters almost universally agreed with this recommendation.

- (b) **Bestiality.** While some submitters contended that bestiality indicates perverse behaviour and so should remain as a qualifying offence, 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.¹³³ Harm to animals would be a significant change in scope to the regimes and may require reconsideration of other offences.
- (c) **Accessory after the fact to murder.** 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. Additionally, this offence tends to be highly situational, often based on familial or personal relationships with an offender. This suggests that the risk of reoffending is low. This was supported by the majority of submitters.

FURTHER QUALIFYING OFFENCES

Issues

- 8.96 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 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:¹³⁴

¹³¹ *B (CA 817/2011) v R* [2012] NZCA 260 at [13].

¹³² 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”.

¹³³ 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.

¹³⁴ Issues Paper at [8.21].

- (a) indecent assault spans a spectrum of behaviour, some of which may be very serious and some less so;
- (b) incest and bestiality 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.

8.97 We sought feedback from submitters on whether there were any issues with further qualifying offences. Most submitters at Issues Paper stage did not address this issue specifically and referred to their earlier responses on the inclusion of these offences as qualifying offences.¹³⁵ Most commented on the inclusion of attempts and conspiracies as further qualifying offences, which we have summarised above.¹³⁶

Results of consultation

8.98 In the Preferred Approach Paper, we proposed that all qualifying offences identified for inclusion in the new Act should also be further qualifying offences for the purpose of the application of the legislative tests under the new Act, with the exception of:¹³⁷

- (a) imprisonable FVPC Act offences;
- (b) attempts and conspiracies to commit a qualifying offence; and
- (c) Prostitution Reform Act offences.

8.99 Our view was that, with these three exceptions, the qualifying offences we had identified for inclusion in the new Act were serious enough to constitute the type of future risk needed to justify the imposition of a preventive measure.¹³⁸

8.100 The majority of submitters to the Preferred Approach Paper supported this proposal.¹³⁹ The NZCCL commented that, while these offences are troubling indicators of risk, there needed to be something more to justify the imposition of a preventive measure and associated deprivation of liberty.

8.101 The Public Defence Service, although supportive, expressed some caveats. It noted that the reasoning for not including these offences as further qualifying offences suggests that they should also not be qualifying offences to begin with. It restated its opposition to the inclusion of attempts and conspiracies and FVPC Act offences as qualifying offences, as these offences are only indicative of future risk and not sufficiently serious in and of themselves.

¹³⁵ Preferred Approach Paper at [8.49].

¹³⁶ Te Tari Ture o te Karauna | Crown Law, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association. See discussion in the Preferred Approach Paper at [8.50]–[8.51].

¹³⁷ Preferred Approach Paper, P17.

¹³⁸ Preferred Approach Paper at [8.123].

¹³⁹ Bond Trust, 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 of New Zealand.

Recommendation

R21

All qualifying offences should be further qualifying offences for the purpose of the application of the legislative tests in R25 except:

- 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.

- 8.102 We recommend that, generally, all qualifying offences for the purposes of eligibility should also be further qualifying offences for the purposes of determining future risk. 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 the new Act. We consider, for the same reasons, they are also serious enough to embody the type of future risk necessary to justify the imposition of preventive measures.
- 8.103 We recommend three exceptions to this general approach. First, we do not consider that the set of imprisonable FVPC Act offences we recommend as qualifying offences above should also be further qualifying offences. We have concluded that the harm from which the community should be protected is not the risk of repeated possession and viewing of child sexual abuse material but the risk that someone who has previously offended by viewing child sexual abuse material will go on to carry out a more serious contact offence. Therefore, these offences do not embody the type of future risk necessary to justify inclusion as further qualifying offences.
- 8.104 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 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 recommend including them as further qualifying offences. 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.
- 8.105 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.
- 8.106 Some submitters expressed concern that the inclusion of the Prostitution Reform Act offences as qualifying offences could lead to someone being eligible for a preventive measure for a strict liability offence. We consider that the retention of these offences as qualifying offences will allow consideration of offending as an indicator of risk but that preventive measures themselves should only be imposed in circumstances that indicate a risk of more serious future offending.
- 8.107 For completeness, we make two final observations on incest, bestiality and indecent assault, 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 examine whether they should be further qualifying offences. Regarding indecent assault, we reiterate our conclusion that this offence *can* be extremely serious and is something from which the community should expect to be protected. For this reason, it should remain as a further qualifying offence. The legislative tests for imposing preventive measures should require the court to be satisfied that the nature and extent of the reoffending risks a person poses justify the imposition of the preventive measure. In our view, the tests will ensure that a preventive measure is only imposed in sufficiently serious cases.

CHAPTER 9

Overseas offending

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.
- 9.2 We examine issues with the current law regarding overseas offending and eligibility for extended supervision orders (ESOs) and public protection orders (PPOs). We recommend that people whose offending occurred in another jurisdiction should continue to be eligible for preventive measures. We consider that the approach under the new Act should be based on the current law, with the requirement that the overseas offending must fall within the definition of a qualifying offence had it been committed in Aotearoa New Zealand.

BACKGROUND

- 9.3 Generally, acts done outside Aotearoa New Zealand are not offences under New Zealand law, so a person cannot be sentenced for them in Aotearoa New Zealand.¹ As preventive detention is imposed at the time of sentencing, it is not available for offending committed overseas. 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.
- 9.4 A person who commits offending overseas and returns to Aotearoa New Zealand is eligible for an ESO or a PPO if:
- (a) under the Returning Offenders (Management and Information) Act 2015 (Returning Offenders Act), they:
 - (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).

¹ 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 people. Offences charged under s 144A are qualifying offences for preventive detention.

9.5 We discuss each of eligibility for ESOs and PPO in greater detail.

Returning Offenders Act

9.6 Treatment of returning overseas offenders is largely governed by the Returning Offenders Act. The purpose of this 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.²

9.7 It was enacted 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 led to a significant increase in the number of New Zealand citizens deported or removed from Australia to Aotearoa New Zealand.³ As of 30 June 2024, 184 returning offenders were subject to management by Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) under the Returning Offenders Act.⁴

Returning prisoners

9.8 A person may be eligible for an ESO or a PPO based on whether they are determined to be a “returning prisoner” under the Returning Offenders Act.

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:

(a) has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand; and

(b) has, in respect of that conviction, been sentenced to—

(i) a term of imprisonment of more than 1 year; or

(ii) 2 or more terms of imprisonment that are cumulative, the total term of which is more than 1 year; and

(c) is returning or has returned to New Zealand within 6 months after his or her release from custody during or at the end of the sentence.

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.⁵ A returning prisoner will then be subject to mandatory standard release conditions for a period of between six months and five

² Returning Offenders (Management and Information) Bill (98-1) (explanatory note) at 1. Te Kōti Pira | Court of Appeal has considered how the Returning Offenders (Management and Information) Act 2015 (Returning Offenders Act) should be interpreted in light of 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 second 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.

³ The number increased five-fold from about five to about 25 per month: Justice Committee *Review of the Operation of the Returning Offenders (Management and Information) Act 2015* (September 2019).

⁴ 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 returning offenders orders from year ending June 2024 (15 November 2024).

⁵ Returning Offenders (Management and Information) Act 2015, s 18.

years, depending on the term of imprisonment to which they were sentenced for the offence.⁶ The standard release conditions are those that apply to parole under the Parole Act.⁷ 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 (chief executive).⁸ 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.⁹

- 9.11 A person is eligible for an ESO or a PPO if they have been convicted of a qualifying offence overseas and, upon return to Aotearoa New Zealand, the Commissioner of Police determines they are a returning prisoner under section 17 of the Returning Offenders Act.¹⁰ The chief executive must apply for the ESO or PPO before the expiry of any release conditions to which the person is subject under the Returning Offenders Act.¹¹

People who return to Aotearoa New Zealand more than six months after release from custody

- 9.12 People who return to Aotearoa New Zealand more than six months after release from custody will not meet the criteria of being a returning prisoner, but they can still be eligible for an ESO or a PPO. It will depend on whether they are a person on whom the court can impose standard and special release conditions under Subpart 3 of Part 2 of the Returning Offenders Act.
- 9.13 Section 32 of the Returning Offenders Act sets out criteria for when the court can impose standard and special release conditions under the Act for people who have arrived more than six months after their release from custody. The criteria are that the person:¹²
- (a) meets the criteria for a returning prisoner except they are returning to Aotearoa New Zealand more than six months after their release from custody; and
 - (b) immediately before their return to Aotearoa New Zealand, they were subject to:
 - (i) monitoring, supervision or other conditions for the relevant sentence; or
 - (ii) conditions imposed under an order in the nature of an ESO or a PPO.

⁶ Returning Offenders (Management and Information) Act 2015, s 24(2).

⁷ 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.

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

⁹ Returning Offenders (Management and Information) Act 2015, s 26(2). The same test as in the Parole Act 2002 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).

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

¹¹ Parole Act 2002, ss 107C(1)(c) and 107F(1)(d); and Public Safety (Public Protection Orders) Act 2014, s 7(1)(e).

¹² Returning Offenders (Management and Information) Act 2015, s 32(1)(b). The person must also meet the criteria in s 17(1) for a returning prisoner except that he or she is returning or has returned more than 6 months after his or her release from custody.

- 9.14 If the criteria are met, the court may then impose release conditions if satisfied that they are necessary to facilitate the person's rehabilitation and reintegration or to reduce the risk of reoffending.¹³
- 9.15 The Parole Act and PPO Act provide that a person is eligible for an ESO or a PPO if they are a person to whom the criteria in section 32 of the Returning Offenders Act applies¹⁴ and they are still subject to release conditions imposed under the Returning Offenders Act.¹⁵
- 9.16 There is, however, an important difference. The PPO Act includes the additional requirement that the offending committed overseas would come within the description of a qualifying offence under the PPO Act if it had been committed in Aotearoa New Zealand.¹⁶ In contrast, a person can be eligible for an ESO whether or not the offending committed overseas would be qualifying offending under the ESO legislation.

Other eligibility on the basis of overseas offending

- 9.17 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 offence¹⁷ overseas and they:¹⁸
- (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.
- 9.18 These provisions overlap with eligibility that is determined by the Returning Offenders Act. It is likely that, if a person meets these criteria, they also meet the criteria to be a returning prisoner. This category of eligibility was in place before the Returning Offenders Act was enacted.

ISSUE

- 9.19 Most pathways to eligibility for an ESO or a PPO require a returning offender 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. However, as noted above, the current law provides that an ESO may also be imposed where overseas offending is not a qualifying offence if:¹⁹

¹³ Returning Offenders (Management and Information) Act 2015, s 33(2).

¹⁴ Parole Act 2002, s 107C(1)(d); and Public Safety (Public Protection Orders) Act 2014, s 7(e)(ii)(B).

¹⁵ Parole Act 2002, s 107F(1)(d); and Public Safety (Public Protection Orders) Act 2014, s 7(1)(e)(iii).

¹⁶ Public Safety (Public Protection Orders) Act 2014, s 7(e)(ii)(B).

¹⁷ 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.

¹⁸ Parole Act 2002, s 107C(1)(b); and Public Safety (Public Protection Orders) Act 2014, s 7(1)(d).

¹⁹ Parole Act 2002, s 107C(1)(d); and Returning Offenders (Management and Information) Act 2015, s 32.

- (a) the person is returning or has returned to Aotearoa New Zealand more than six months after release from custody;
 - (b) the person has been convicted of an offence overseas that would be an imprisonable offence in Aotearoa New Zealand; and
 - (c) 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 In the Issues Paper, we observed that this is inconsistent with general eligibility for preventive measures, which requires conviction for a *qualifying* offence. We noted the lack of any policy or legislative materials that explain why the law does not require the overseas offending to fit the description of qualifying offending in Aotearoa New Zealand in respect of ESOs. Submitters on the Issues Paper agreed that eligibility for preventive measures without conviction for a qualifying offence is inappropriate. 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.²⁰
- 9.21 We also considered that the current legislation 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.²¹

RESULTS OF CONSULTATION

- 9.22 In the Preferred Approach Paper, we proposed that, in all circumstances, overseas offending should only give rise to eligibility for a preventive measure if the offending would come within the description of a qualifying offence if it had been committed in Aotearoa New Zealand.²²
- 9.23 Some submitters who addressed the proposals agreed without further comment.²³ Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) reiterated concerns expressed at the Issues Paper stage about eligibility based on overseas convictions that may be imposed by a justice system “with different processes and protections than New Zealand”. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service agreed with the proposal but shared similar concerns to the NZLS. The South Auckland Bar Association said it opposed the application of preventive measures to returning offenders due to concerns about “breaches of the Bill of Rights, lack of certainty of sentence, and lack of support and resources available”.

²⁰ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [9.28].

²¹ 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].

²² Preferred Approach Paper, P18.

²³ Bond Trust, Myra Crawford-Smith.

RECOMMENDATION

R22

A person convicted of an offence overseas should be 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.

9.24 We recommend that people returning to Aotearoa New Zealand who have committed offences overseas should continue to be eligible for preventive measures if certain criteria are met. This eligibility is necessary to address the risk posed by a small number of returning offenders for whom a preventive measure may be justified.²⁴ Most submitters in consultation agreed.

9.25 Our recommendation adopts the approach from the PPO Act by requiring consistency between the overseas offence and the qualifying offences under the new Act. In Chapter 8, we recommend that a person must have been convicted of a qualifying offence in order to be eligible for preventive measures. The new Act should, therefore, require that the person's offending overseas would come within the description of a qualifying offence under the new Act if it had been committed in Aotearoa New Zealand. This ensures that all eligibility is based on conviction for offending that is equivalent to a qualifying offence. Submitters supported this approach.

9.26 Minor consequential amendments to the Returning Offenders Act will be required to ensure consistency with the language of the new Act. 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 will repeal those measures, an amended provision should refer to preventive measures under the new Act instead.

²⁴ Ministry of Justice *Regulatory Impact Statement: Management of offenders returning to New Zealand* (October 2015) at 3.

9.27 Some submitters were concerned about eligibility based on a conviction from an overseas jurisdiction due to other countries having different criminal justice processes or lesser protections for defendants than those that apply in Aotearoa New Zealand. We note that the fact a person has committed a qualifying offence overseas is only the threshold for eligibility. Conviction does not, on its own, lead to imposition of a preventive measure. The application of the legislative tests will ensure that preventive measures are appropriately imposed, taking into account the individual's previous offending and the level of risk they pose.

Procedural problems with timing and difficulty obtaining information

9.28 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 noted concerns heard during our preliminary engagement that it can be difficult to access the information needed from overseas jurisdictions within this timeframe.²⁵ Extending the timeframe could facilitate more extensive gathering of information held overseas on which to base and defend an application for a preventive measure. On the other hand, extending the timeframe would create uncertainty for people about whether they would be subject to restrictions.

9.29 In the Issues Paper, we explained that the vast majority of returning offenders under the Returning Offenders Act arrive from Australia.²⁶ Processes and formal information-sharing agreements are already in place so that New Zealand government departments and agencies can coordinate with Australian authorities.²⁷ 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.

9.30 Most submitters to the Issues Paper said reform was unnecessary.²⁸ They thought 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.

9.31 Accordingly, we did not make any proposals regarding this issue in the Preferred Approach Paper. Although feedback confirmed that there are some practical difficulties with the current approach, there was no support for addressing them through statute. The balance of feedback also affirmed our view that a six-month time limit to apply for a preventive measure strikes an appropriate balance between administrative efficiency and providing certainty for returnees.²⁹ We therefore conclude that the procedural problems should not be addressed under the new Act and make no recommendations.

²⁵ Issues Paper at [7.27]–[7.30].

²⁶ 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].

²⁷ Ministry of Justice “Submission to the Justice Committee on the Statutory Review of the Returning Offenders (Management and Information) Act 2015” at [32]–[40].

²⁸ Preferred Approach Paper at [9.29].

²⁹ Bond Trust expressed a preference that the six-month period to make an application for a preventive measure once a person returns to Aotearoa New Zealand should be extended to 12 months.

PART 4:

IMPOSING PREVENTIVE MEASURES



CHAPTER 10

Legislative tests for imposing preventive measures

INTRODUCTION

- 10.1 In this chapter, we consider what tests the courts should apply when determining whether to impose a preventive measure. We examine issues with the current tests for imposing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs). We conclude that significant reform to the legislative tests is required to respond to these issues. Our recommendations address the following:
- (a) Which court should have jurisdiction for determining applications for preventive measures. We recommend that, under the new Act, te Kōti Matua | High Court should have first instance jurisdiction to determine applications for residential preventive supervision and secure preventive detention and te Kōti-ā-Rohe | District Court should have first instance jurisdiction to determine applications for community preventive supervision. Applications should originate from the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive).
 - (b) What test the courts should apply. We recommend that the new Act should contain a single set of legislative tests to determine which preventive measure should be imposed, along with statutory guidance on the factors to be taken into account in applying those tests.
 - (c) Whether the courts should continue to have the power to impose a preventive measure on an interim basis. We recommend that they should when the primary legislative tests have been made out on the available evidence.

CURRENT LAW

- 10.2 The legislation governing preventive detention, ESOs and PPOs has different tests to determine whether a court should impose each preventive measure.

Preventive detention

- 10.3 At sentencing for a qualifying offence, the High Court may, on application of the prosecutor or on its own motion, impose a sentence of preventive detention.¹
- 10.4 The court determines whether to impose preventive detention based on the tests in section 87 of the Sentencing Act 2002. 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 expiry date of their determinate sentence. In making that assessment, the court must take into account the matters set out in section 87(4):
- (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.
 - (e) The principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.
- 10.5 When taking into account the principle that a lengthy determinate sentence is preferable, the court will also consider the availability of an ESO and whether it would provide adequate protection for the public.² Te Kōti Pira | Court of Appeal has explained that those seeking preventive detention must demonstrate why a less restrictive option would be insufficient.³ 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.⁴
- 10.6 A person subject to preventive detention will remain in prison unless they are granted release on parole at the direction of the New Zealand Parole Board (Parole Board). Upon release, they will be subject to both standard conditions and any special conditions the Parole Board imposes.⁵ The principles in section 7(2) of the Parole Act 2002 guide how the Parole Board decides to set special conditions. They include 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

- 10.7 The chief executive may apply to the “sentencing court” for an ESO in respect of an eligible offender.⁶ The sentencing court is the High Court or the District Court, depending on which court most recently imposed a sentence of imprisonment on the offender in

¹ Sentencing Act 2002, s 87(3).

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

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

⁴ *T (CA502/2018) v R* [2022] NZCA 83 at [30]–[31].

⁵ Parole Act 2002, ss 14–15. Section 15(2) sets out the aims special conditions must have in order to be imposed and s 15(3) sets out the kinds of conditions that may be imposed as special conditions.

⁶ Parole Act 2002, s 107F(1).

- respect of a relevant offence.⁷ ESOs are post-sentence orders and so decisions to impose them are made at the end of a sentence.
- 10.8 The sentencing court determines whether to impose an ESO by applying the test set out in section 107I of the Parole Act.
- 10.9 Section 107I(2) of the Parole Act provides that the sentencing 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.
- 10.10 Section 107IAA provides that the sentencing court may determine that a person is at high risk of committing future sexual offending, or a very high risk of committing future violent offending, “only if it is satisfied” the person displays certain traits and behavioural characteristics. In respect of sexual offending, these are that the person:⁸
- (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 or 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.
- 10.11 In respect of violent offending, the characteristics are that the person:⁹
- (a) has a severe disturbance in behavioural functioning established by evidence of each of the following characteristics:
 - (i) intense drive, desires, or urges to commit acts of violence;
 - (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.
- 10.12 Once an ESO is imposed on a person, they become subject to standard ESO conditions.¹⁰ In addition, once the sentencing court has imposed the ESO, the Parole Board can impose special conditions on the person.¹¹

⁷ Parole Act 2002, s 107D.

⁸ Parole Act 2002, s 107IAA(1).

⁹ Parole Act 2002, s 107IAA(2).

¹⁰ Parole Act 2002, ss 107J and 107JA.

¹¹ Parole Act 2002, ss 15, 107J and 107K.

Public protection orders

- 10.13 The chief executive may apply to the High Court for a PPO against an eligible person. Like ESOs, PPOs are post-sentence orders and so decisions to impose them are made at the end of a sentence or if the person is already subject to an ESO with certain conditions.¹²
- 10.14 The court decides whether to impose a PPO based on the tests in section 13(1) of the Public Safety (Public Protection Orders) Act 2014 (PPO Act).
- 10.15 Under these tests, the court may make a PPO if it is satisfied “there is a very high risk of imminent serious sexual or violent offending” when the person is released from prison into the community or, in any other case, is left unsupervised. The Act defines “imminent” to mean the person is expected to commit an offence as soon as they have a “suitable opportunity to do so”.¹³
- 10.16 Like the tests for imposing ESOs, the court can only impose a PPO if satisfied that the person displays certain traits and behavioural characteristics. The court may not make a finding that the person presents a very high risk of imminent serious sexual or violent offending unless it is satisfied the person exhibits a “severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics”:¹⁴
- (a) an intense drive or urge to commit a particular form of offending;
 - (b) limited self-regulatory capacity, evidence 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.¹⁵

APPLICATIONS FOR PREVENTIVE MEASURES

- 10.18 Under the current law, different courts hear and determine applications for all preventive measures. Who applies for preventive measures and when applications are made are governed by different procedures. A question arises as to who should be responsible for applying for preventive measures under the new Act and to which court applications should be made.

¹² Public Safety (Public Protection Orders) Act 2014, s 7(1).

¹³ Public Safety (Public Protection Orders) Act 2014, s 3.

¹⁴ Public Safety (Public Protection Orders) Act 2014, s 13(2).

¹⁵ *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].

Results of consultation

- 10.19 In the Preferred Approach Paper, we presented two proposals.¹⁶ First, we proposed that the chief executive should be responsible for applying for an order to impose a preventive measure. Second, we proposed that the High Court should have first instance jurisdiction for determining applications for residential preventive supervision and secure preventive detention and the District Court for applications for community preventive supervision. Where the chief executive applies for preventive measures in the alternative, they should apply to the court with the first instance jurisdiction for the most restrictive measure sought, namely the High Court. These proposals were broadly consistent with the approach under the current law.
- 10.20 Most submitters who responded to these proposals supported the continuation of the approach that applies to ESOs and PPOs whereby the chief executive is responsible for applying for a preventive measure.¹⁷ The New Zealand Council for Civil Liberties said the proposal appropriately kept responsibility for such serious measures at “the highest level of the Department”.
- 10.21 Some submitters made additional comments. The Bond Trust suggested that the Attorney-General (on behalf of Ngā Pirihimana Aotearoa | New Zealand Police) and Oranga Tamariki should also be able to apply to the court for an order imposing a preventive measure. The Law Association of New Zealand (TLANZ) agreed with our proposal but also thought the Crown should have greater involvement in proceedings.
- 10.22 Only the South Auckland Bar Association opposed our proposed approach. It considered that applications for preventive measures should only be sought by the Crown and imposed by a judicial officer at the time of sentencing.
- 10.23 Submitters were more divided on the proposal to split first instance jurisdiction between the High Court and the District Court. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and TLANZ were supportive. However, the Public Defence Service suggested consideration be given to whether it is appropriate for the District Court to hear a community preventive supervision application if the person was originally sentenced in the High Court or whether, in these circumstances, jurisdiction should stay with the High Court. The South Auckland Bar Association was also supportive, on the basis of its submission to the previous proposal, that the application come from the Crown, not Ara Poutama Aotearoa | Department of Corrections (Ara Poutama).
- 10.24 Some submitters disagreed with the proposal. The Bond Trust considered that the High Court should have sole jurisdiction to determine all preventive measures. Another submitter suggested that applications should be considered by a specially created panel because, given the highly restrictive conditions of preventive measures, it was not appropriate for the decision to rest only in the hands of one person.

¹⁶ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P19 and P20.

¹⁷ Bond Trust, Myra Crawford-Smith, 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 of New Zealand.

Recommendations

R23

All proceedings for the imposition of a preventive measure should commence by application to the court from the chief executive of Ara Poutama Aotearoa | Department of Corrections for an order for a specific preventive measure.

- 10.25 We recommend that the chief executive should be responsible for applying to the court for an order imposing a preventive measure. This represents a continuation of the current approach under ESOs and PPOs. Submitters to the Preferred Approach Paper generally agreed with this approach.
- 10.26 This follows from our recommendation that preventive measures should be administered as a single, post-sentence regime that applies after someone has completed a determinate prison sentence. At the end of a prison sentence, the chief executive will be best placed to make an initial assessment of the risk posed by someone who would otherwise be released and, if necessary, initiate the application process. We do not consider the same can be said of alternatives suggested by submitters — for example, the Attorney-General or Oranga Tamariki.¹⁸
- 10.27 Additionally, a requirement that all applications are commenced by the chief executive creates a single point of entry into the preventive regime, which further streamlines our recommended approach and ensures consistency in the new Act's operation. It is for this reason that we do not agree with the views of TLANZ and the South Auckland Bar Association that Crown prosecutors should more appropriately be responsible for seeking a preventive measure and initiating an application for it.

R24

Jurisdiction to hear and determine applications for preventive measures should be as follows:

- a. Te Kōti-ā-Rōhe | District Court should have first instance jurisdiction to determine applications for community preventive supervision.
- b. Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for residential preventive supervision and secure preventive detention.
- c. Where the chief executive of Ara Poutama Aotearoa | Department of Corrections applies for preventive measures in the alternative, they should apply to te Kōti Matua | High Court.

- 10.28 As we conclude in Chapter 4, preventive measures should be consolidated into a single statute to be administered by the courts. Following this, we recommend that jurisdiction should be split between the District Court for community preventive supervision and the High Court for residential preventive supervision and secure preventive detention. This resembles the arrangements under the current law where the High Court has exclusive jurisdiction to impose preventive detention and PPOs. We consider it is appropriate for

¹⁸ We also note our recommendation in Chapter 7 about the age of eligibility for a preventive measure that would necessarily exclude Oranga Tamariki from being in a position to make an application for a preventive measure.

the High Court to continue to exercise jurisdiction over residential preventive supervision and secure preventive detention given the severity of restrictions these measures can impose. Likewise, we note that, although jurisdiction for imposing ESOs currently rests with whichever court sentenced the person for their qualifying offending,¹⁹ the majority (68 per cent) of applications are heard in the District Court.²⁰ We consider, therefore, that it is appropriate for the District Court to continue to hear and determine applications for community preventive supervision.

- 10.29 As set out above, there was broad agreement for this split among submitters. The Bond Trust, however, suggested that the High Court should have sole jurisdiction to determine all preventive measures. We did consider an approach whereby only one court would hear and determine applications for all preventive measures but did not pursue this approach following feedback from stakeholders about the practicalities of such an arrangement. We heard concerns that this would have huge workload implications for whichever court was chosen and affect the ability for applications to be heard and determined in a timely fashion.
- 10.30 Finally, we note feedback from the Public Defence Service about whether it will be appropriate for the District Court to hear and determine an application for community preventive supervision if the person was originally sentenced in the High Court or whether, in those circumstances, jurisdiction should remain with the High Court. As we have stated throughout this Report, we consider the imposition of a preventive measure to be separate from a person's previous offending — that is, the previous offending is only the trigger, rather than the justification, for consideration of a preventive measure. It is the assessment of risk of future offending and the nature of the measure needed to address that risk that are relevant to consideration of a preventive measure. On this basis, we do not consider that the original sentencing court should remain connected to the imposition of a preventive measure.
- 10.31 Lastly, our recommendation envisages a situation where the chief executive seeks preventive measures in the alternative (for example, the application is made for residential preventive supervision or, if the court declines that application, community preventive supervision). We recommend that the High Court, as the court with jurisdiction over the more restrictive measure, should receive and determine the application. We did not receive any feedback from submitters on this approach.

¹⁹ 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.

²⁰ 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).

LEGISLATIVE TESTS FOR IMPOSING A PREVENTIVE MEASURE

Issues

The legislative tests may not target the appropriate level of risk

- 10.32 As noted above, the tests for preventive detention, ESOs and PPOs adopt different approaches to the likelihood of serious reoffending. The test for preventive detention requires the court to be satisfied that the person is simply “likely” to commit a further qualifying offence, while the tests for ESOs and PPOs require the risk that a person reoffends to be “high” or “very high”.
- 10.33 There is a further differentiation of risk within the test for ESOs, which sets different thresholds for sexual and violent offending. To impose an ESO, the court must be satisfied there is a “high risk” the person will commit a future relevant sexual offence but a “very high risk” the person will commit a future relevant violent offence.²¹
- 10.34 In the Issues Paper, we questioned whether these tests were focused on the appropriate likelihood of serious reoffending.²² We also identified a lack of coherence across the tests in that the different levels of likelihood expressed in the tests do not correlate with the relative severity of the preventive measures — that is, preventive detention has the lowest threshold for imposition but is the most restrictive measure.²³
- 10.35 Submitters who responded to the Issues Paper generally favoured a consistent threshold for all measures.²⁴ Many commented specifically on the difficulty of rationalising the different thresholds for the risks of further sexual or violent offending.²⁵

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

- 10.36 In the Issues Paper, we observed that the courts and international bodies have created several additional features of the test that reflect human rights law but that are not expressed in the legislative tests.²⁶

²¹ Parole Act 2002, s 107(2)(b). This disparity may explain, in part, why a very high proportion of ESOs are imposed for sexual offending rather than violent offending: as we note in Chapter 2, of the 286 people subject to an ESO as at 30 June 2024, the qualifying offence for 231 individuals (81 per cent) was sexual offending (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 from year ending June 2024 (11 October 2024)). Another reason may be that, prior to 2014, violent offending did not qualify someone for an ESO.

²² 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 [8.12]–[8.18].

²³ Issues Paper at [8.19(b)].

²⁴ Preferred Approach Paper at [10.48].

²⁵ Preferred Approach Paper at [10.49].

²⁶ Issues Paper at [8.23]–[8.26]. We also observed in the Issues Paper and the Preferred Approach Paper that, following the Kōti Pira | Court of Appeal's decision in *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484, the courts established that an ESO or a PPO should only be imposed if it is a “strongly justified” limit on the person's right to protection against second punishment. See Issues Paper at [8.8] and Preferred Approach Paper at [10.26]. This approach reflected the courts' understanding that, if the statutory criteria for the imposition of an ESO or a PPO are met, the courts hold a residual discretion as to whether to impose the order. On appeal, the Kōti Mana Nui | Supreme

- 10.37 For preventive detention, international human rights jurisprudence under the International Covenant on Civil and Political Rights provides that preventive detention should only be imposed as a “last resort” to address reoffending risk.²⁷ Although the domestic courts have been clear that preventive detention is not a sentence of last resort,²⁸ 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. The courts have adopted an approach whereby preventive detention will not be imposed if a person’s risk of reoffending can be adequately managed through less restrictive means — normally through a determinate sentence and an ESO.²⁹ The Sentencing Act, however, only refers to a lengthy determinate sentence being preferable and does not explicitly state that an ESO should be imposed over preventive detention if it can manage a person’s risk.³⁰
- 10.38 In respect of PPOs, in *Chisnall v Chief Executive of the Department of Corrections*, Elias CJ explained that, if less restrictive options can be put in place without detention that would address the very high risk of imminent offending, a PPO ought not to be made.³¹ Her Honour explained that this approach would be consistent with protections contained in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights), including sections 22 (protection against arbitrary detention) and 26 (protections against retrospective and second penalties). Again, this additional test is not expressed in the PPO Act.³²
- 10.39 Te Kōti Mana Nui | Supreme Court has emphasised that it is imperative that the preventive regimes achieve public protection by the least restrictive means possible.³³ The Court considered that the ESO and PPO legislation can be read, consistent with section 5 of the NZ Bill of Rights, as requiring that the restrictions imposed must not be greater than necessary.³⁴
- 10.40 In the Issues Paper, we observed that, as a general principle, the law should be comprehensive, clear and accessible, particularly if it involves coercive powers that can

Court held in *Attorney-General v Chisnall* [2024] NZSC 178 at [95]–[97] that the ESO and PPO regimes are not discretionary. Rather, if the statutory criteria are made out, it is hard to conceive of a situation in which the order will not be made. We do not expect, therefore, that the courts will continue to approach ESO and PPO cases by determining, in addition to the statutory criteria, whether the order constitutes a strongly justified limit on the person’s rights.

²⁷ 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]; and *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3].

²⁸ *R v C* [2003] 1 NZLR 30 (CA) at [6].

²⁹ *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].

³⁰ Sentencing Act 2002, s 87(4)(e).

³¹ *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].

³² 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 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].

³³ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

³⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [239].

limit human rights.³⁵ We expressed concern that this was not the case currently due to existing legislation not fully expressing the human rights considerations the courts weigh in applying the tests for imposition. Several submitters responding to this issue supported the inclusion of the relevant human rights considerations within the legislative tests. Some others did not see the current approach as causing significant problems in practice and so did not see a need for amendment.³⁶

Temporal elements of the legislative tests

- 10.41 As noted above, the tests for preventive detention and PPOs both incorporate a temporal element. For preventive detention, the court must be satisfied that the person is likely to commit another offence if they are released at the sentence expiry date. For a PPO, the court must be satisfied that the person is at very high risk of “imminent” reoffending if the person is released from prison or otherwise left unsupervised. In the Issues Paper, we also observed that the PPO Act’s definition of “imminent” has a circumstantial element to it by requiring the person to be at risk of offending as soon as they have a “suitable opportunity”. It is not clear what is meant by “suitable opportunity” and whether this reflects reoffending patterns and risks.³⁷ The High Court has held, however, that the likelihood of reoffending occurring must almost border on being inevitable for a PPO to be justified under the NZ Bill of Rights.³⁸
- 10.42 Although no similar element exists in relation to ESOs, the Court of Appeal has observed that the fact that an ESO may be made for up to 10 years contemplates the risk may relate to offending within that timeframe.³⁹
- 10.43 In the Issues Paper, we noted that studies on recidivism identify time periods in which people who are most at risk of reoffending can be expected to do so.⁴⁰ Most literature considers that a period of five to seven years is most appropriate for sexual offending and two to five years for violent offending.⁴¹ Risk assessments and tools devised for the purpose of assessing risk of reoffending are based on these periods, and are not suited to assess risk beyond those relevant periods. We expressed a preliminary view that it was preferable for the court’s inquiry, and the resulting preventive measure, to better reflect risk assessment best practice. Submitters to the Issues Paper generally agreed that predictions of risk well into the future are problematic.⁴²

³⁵ Issues Paper at [8.26], citing 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.

³⁶ Preferred Approach Paper at [10.51].

³⁷ Issues Paper at [8.50].

³⁸ *Chief Executive of the Department of Corrections v Douglas* [2023] NZHC 1085 at [150].

³⁹ *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [26].

⁴⁰ Issues Paper at [8.48].

⁴¹ Lucy Moore *Literature Review – Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 17.

⁴² Preferred Approach Paper at [10.57]–[10.58].

Scope of further qualifying offences too broad

10.44 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 serious enough to justify imposing a preventive measure.⁴³ We identified indecent assault, incest, bestiality, and attempts and conspiracies. We discuss this issue in Chapter 8.

Results of consultation

10.45 In the Preferred Approach Paper, we concluded that significant revisions to the legislative tests were needed to address the issues identified above. We made several proposals for how this should be done.

10.46 We proposed a single set of tests to apply to the imposition of all preventive measures under the new Act.⁴⁴ The new set of tests comprised three parts and would allow a court to impose a preventive measure only if satisfied that:⁴⁵

- (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) the preventive measure is the least restrictive measure adequate to address that risk; and
- (c) the preventive measure only limits the person's rights and freedoms (as affirmed by the NZ Bill of Rights) in ways that can be justified by the nature and extent of the risk the person poses.

10.47 Submitters to the Preferred Approach Paper were broadly supportive of the proposed new tests.⁴⁶ Both the New Zealand Law Society (NZLS) and criminal lawyers from Te Tari Ture o te Karauna | Crown Law supported the introduction of a single and streamlined test for imposition.

10.48 Some submitters commented on specific elements of the proposed tests. The Public Defence Service and criminal lawyers from Crown Law supported the requirement that the court be "satisfied" that the tests are met. The criminal lawyers from Crown Law commented that this clearly implies that this is a question of judicial evaluation rather than a standard of proof.

10.49 Most submitters' comments were aimed at the element of the proposed test relating to the likelihood of reoffending. Some submitters agreed with our proposal for the person to be assessed as being at high risk of committing a further qualifying offence in the next three years.⁴⁷ The criminal lawyers from Crown Law disagreed and considered the three-year period "arbitrary". The lawyers, however, had mixed views about whether the law should specify a time period at all. They suggested an alternative could be not to specify a time period but to use the three-yearly review mechanism (discussed in Chapter 18) to ensure that people do not stay on a measure for longer than is necessary. In the

⁴³ Issues Paper at [8.20]–[8.21].

⁴⁴ Preferred Approach Paper at [10.64].

⁴⁵ Preferred Approach Paper, P21 and [10.69]–[10.71].

⁴⁶ Bond Trust, Myra Crawford-Smith, New Zealand Council for Civil Liberties, criminal lawyers from Te Tari Ture o te Karauna | Crown Law, South Auckland Bar Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

⁴⁷ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

alternative, they suggested that the time period of reoffending risk could be set at five years but also to review measures every three years.

- 10.50 Both the Public Defence Service and the criminal lawyers from Crown Law expressed concern about the standard of “high risk” applying to all future qualifying offending (sexual and violent offences). They observed that this is a lesser standard than the current law, which provides that, for the imposition of ESOs and PPOs, violent offenders must pose a “very high risk” of reoffending. The submitters were concerned that this reduction in standard would dramatically increase the number of violent offenders eligible for a preventive measure. This is because more violent offences than sexual offences are tried and the nature of violent reoffending differs from sexual offending.
- 10.51 These submitters said there were practical matters that explain why violent offenders may be more likely than sexual offenders to be deemed to be “high risk”. Violent offenders are more likely to serve shorter sentences and may spend much of that time on remand or be close to time served at the time of imposition of the preventive measure. This means they may miss out on rehabilitative opportunities and so be judged to be at greater risk of reoffending.
- 10.52 Both the Public Defence Service and the criminal lawyers from Crown Law considered the lower “high risk” threshold to be problematic due to wider systemic issues. Many violent offenders are the product of their circumstances and environments, and this approach would be likely to capture far greater numbers of Māori, Pacific peoples and those in more disadvantaged socio-economic groups, so exacerbating inequality and the overrepresentation of these groups in preventive regimes.
- 10.53 On the proposal to incorporate reference to the NZ Bill of Rights in the test, the Public Defence Service agreed. It was concerned, however, that this element of the proposed test would be responsible for excluding the imposition of unjustified measures when other elements of the regime could take on this role such as excluding qualifying offences of low levels of severity.

Recommendations

R25

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.

R26

In deciding whether the tests in R25 are met, the court should take into account:

- a. any health assessor reports before the court;
- b. whether the person has, or has had, a pattern of serious offending;
- c. any efforts made by the person to address the cause or causes of all or any of those offences;
- d. whether and, if so, how a preventive measure imposed can be administered by Ara Poutama Aotearoa | Department of Corrections (or on its behalf);
- e. any other possible preventive measure that the court could impose that would comply with those tests; and
- f. any other information relevant to whether the tests in R25 are met.

10.54 As discussed in Part 1 of this Report, we recommend 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. The legislation should facilitate the imposition of the least restrictive measure needed to ensure adequate community safety.

10.55 To achieve this, we recommend a single set of legislative tests that the court should 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 offence;
- (b) is the least restrictive necessary in the circumstances to address that risk; and
- (c) only limits the eligible person's rights and freedoms affirmed under the NZ Bill of Rights in ways that can be justified.

10.56 There was broad support for this general approach from submitters who responded to the proposal in the Preferred Approach Paper.

10.57 We discuss each of the tests separately below. In summary, the tests are intended to direct the court to which measure would best achieve the objective of community safety while imposing only justified limits on a person's rights and freedoms.

Standard of proof

10.58 Our recommendation requires the court to be "satisfied" that the tests are met. This adopts the current test for preventive detention under the Sentencing Act.⁴⁸ It is intended to continue the law as settled in *R v Leitch* that the term "satisfied" is inapt to import notions of the burden of proof and of setting a particular standard.⁴⁹ Rather, the court is

⁴⁸ Sentencing Act 2002, s 87(2)(c).

⁴⁹ *R v Leitch* [1998] NZLR 420 (CA) at 428.

required to “make up its mind” and come to a decision based on the evidence.⁵⁰ The submitters who commented on this approach supported it.⁵¹

First test – high risk of committing a further qualifying offence in the next three years

10.59 The first test is for the court to be satisfied that there is a high risk that the person will commit a further qualifying offence within the next three years if the preventive measure is not imposed on them.

10.60 Our recommendation is based on the concept of “risk” rather than “likelihood” (as compared to the current test for preventive detention, which requires the court to be satisfied the person is “likely” to commit another qualifying offence).⁵² It also differs from the current tests for ESOs and PPOs, which, although they use the language of risk, require that evaluation to be made with reference to the existence of particular traits and behavioural characteristics.⁵³ We explain further the reasons for our departure from this approach below.

10.61 We prefer an approach based on risk for the following reasons:

- (a) First, the risk a person will reoffend calls for the assessment of a 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.⁵⁴ Assessments looking at the interplay of these factors are, in our view, best understood through the concept of risk.⁵⁵ Conversely, we do not think an inquiry that recognises that reoffending is contingent on individualised risk factors lends itself to assessments expressed in terms of “likelihood”.
- (b) Second, even where the legislation does use the word “likely”, the courts still 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”.⁵⁶ 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

⁵⁰ *R v Leitch* [1998] NZLR 420 (CA) at 428.

⁵¹ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, criminal lawyers from Te Tari Ture o te Karauna | Crown Law.

⁵² Sentencing Act 2002, s 87(2)(c).

⁵³ Parole Act 2002, s 107IAA; and Public Safety (Public Protection Orders) Act 2014, s 13(2).

⁵⁴ Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 98–99.

⁵⁵ 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.”

⁵⁶ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [11].

sensibly ignored having regard to the nature and gravity of the likely re-offending”.⁵⁷ 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”.⁵⁸

- 10.62 Our recommendation adopts a threshold of “high risk” of further qualifying offending if the person is not subject to the preventive measure being sought. This again differs from the current law for ESOs, which adopts different thresholds of risk — “high risk” for sexual offending and “very high risk” for violent offending. Our recommendation will mean that, under the new Act, there is a single, consistent threshold for all types of offending and all types of preventive measures. We prefer this approach over linking risk to either particular offending or a particular preventive measure. A single threshold avoids any suggestion that the risk of some types of reoffending are seen as more or less tolerable than others. All comparable jurisdictions we have researched apply the same threshold to all offending types.⁵⁹ Most submitters to the Preferred Approach Paper were also supportive of a consistent threshold.⁶⁰
- 10.63 We conclude that a threshold of “high risk” is preferable to a threshold of “very high risk”.⁶¹ This is for the following reasons:
- (a) First, we consider a threshold of “high risk” is appropriate given the seriousness of the harm to the community posed by reoffending. As we explain in Chapter 8, we consider that the further qualifying offences we have recommended for the new Act are sufficiently serious to justify their inclusion. We do not think that a higher threshold of “very high risk” is necessary or appropriate to further justify the imposition of a preventive measure.
 - (b) Second, we understand that, in clinical terms, there is little differentiation between “high risk” and “very high risk”. Not all actuarial assessments include a “very high risk” category. In the absence of established clinical terms, it is likely that any distinction between “high risk” and “very high risk” will be determined by the courts through case law, as it has been under the current law, and result in the same people being determined as meeting whichever threshold is used.
- 10.64 Although some submitters commented that the lower threshold of “high risk” would have a widening effect on the regime by bringing a greater number of violent offenders within scope, we do not share that concern. As an initial observation, it is very difficult to speculate on how each element of the recommended tests will correspond to the elements of the tests in the current law. This is because they are formulated in such different ways. For instance, the current tests for ESOs and PPOs make a finding of risk contingent on the person displaying certain behavioural traits and characteristics that, as discussed further below, do not feature in the new tests.

⁵⁷ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [11].

⁵⁸ *B v R* [2013] NZCA 594 at [14].

⁵⁹ We have examined the law in England and Wales, the Australian jurisdictions and Canada.

⁶⁰ Preferred Approach Paper at [10.48].

⁶¹ 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”.

- 10.65 Ultimately, we do not think that the new regime will be materially widened by adopting a “high risk” as opposed to a “very high risk” threshold. This is because of the second and third recommended tests. They require a court to decline an application when, even if the person is at high risk of reoffending, the nature and extent of that risk could be addressed by less restrictive means or does not otherwise justify the preventive measure sought.
- 10.66 The tests work together to ensure that the imposed measure is appropriate in each case. The role of the first test is as an initial criterion based on the minimum threshold of “high risk”, but the second and third tests have a much more instrumental role in determining whether that risk is of sufficient nature and extent for a preventive measure to be imposed. We expect, for example, that only reoffending risks of the most serious nature and extent will warrant secure preventive detention. As regards violent offending, the third test would enable a court to decline a preventive measure if it considered that the predicted future offending was not of the nature and extent to warrant the measure. We discuss the second and third tests further below.
- 10.67 The recommended first test includes a temporal element in that the court must be satisfied the person poses a high risk of committing a further qualifying offence in the next three years. We consider a set time period is preferable to the current “imminence” test under the PPO Act because, as we have explained above, a test linked to the first suitable opportunity to reoffend may not accurately reflect reoffending behaviour.
- 10.68 We disagree with the concern of some submitters that three years is arbitrary. We have chosen this period because risk of reoffending can be accurately predicted within it, as opposed to longer or indefinite timeframes. It is also linked with the three-year interval at which we recommend the court is required to review a preventive measure. As we explain further in Chapter 18, this three-year period has been chosen as a midway point between the current five-year review intervals for PPOs and the 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.

Second test — the preventive measure is the least restrictive measure

- 10.69 The second test is that the court should be satisfied that the preventive measure sought is the least restrictive measure adequate to address the high risk that a person will reoffend. By “least restrictive”, we mean broadly that the preventive measure interferes with the person’s choices and freedoms to the least extent necessary.
- 10.70 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.⁶²
- 10.71 The courts are, to an extent, already attempting to apply the least restrictive measure test. 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. The Supreme Court in *Attorney-General v Chisnall* emphasised that the restrictions imposed under a post-sentence measure must be the least restrictive possible in order to justify limitations on the human rights

⁶² *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; and *Attorney-General v Chisnall* [2024] NZSC 178 at [195] and [197].

protection against second punishment.⁶³ In our view, it is desirable that this requirement be provided for within the tests to make the primary legislation as clear and comprehensive as possible. Submitters agreed.

- 10.72 The preventive measures of community preventive supervision and residential preventive supervision should consist of standard conditions and, if the court imposes any, special conditions. In determining whether these measures are the least restrictive to address the risks the person poses, the court will need to be satisfied the standard conditions and any additional special condition of the measure sought meet this test. We explain further below how the tests apply to the imposition of special conditions.

Third test – the preventive measure is justified

- 10.73 The third test 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 nevertheless be an unjustified intrusion on a person's rights and freedoms. The measure may be unjustified, for example, because the nature of the risks presented by the person does not justify the extent of the intrusion on the person's rights. For example, the further qualifying offending the person is at high risk of committing may be of a relatively low level of severity,⁶⁴ but it may be that the offending cannot be prevented other than through a more restrictive measure such as residential preventive supervision or secure preventive detention. In that case, the indefinite detention of the person might be considered disproportionate.
- 10.74 We have considered the point raised to us during consultation that the legislation should better define when a preventive measure would be an unjustified limitation on human rights, instead of leaving this determination to the court. For example, the Public Defence Service submitted that the regimes should simply not allow a person to be considered for residential preventive supervision or secure preventive detention for qualifying offending that is considered of relatively low severity.
- 10.75 We do not favour a more prescriptive approach in place of this recommended third test. A wide range of human rights are likely to be engaged by preventive measures in different ways in each case. For example, a measure might engage rights such as freedom of expression, freedom of association, freedom of movement and protection from second punishment. The extent these rights are engaged will depend on the circumstances of the individual, the nature of the risks they pose and the terms of the preventive measure sought. Different rights engage different values, and whether a preventive measure may be regarded as a justified limit also differs depending on the right engaged. It would be impractical for the legislation to attempt to guide the court on how to approach all these matters. Rather, these are issues better suited for determination by the court based on the circumstances of each case.

⁶³ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

⁶⁴ 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.

Factors for consideration

- 10.76 We recommend that, like the current test for preventive detention, the new Act should include a non-exhaustive list of matters the court must consider when applying the legislative tests. These are matters we anticipate will be relevant in nearly all cases.
- 10.77 Of particular importance is the first factor (a) that the court should be required to take into account any health assessor reports. The wording of this factor responds to feedback we received in consultation on the Preferred Approach Paper that the court should take into account any health assessor reports submitted by the respondent — not just those provided in support of the application.
- 10.78 We have also changed factor (b) from the proposal put forward in the Preferred Approach Paper. We had suggested that the court only take into account offending disclosed in a person's criminal record. Feedback we received in consultation suggested this is too narrow and that the court should be able to take into account all previous offending, even if the person was not convicted. We agree with this approach. The cases concerning preventive detention, and more recently in respect of ESOs, demonstrate that the courts accept that unproven offending should be taken into account in some instances, as it can be highly relevant to the assessment of the person's risk.⁶⁵
- 10.79 We expect, however, that the courts will apply safeguards to its treatment of unproven conduct to ensure a rights-consistent approach. Those safeguards should require that the court must:⁶⁶
- (a) have regard to cogent evidence that the unproven conduct occurred and approach the assessment of that evidence bearing in mind the seriousness of what is at stake for the person if the preventive measure is imposed;
 - (b) respect a jury verdict where there has been an acquittal in respect of that conduct; and
 - (c) provide an explanation of the basis on which the court is satisfied the offending took place.
- 10.80 We include in the list of factors a final matter of any other relevant information. This will give the court flexibility to consider any matter that may have a bearing on whether the three primary tests are satisfied. Some submitters to the Preferred Approach Paper suggested various matters that may be relevant and could be included in this list.⁶⁷ Because of this final catch-all factor, the court could take those matters into account without the list of factors becoming too burdensome to work through in each case.
- 10.81 Finally, we acknowledge the concerns raised by the NZLS in its submission that the court should consider how Ara Poutama will administer a preventive measure in practice. The NZLS suggested that people may be made subject to a more restrictive measure because Ara Poutama simply cannot administer a less restrictive measure owing to insufficient resources. In our view, this is not a reason to remove the factor. We consider it essential

⁶⁵ See for example *Lepper v R* [2016] NZCA 209 at [34]. A recent decision of te Kōti Mana Nui | Supreme Court affirms the potential relevance of unproven conduct. At the time of publication, this case is subject to publication restrictions.

⁶⁶ These safeguards were developed in a recent decision of te Kōti Mana Nui | Supreme Court relating to the imposition of an ESO. At the time of publication, this case is subject to publication restrictions.

⁶⁷ For example, criminal lawyers from Te Tari Ture o te Karauna | Crown Law suggested “conduct [and] compliance with their sentence” as a factor.

for the courts to understand how a preventive measure will operate in practice when considering if the three primary tests are satisfied. We do not intend this factor to be a licence to constrain resources. It is incumbent on the government to resource human rights-compliant approaches.

IMPOSITION OF SPECIAL CONDITIONS

Issues

- 10.82 There are several issues regarding the imposition of special conditions on people subject to preventive detention who have been released on parole and for people subject to ESOs.
- 10.83 First, under the current law governing ESOs, although the sentencing court makes the order to impose an ESO, the Parole Board will then set any special conditions applying to the ESO. There are concerns about the division of order-making and condition-setting responsibilities between the court and the Parole Board. In the Issues Paper, we explained that this approach necessitates multiple hearings concerning similar issues and the same evidence, creating unnecessary duplication.⁶⁸
- 10.84 We also commented on the different processes for challenging a court's decision in relation to an ESO (appeal to the Court of Appeal) and the Parole Board's decision in relation to special conditions for an ESO (judicial review). We identified two difficulties with this approach:⁶⁹
- (a) Judicial review is a civil process that many lawyers, though experienced in acting in relation to ESO matters, will not have the necessary expertise in or be approved for legal aid to represent their client.
 - (b) The two processes are aimed at very different considerations. Judicial review is limited to examining whether the decision was lawful and complied with standards contained in administrative law rather than looking at whether the decision was the correct one.
- 10.85 The Supreme Court in its decision *Attorney-General v Chisnall* said it was of concern that the special conditions of an ESO are set by the Parole Board rather than by a court.⁷⁰
- 10.86 Second, there is some uncertainty as to what tests the Parole Board should apply when imposing special conditions on a person subject to preventive detention.⁷¹ This issue was considered by the Court of Appeal in *Attorney-General v Grinder*.⁷² Mr Grinder was subject to preventive detention and had been released on parole. He argued that the Parole Board should only impose and maintain a special condition if, without it, the person would be an "undue risk" to the community.

⁶⁸ Issues Paper at [10.80]–[10.87].

⁶⁹ Issues Paper at [10.88]–[10.93].

⁷⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [240].

⁷¹ Preferred Approach Paper at [10.43]–[10.47].

⁷² *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760.

- 10.87 The Court held that the Parole Act requires that the Parole Board should apply an undue risk test only when making decisions about the release or recall of an offender.⁷³ In contrast, the terms of the Parole Act enable the Parole Board to impose special conditions when an offender is considered to pose a low risk of reoffending without them. The Court explained that special conditions can assist with stabilising the offender’s risk level or reducing the risk to negligible levels through the offender’s rehabilitation and reintegration.⁷⁴
- 10.88 The Court in *Grinder* also considered that an NZ Bill of Rights-consistent interpretation of the Parole Act does not require the Parole Board to be satisfied that special conditions are needed to avoid undue risk to the community.⁷⁵ Rather, there is a proportionality requirement 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”. This 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 that is inbuilt into the Parole Act.⁷⁶
- 10.89 The Court of Appeal’s decision in *Grinder* has been appealed to the Supreme Court and a decision is awaited.⁷⁷ Although the Courts’ decisions may help clarify the test to be applied to the imposition of special conditions, in our view, it would be desirable for the legislation to state the test more clearly.
- 10.90 Third, it is not clear whether or how section 7 of the Parole Act applies to ESOs. Section 7 sets out guiding principles that govern the Parole Board’s decisions. As highlighted in the *Grinder* proceeding, section 7(2)(a) sets out the important principle that “release conditions” should not be “more onerous, or last longer, than is consistent with the safety of the community”. The provision, however, refers only to “release conditions” but not to the conditions of extended supervision.⁷⁸ The requirements of the NZ Bill of Rights still apply when the Parole Board sets special conditions under an ESO.⁷⁹ Even so, it is odd that the mechanisms under the Parole Act for ensuring release conditions are reasonable and proportionate are not connected to ESOs.

Results of consultation

- 10.91 In the Preferred Approach Paper, we proposed that, when the court hears and determines an application for community preventive supervision or residential preventive supervision, the court should impose the preventive measure *and* special conditions. This means that the court should also apply the legislative tests to any special conditions that

⁷³ *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.

⁷⁴ *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [44].

⁷⁵ *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [51].

⁷⁶ *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [51].

⁷⁷ *Grinder v Attorney-General* [2024] NZSC 50 (leave judgment).

⁷⁸ Issues Paper at [10.75]–[10.79]. Section 107O(2) of the Parole Act 2002 states that certain sections of that 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 also 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 ss 107K and 15 of the Parole Act 2002. The Court did not refer to the guiding principles in s 7.

⁷⁹ For example, te Kōti Pira | Court of Appeal confirmed that decisions of the New Zealand Parole Board in imposing special conditions must be consistent with the New Zealand Bill of Rights Act 1990 in *McGreevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [21].

form part of the preventive measure being sought.⁸⁰ We considered that allowing the court to consider the imposition of a preventive measure and special conditions at the same time would address some of the inefficiencies in the current approach (which splits these roles between the courts and Parole Board) and reflect the indivisibility of a preventive measure from the special conditions that comprise it.⁸¹

10.92 Submitters to this proposal all agreed with this approach.⁸² In particular, TLANZ considered this approach would address the illogicality and inefficiency of requiring different hearings, traversing the same material, for the imposition of a preventive measure and the imposition of special conditions.

Recommendation

R27

Special conditions of community preventive supervision or residential preventive supervision should be set in the following way:

- a. An application for either measure should include any special condition sought.
- b. The court determining the application should apply the tests in R25 to the whole application, including the special conditions sought.
- c. An order imposing community preventive supervision or residential preventive supervision should include any special conditions of the measure.

10.93 As we explain in Chapters 15 and 16, it should be possible for special conditions to apply to a person subject to community preventive supervision or residential preventive supervision. We recommend that the court should impose any special conditions that will form part of these preventive measures at the same time it considers and imposes the measure. This means that any special conditions will be imposed applying the primary legislative tests set out above.

10.94 This approach departs from the current law in two key respects. First, it places the power to impose special conditions with the court rather than the Parole Board. Second, the court determines 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.

10.95 We recommend 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 will 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

⁸⁰ Preferred Approach Paper, P22

⁸¹ Preferred Approach Paper at [10.89]–[10.91].

⁸² Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

in examining the Parole Board's decision-making. 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 — also determines which special conditions should apply.⁸³
- (d) Under the current law, the courts already have responsibilities for setting conditions such as when imposing an interim supervision order or release conditions for offenders on short-term prison sentences.⁸⁴
- (e) Lastly and most importantly, it is important that the court imposing the measure be satisfied the preventive measure it imposes is the least restrictive measure to address the risks the person poses. That is why the recommended primary tests for the imposition of a preventive measure should require the court to be satisfied that the measure is the least restrictive one adequate to address the nature and extent of the risk the person poses and is justified by that nature and extent. It would be difficult for the court to reach a view on these matters if the special conditions of the measure would be set subsequently by a separate body.

10.96 Accordingly, our recommendations recognise that a preventive measure and the 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.

10.97 We recognise that the Court of Appeal in *Grinder* was satisfied that the Parole Board could impose special conditions even though the condition may not be needed to stop the person from posing an undue risk to the community. The Court's view was based on its interpretation of sections 7 and 15 of the Parole Act. 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.⁸⁵ It is questionable 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, in our view, is to justify restrictions of this nature based on the primary objective of preventing serious reoffending rather than on an ancillary or other objective.

10.98 TLANZ, one of the intervening parties to the appeal, noted in its submission to the Preferred Approach Paper that many of the issues raised in *Grinder* would have been avoided through our proposed approach.

⁸³ This is the case in Australia (Cth), New South Wales, Northern Territory, Queensland, Tasmania, Victoria, England, Wales, Scotland, Northern Ireland and Ireland.

⁸⁴ Parole Act 2002, s 107FA(3); and Sentencing Act 2002, s 93.

⁸⁵ Parole Act 2002, s 29.

TRAITS AND BEHAVIOURAL CHARACTERISTICS SHOULD NOT BE PRESCRIBED IN THE TESTS

Issue

- 10.99 As we have noted above, to impose an ESO or a PPO, the court must be satisfied that a person displays certain traits or behavioural characteristics. These are taken to be indicative of people who pose the highest risk of reoffending. In the Issues Paper, we queried whether these traits and characteristics were in fact an indicator of reoffending risk.⁸⁶ We have struggled to find any authoritative material in the policy and legislative materials that indicates why these characteristics were chosen to identify the highest-risk people.⁸⁷
- 10.100 In the Issues Paper, we identified several specific issues relating to the traits and behavioural characteristics a person is required to display under the tests for imposition of an ESO and PPO:
- (a) **An undue focus on traits and behavioural characteristics fails to recognise the complex interactions between psychological and situational factors that result in offending.**⁸⁸ There is a number of other acute risk factors — such as intoxication, peer association and proximity to potential victims — that are equally relevant to reoffending risk.⁸⁹ This interaction of relevant factors can be overlooked by the legislation's focus on the existence or non-existence of traits and behavioural characteristics listed.
 - (b) **Risk assessment and psychological practice is regularly updated in light of new research.**⁹⁰ What may have been considered important at the time the legislative tests were enacted may now have changed, without the ability to update or revise the legislative tests easily.
 - (c) **The focus on traits and behavioural characteristics may breach human rights law.**⁹¹ Conditions such as autism spectrum disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, traumatic brain injury and “low levels of intellectual functioning” can commonly present in people who have preventive measures imposed on them. We discuss this further in Chapter 5. These conditions can prevent people from regulating their behaviour or appreciating the consequences of their actions. The conditions closely resemble some of the traits and behavioural

⁸⁶ Issues Paper at [8.33]–[8.46].

⁸⁷ 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.

⁸⁸ Issues Paper at [8.37(a)], citing discussion in *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [52] and *Report of the Committee on Serious Violent and Sexual Offenders* (Scottish Executive, SE/2000/68, June 2000) at [2.4].

⁸⁹ Lucy Moore *Literature Review — Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 9.

⁹⁰ Issues Paper at [8.37(b)].

⁹¹ Issues Paper at [8.43]–[8.46].

characteristics listed in the legislation.⁹² This means that an approach based on traits and behavioural characteristics may be more likely to capture people who, because of their disability, have these traits. Others who in fact pose the same or higher risk of reoffending may not have a preventive measure imposed on them because they do not exhibit these traits. Consequently, the law may have a discriminatory effect in breach of section 19 of the NZ Bill of Rights and contravene article 14(1)(b) of the United Nations Convention on the Rights of Persons with Disabilities.⁹³

- (d) **The language used to describe the traits and behavioural characteristics is difficult to interpret.**⁹⁴ Some of the phrases used in the legislation — such as “pervasive pattern”, “predilection or proclivity” and “severe disturbance” — do not appear to have a recognised and settled clinical meaning. Additionally, the Parole Act and the PPO Act use the same terms in different ways. For example, the Parole Act requires that a person display “a severe disturbance of behavioural functioning” to demonstrate a risk of further violent offending only, whereas under the PPO Act, it is relevant to a risk of both further sexual and violent offending.

10.101 In addition to these overarching concerns, there are also issues in relation to particular characteristics. For example, it is questionable whether the absence of understanding or concern about the effects of offending is necessarily an indicator of risk.⁹⁵ A person may have some insight into the effects of their offending but remain a high risk.⁹⁶ Additionally, the requirement that someone harbour “persistent vengeful intentions” may exclude someone who does pose a high risk of reoffending but whose risk might be more reactive or impulsive.⁹⁷

Results of consultation

10.102 In the Preferred Approach Paper, we proposed that the tests for imposing preventive measures should not include references to any specific traits or behavioural characteristics because of the issues we have identified. However, our proposed

⁹² In particular, the inquiry into whether the person has “limited self-regulatory capacity” (Parole Act 2002, ss 107IAA(1)(c) and 10IAA(2)(b)(ii) and Public Safety (Public Protection Orders) Act 2014, s 13(2)(b)); “a lack of acceptance of responsibility or remorse for past offending” (Parole Act 2002, s 107IAA(1)(d)(i)); an “absence of understanding or concern for the impact of ... offending” (Public Safety (Public Protection Orders) Act 2014, s 13(2)(c)); and “poor interpersonal relationships or social isolation or both” (Public Safety (Public Protection Orders) Act 2014, s 13(2)(d)).

⁹³ This provides that the existence of a disability should not be a ground to justify a deprivation of liberty.

⁹⁴ Issues Paper at [8.40]–[8.42].

⁹⁵ As required by s 107IAA(1)(d) of the Parole Act 2002 and s 13(2)(c) of the Public Safety (Public Protection Orders) Act 2014.

⁹⁶ Te Kōti Pira | Court of Appeal has held that Parliament cannot have intended that the presence of any understanding or concern about the effects of a person’s offending should preclude a person from being assessed as high risk and that there must be a materiality threshold so that a person’s acceptance, responsibility, remorse or concern is only relevant if it actually mitigates their risk: *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [23]. See also *Miller v Department of Corrections* [2021] NZHC 983 at [39]; *Chief Executive of Department of Corrections v Douglas* [2016] NZHC 3184 at [83] and [96]; and *Douglas v Chief Executive of the Department of Corrections* [2024] NZCA 634 at [69].

⁹⁷ As required by s 107IAA(2)(a)(ii) of the Parole Act 2002. See for example *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 where an ESO was cancelled because Mr Mosen did not demonstrate “persistent harbouring of vengeful intentions”, despite evidence showing his risk of violent offending would emerge in more reactive circumstances such as if he relapsed into drug use or felt threatened by a peer. See also the difficulties in interpreting and applying this criterion expressed by te Kōti Matua | High Court in *Chief Executive of the Department of Corrections v Waiti* [2019] NZHC 3256 at [36]–[39].

approach would not preclude the court taking them into account where relevant, for example, through health assessor reports or other expert evidence and argument.⁹⁸

10.103 Some submitters expressed support for this approach.⁹⁹ The Public Defence Service supported this approach but considered that the proposed test was “vague and subjective” without the traits and behavioural characteristics. However, it considered the proposed test was still preferable to using a traits-based approach. It noted that the vagueness of the proposed tests made the role of qualifying offences particularly important as a tool to determine eligibility and that only the most serious offences should be qualifying offences. It also suggested it should be clear that the respondent also has the right to call evidence and challenge evidence filed by Ara Poutama and that the court is required to consider this. The NZLS made a similar suggestion.

10.104 TLANZ, on the other hand, preferred an approach based on specific traits and behavioural characteristics. It described the traits and behavioural characteristics in the current legislation as “strict and specific”. It said that the proposed approach could widen jurisdiction by allowing the court to consider a wider range of traits and characteristics rather than the more specific and tightly defined traits set out in the current test for the imposition of an ESO.

Conclusions

10.105 We conclude that the legislative tests for the imposition of preventive measures should not include any reference to particular traits and behavioural characteristics as currently required for ESOs and PPOs. We consider this is appropriate in light of the concerns with the reliance on traits and behavioural characteristics in the current tests for ESOs and PPOs outlined above. We disagree with submitters who thought the current approach is satisfactory.

10.106 Although supportive of the removal of specific traits and characteristics, the NZLS noted that the replacement of specific criteria with a single requirement that someone be at high risk of reoffending creates a risk that judges simply defer to actuarial risk assessment tools when considering imposition. The Public Defence Service raised a similar concern to any approach that would rely on percentages to quantify risk. We consider that the three recommended primary tests, with a non-exhaustive list of factors, make clear that the court is making a qualitative rather than a quantitative determination of whether the imposition of an order is appropriate. The health assessor reports (of which actuarial risk assessment is one part) is only one factor for the court to consider in its assessment.

10.107 Furthermore, we emphasise that our recommendation does not preclude consideration of traits and characteristics where they are relevant to the risk the person will reoffend and what measures are necessary and justified to address that risk. The extent to which traits and characteristics are relevant to the courts’ assessment can be dealt with through evidence such as the health assessor reports (discussed further in Chapter 11) and other expert evidence and argument.

⁹⁸ Preferred Approach Paper at [10.88].

⁹⁹ Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

ABILITY TO IMPOSE A LESS RESTRICTIVE MEASURE

10.108 The preventive measures we recommend range in their restrictiveness, with secure preventive detention being the most severe and community preventive supervision allowing the greatest freedoms. A question arises as to what should happen if the court declines an application for a specific preventive measure but is satisfied a less restrictive measure should be imposed instead.

Results of consultation

10.109 In the Preferred Approach Paper, we proposed that, if the court is not satisfied that the legislative tests are met, it should be able to impose a less restrictive preventive measure in the same proceedings.¹⁰⁰

10.110 Most submitters who addressed this proposal agreed.¹⁰¹ The South Auckland Bar Association supported this approach on the proviso that, if the court considers a different preventive measure ought to be imposed, the chief executive should be invited to make an alternative application and the parties should have an opportunity to file further submissions and be heard on the alternative measure.

10.111 TLANZ opposed this proposal because it opposed a single statute for all preventive measures. It considered that each measure is designed to achieve a different outcome and so an application should be “detailed and supported by cogent and fulsome evidence which may not easily transfer to a different type of preventive measure”. It was concerned that, although under the proposal only a *less* restrictive measure could be imposed, the reality would be that an application would always be made for the most restrictive measure, as the court would be able to “drop down” to a less restrictive measure. The pitching of applications in this way would result in more people being made subject to the most restrictive measure. The more appropriate approach would be for the court to decline the application and direct that a fresh application is made.

Recommendation

R28

If the court is not satisfied the tests in R25 are met in respect of the measure sought in the application, the new Act should confer on the court the power in the same proceedings to impose a less restrictive preventive measure if satisfied the tests are met in respect of that measure.

10.112 If the court is not satisfied the tests are met in respect of the preventive measure sought, we recommend 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

¹⁰⁰ Preferred Approach Paper, P24.

¹⁰¹ Bond Trust, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

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, that the less restrictive measure satisfies the tests.

- 10.113 We have considered the submission from the South Auckland Bar Association that, in this event, the court should invite the applicant to make an alternative application, with the parties having the opportunity to file further submissions and be heard on the alternative measure. This aligns with the view of TLANZ, which opposed our proposal and said the court should decline an application and direct a fresh one to be made. While it may be that the evidence and argument the court has considered do not enable it to impose a less restrictive measure (in which case a new application may need to be made), we do not agree that a new application should be required in all cases if it can be avoided.
- 10.114 We do not share the concern expressed by TLANZ that, under this recommendation, more people will be made subject to the most restrictive preventive measures because Ara Poutama will always apply for the most restrictive option possible in the knowledge that the court will be able to select a less restrictive option. We are confident the courts will apply the tests we have recommended to exclude the imposition of unjustifiably restrictive preventive measures.

INTERIM PREVENTIVE MEASURES

- 10.115 Under the current law governing ESOs and PPOs, the courts may impose preventive measures on an interim basis until a final determination is made. A question arises whether this approach should continue under the new Act.

Results of consultation

- 10.116 In the Preferred Approach Paper, we proposed that the law should continue to make provision for the imposition of a preventive measure on an interim basis. We made three proposals relating to the circumstances in which an interim preventive measure may be imposed, the tests the court should apply in doing so and the application of standard and special conditions under any interim measure.¹⁰² The proposals were broadly a continuation of the current law.
- 10.117 Submitters largely agreed with our proposal for when interim orders should be available but suggested some amendments.¹⁰³ The NZLS said that the Act should explicitly provide that a respondent has the right to be heard in respect of any application for an interim measure — at present, returning offenders are dealt with without notice. The Public Defence Service also noted some potential practical difficulties with interim orders. It said that, currently, the availability of interim orders results in Ara Poutama applying at the last minute. An interim order is granted on the basis of a reduced test — although the court determines the statutory criteria have been met, the decision is based on preliminary and untested evidence. Final orders are often declined, but the person has been under the interim order nonetheless all because Ara Poutama did not apply in a timely fashion.

¹⁰² Preferred Approach Paper, P25 and P26.

¹⁰³ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

- 10.118 Both TLANZ and the South Auckland Bar Association opposed this proposal because they favoured the retention of the current preventive measures under the existing legislation.
- 10.119 We proposed that, to impose an interim preventive measure, the court must be satisfied, on its provisional assessment based on the available evidence, that the primary legislative tests for the imposition of a preventive measure are made out.¹⁰⁴ Submitters who addressed this proposal agreed with it.¹⁰⁵ The Bond Trust also suggested that there should be a reasonable limitation on the amount of time a person could be subject to an interim preventive measure.
- 10.120 Lastly, we proposed that standard conditions should apply automatically when community preventive supervision or residential preventive supervision are imposed as an interim measure. The court should also have power to impose special conditions.¹⁰⁶ This departs from the Parole Act, which requires the court to impose any standard condition individually on interim orders.¹⁰⁷
- 10.121 Submitters responding to this proposal agreed.¹⁰⁸ TLANZ considered it was appropriate for the court to impose standard conditions to ensure consistency and clarity. Giving the court the power to impose special conditions also provides the necessary flexibility to tailor the interim measure to the specific risks and needs of the individual.

Recommendations

R29

Before an application for a preventive measure is finally determined, the court should have power to impose any preventive measure on an interim basis in the following circumstances:

- a. An eligible person is, or is about to be, released from detention.
- b. An eligible person who is a returning offender arrives, or is about to arrive, in Aotearoa New Zealand.
- c. The court directs the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) to consider an application in respect of a 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 makes an application to escalate a person to a more restrictive measure.

¹⁰⁴ Preferred Approach Paper at [10.102].

¹⁰⁵ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

¹⁰⁶ Preferred Approach Paper, P27 and [10.103].

¹⁰⁷ Parole Act 2002, s 107FA(3).

¹⁰⁸ Bond Trust, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

- 10.122 We recommend that the law should continue to provide for the imposition of a preventive measure on an interim basis, pending a final determination of an application for preventive measure.
- 10.123 This is a continuation of the current law under which the courts may impose an interim supervision order (pending determination of an application for an ESO)¹⁰⁹ or an interim detention order (pending determination of an application for a PPO).¹¹⁰ We consider the availability of interim measures allows for any risk to be managed appropriately between the time an application is made and finally determined if the person would otherwise be released from prison without restrictions. Most submitters who responded to this proposal supported this approach.
- 10.124 We agree with the NZLS that a respondent should ordinarily be heard. However, we do not recommend that a without notice application should never be made. We expect those instances will be rare and based on an exceptional need to protect the community when it is impractical to give notice to the person against whom the interim measure is sought.
- 10.125 We have considered the submission from the Public Defence Service that interim orders are often applied for at “the last minute”. We recognise that there may be good reason for Ara Poutama to wait before bringing applications. For example, Ara Poutama may wait until the Parole Board has considered the person for release on parole or it may wish to provide as much time as possible for a person to demonstrate they do not need to be placed on a preventive measure.

R30

To impose an interim preventive measure, the court should be satisfied the primary legislative tests in R25 are made out on the available evidence in support of the application for the interim measure.

- 10.126 We recommend that, in determining an application for an interim measure, the court should apply the primary legislative tests for imposition, as set out above. This means that, to impose an interim measure, the court must be satisfied, on the basis of the available evidence, that the primary tests for the imposition of a preventive measure are made out. All submitters who responded to this proposal supported this approach.
- 10.127 As we note above, the current law already provides for the imposition of interim measures pending the final determination of an application for an ESO or a PPO. However, none of the statutes governing existing preventive measures prescribe a test for the courts to apply. Instead, the courts have developed an approach following the Supreme Court’s decision in *Chisnall v Chief Executive of the Department of Corrections*.¹¹¹ The Supreme

¹⁰⁹ Parole Act 2002, s 107FA.

¹¹⁰ Public Safety (Public Protection Orders) Act 2014, s 107.

¹¹¹ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83. The Court developed this approach when considering interim detention orders pending a substantive determination of a PPO application, but it has subsequently been applied by the courts in considering interim supervision orders under the Parole Act 2002.

Court held that, when determining whether to impose an interim detention order, the court must be satisfied that:¹¹²

- (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.

10.128 We consider it preferable for these tests to be clearly expressed in the new Act.

10.129 We consider it appropriate that the imposition of an interim measure should be based on the primary tests for the substantive measure. As the Supreme Court reasoned, it is appropriate to be satisfied the substantive statutory criteria are made out given the deprivation of liberty involved, even on an interim basis.¹¹³ Also, as the Court recognised, the evidence in support of an interim application may be provisional and untested. Further evidence and argument presented at the substantive hearing may lead the court to change its conclusion.¹¹⁴

R31

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

10.130 We recommend that the court should have the power to impose special conditions when imposing community preventive supervision or residential preventive supervision on an interim basis. We recommend that the standard conditions should apply automatically to interim measures. We recommend that the court should have the ability to impose special conditions if satisfied, on a provisional assessment, that the primary tests for imposition are made out. All submitters who responded to this proposal supported it.

10.131 We have explained above our conclusion that the conditions that comprise preventive measures are inseparable from the preventive measure itself and so must be considered and imposed by the court together. It follows from this that interim preventive measures should be imposed on the same basis. We also consider the recommended approach will make interim applications more straightforward and align with how the primary tests should be applied in substantive applications.

¹¹² *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83 at [32]–[33], [40] and [83]–[84].

¹¹³ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83 at [35].

¹¹⁴ *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] NZLR 83 at [41].

CHAPTER 11

Evidence of reoffending risk

INTRODUCTION

- 11.1 In this chapter, we consider what evidence a court should rely on when deciding whether to impose a preventive measure.
- 11.2 We recommend that the law should continue to require the filing of health assessor reports as the principal evidence to support an application for a preventive measure. We recommend that the court should continue to be able to receive and consider a wide range of other evidence. We also discuss the use of risk assessment tools and our conclusions about the need for reform.

HEALTH ASSESSOR REPORTS AS THE PRINCIPAL EVIDENCE IN PREVENTIVE MEASURES PROCEEDINGS

- 11.3 Health assessor reports have long been central to the court's determination of whether to impose a preventive measure. A question for consideration is whether this approach should continue.

Current law

- 11.4 Health assessor reports are the principal evidence on which a court will determine whether to impose preventive detention, an extended supervision order (ESO) or a public protection order (PPO). 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 Aotearoa | Department of Corrections (chief executive) applies for an ESO or a PPO.¹ A "health assessor" is defined as a registered psychiatrist or psychologist.²
- 11.5 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

¹ Sentencing Act 2002, s 88(1)(b); Parole Act 2002, s 107F(2); and Public Safety (Public Protection Orders) Act 2014, ss 9 and 13.

² 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".

regarding the “likelihood of the offender committing a further qualifying sexual or violent offence”.³

11.6 For ESOs, the Parole Act 2002 requires the chief executive to accompany an application with one health assessor report (although, in practice, more than one is often provided).⁴ The report must address one or both of the questions:⁵

(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.

11.7 For PPOs, the Public Safety (Public Protection Orders) Act 2014 (PPO Act) requires the chief executive to accompany an application with two reports from health assessors, one of whom must be a registered psychologist.⁶ The reports must address:⁷

(a) whether the person exhibits to a high level 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.

11.8 A health assessor report is not required when the New Zealand Parole Board (Parole Board) considers whether to direct the release of a person sentenced to preventive detention. However, Ara Poutama Aotearoa | Department of Corrections (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.⁸

Number and content of reports

Results of consultation

11.9 In the Preferred Approach Paper, we proposed that applications for a preventive measure should be accompanied by health assessor reports. We proposed that the law should require that two reports accompany applications where residential preventive supervision or secure preventive detention is sought and one report where community

³ Sentencing Act 2002, s 88(1)(b).

⁴ Parole Act 2002, s 107F(2).

⁵ Parole Act 2002, s 107F(2A).

⁶ Public Safety (Public Protection Orders) Act 2014, s 9(a).

⁷ Public Safety (Public Protection Orders) Act 2014, s 9(b).

⁸ 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: “Parole process” New Zealand Parole Board <www.paroleboard.govt.nz>; and *Department of Corrections: Managing offenders on parole* (Controller and Auditor-General, February 2009) at 14–15.

preventive supervision is sought. This proposal balanced the need for courts to consider expert information with the pressure on the health assessor workforce, which our engagement and research revealed to be overstretched.⁹

- 11.10 Several submitters agreed with our proposal.¹⁰ The Law Association of New Zealand (TLANZ) and South Auckland Bar Association expressed agreement in principle but raised issues regarding staff shortages and the delay this causes in providing timely access to health assessor reports. Some submitters disagreed with the proposal, instead preferring that the chief executive should be required to file two health assessor reports to accompany applications for all preventive measures including community preventive supervision.¹¹ Conversely, the Bond Trust said that only one report should be required for all preventive measures but that there should also be “detailed consideration of community supports available to a person”.
- 11.11 We also proposed that health assessor reports should address specific parts of the legislative tests on which a court should determine whether to impose a preventive measure. The elements we said a health assessor should address are whether the person poses a high risk of reoffending and whether that risk can be adequately addressed by any less restrictive measure.¹²
- 11.12 Most submitters who addressed this proposal agreed that the law should direct health assessors to address whether a person poses a high risk of reoffending and whether any less restrictive measure would adequately address that risk.¹³ TLANZ expressed a concern that health assessors might be influenced by information that was not sufficiently reliable on which to assess risk.

Recommendations

R32

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

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

⁹ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P28 and [11.31]–[11.32].

¹⁰ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

¹¹ Dr Jordan Anderson, Myra Crawford Smith, Dr Tony Ellis, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

¹² Preferred Approach Paper, P29 and [11.33].

¹³ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

R33

The health assessor reports should address 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 that risk, the preventive measure is the least restrictive measure adequate to address that risk.

- 11.13 We conclude that applications for a preventive measure should be accompanied by health assessor reports — two reports where residential preventive supervision and secure preventive detention is sought and one report where community preventive supervision is sought.
- 11.14 Requiring this type of report is established practice in Aotearoa New Zealand. As te Kōti Mana Nui | Supreme Court stated in *Attorney-General v Chisnall*, it is a procedural protection to minimise the rights intrusion of preventive regimes.¹⁴ Other jurisdictions with post-sentence preventive regimes similarly require that a person be assessed by an expert and that the expert submit a report to the court.¹⁵ The same applies to overseas jurisdictions that have preventive sentences.¹⁶ Submitters to the Preferred Approach Paper supported this approach.
- 11.15 Through our engagement and research, we are aware that there is a limited number of experts who can provide health assessor reports. The number of reports that should be provided to the court therefore needs to be considered both in light of what information the courts need before them and what is practically possible. We are mindful, too, that pressures on the health assessor workforce may cause delays and potentially limit the choice a person opposing an application has in the experts they can retain. Submitters also highlighted these considerations.
- 11.16 Our recommendation that the new Act requires two reports for residential preventive supervision and secure preventive detention applications accords with the current law regarding the number of health assessments required for existing highly restrictive preventive measures (preventive detention and PPOs).¹⁷ To impose a preventive measure under the new Act, 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. For residential preventive supervision and secure preventive detention, these are likely to be complex and contestable inquiries warranting a high degree of expert input.

¹⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [238].

¹⁵ 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).

¹⁶ Scotland: Criminal Procedure (Scotland) Act 1995, s 210B; and Canada: Criminal Code RSC 1985 c C-46, s 752.1.

¹⁷ Scotland and Canada require only a single expert report 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.

- 11.17 The recommended measure of residential preventive supervision is intended to replace those ESOs that detain people through a combination of special conditions (residential restrictions and programme conditions). We recognise that 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. There are few ESOs with these particular restrictions.¹⁸ In addition, because the Parole Board sets special conditions for these ESOs, we understand it is already common for additional health assessor reports to be submitted to the Parole Board.
- 11.18 We recommend 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 recommendation 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.
- 11.19 We also recommend that the law should specify that a health assessor report must provide the health assessor's opinion on the first two tests set out in Chapter 10 — whether the person poses a high risk of reoffending and whether that risk can be adequately addressed by any less restrictive measure. 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 respective test of being a high risk or very high risk of committing a relevant offence. In Chapter 10, we recommend 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 recommendation does not preclude health assessors from focusing on specific traits or characteristics in their reports if they are relevant to the new legislative tests of high risk of reoffending and least restrictive measure.
- 11.20 Some overseas jurisdictions prescribe what a report should contain in more detail.¹⁹ Others provide non-legislative guidance on what elements to include.²⁰ We do not consider it is beneficial to be too prescriptive. Our recommended approach is to enable health assessors to focus on any matters they consider relevant to the two legislative tests on which they are required to provide their opinion. This will avoid requiring health assessors to focus unnecessarily on certain matters that may not be relevant to the risks

¹⁸ 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.

¹⁹ 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.

²⁰ For example, the Canadian Criminal Code does not specify the matters assessors 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.

the person poses. In our view, that is one of the issues with the list of traits and behavioural characteristics health assessors are currently required to assess for ESO and PPO applications, as we explain further in Chapter 10. We anticipate that assessors will continue to draw on best-practice guidance from their professional bodies and Ara Poutama to identify and assess the factors that demonstrate reoffending risks.

- 11.21 We recognise that there are concerns about the accuracy of predictions of reoffending risk, particularly through the use of risk assessment tools. We comment on this matter separately below.

Defining a health assessor

Results of consultation

- 11.22 In the Preferred Approach Paper, we proposed that a health assessor must be accredited as either a psychiatrist or psychologist.²¹ This is the definition of a health assessor under the current law.
- 11.23 Submitters who addressed the proposal agreed.²² The Bond Trust suggested the definition should also include a person registered as an addiction practitioner according to the rules of the Addiction Practitioners Association of Aotearoa New Zealand. It said the involvement of such practitioners would be beneficial for people identified to have addiction issues.

Recommendation

R34

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.

- 11.24 We conclude that the new Act should define the term “health assessor” in the same way as the current legislation governing preventive detention, ESOs and PPOs. It requires that they be a registered and practising psychiatrist or psychologist. It is common in other jurisdictions for practitioners with these specialities to be responsible for assessing and providing evidence to the court about a person’s risk of reoffending. We have not encountered any suggestion that people accredited in the way suggested are unsuitable. Our recommendation uses similar language to the Sentencing Act.

²¹ Preferred Approach Paper, P30 and [11.38].

²² Bond Trust, Myra Crawford-Smtih, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

11.25 We do not agree that the law should provide for accredited addiction practitioners to undertake the role of health assessor unless they are also a registered and practising psychiatrist or psychologist. Addiction practitioners may provide useful information to the court in evidence filed by the parties, but we do not recommend they should be responsible for health assessments. A practitioner of psychology or psychiatry is equipped with the specialist skills and training to provide a risk assessment to the court.

Additional reports

Results of consultation

11.26 In the Preferred Approach Paper, we proposed that both the court and the person subject to an application for a preventive measure should be entitled to obtain additional reports from a health assessor.²³

11.27 Submitters agreed that the court should be able to direct that additional reports be prepared and that the person against whom an application for a preventive measure is made should also be able to file an additional report from a health assessor of their own choosing.²⁴ The Bond Trust thought that the cost of additional reports should be met by the court rather than by legal aid. Both Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service suggested that the new Act should also require the court to take information from additional reports into account. The Public Defence Service said it should be clear that the respondent has the right to call evidence and challenge that submitted by Ara Poutama. It also suggested clarification about the conduct of hearings — it said that oral hearings should take place and that the ordinary rules of evidence should apply. Dr Tony Ellis submitted that the person against whom an application is made should be entitled to submit at least two of their own health assessor reports to ensure “equality of arms” with the applicant.

Recommendations

R35 The court should be able to direct, on its own initiative, that a report or reports prepared by health assessors be provided.

R36 A person against whom an application for a preventive measure is made should be able to file a report or reports prepared by health assessors they have engaged.

R37 A person against whom a preventive measure is sought should have public funding available to them to obtain:

- two health assessor reports if the application against them is to impose residential preventive supervision or secure preventive detention; and
- one health assessor report if the application against them is to impose community preventive supervision.

²³ Preferred Approach Paper, P31–P32 and [11.39].

²⁴ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association, The Law Association of New Zealand.

- 11.28 We recommend that both the court and the person subject to an application be able to obtain reports from a health assessor.²⁵ We consider that the court should continue to have powers to direct a health assessor to prepare a report. This is to ensure that it has available suitable information to make a determination if, for any reason, information it receives from the parties is insufficient. It is also important the person against whom an application is made can provide their own health assessor reports as a matter of fairness. Reports directed by the court or submitted by the person in question should address the legislative test in the same manner as other reports. As with current proceedings for ESOs and PPOs, we expect that the court will conduct hearings at which information the court receives from both the applicant and respondent will be tested.
- 11.29 As provided for in the PPO Act, we consider that public funding should be available to meet the expense of the health assessor reports obtained by the court or the person against whom the preventive measure is sought.²⁶ The extent of the latter entitlement should be to one funded report for community preventive supervision applications and two reports for residential preventive supervision or secure preventive detention. We recognise the practical difficulties of this recommendation given the shortage of health assessors and funding implications. Nevertheless, we agree with the submission that the law should attempt to put the parties on an equal footing in respect of the evidence they can provide to the court.

USE OF RISK ASSESSMENT TOOLS

Background

- 11.30 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.²⁷
- 11.31 In general terms, a risk assessment tool is a statistical method that uses factors or behaviour that are empirically predictive to calculate a person's risk of reoffending. Risk assessment using these tools has proven to be more accurate than non-structured clinical evaluation of risk.²⁸ 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.²⁹
- 11.32 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

²⁵ See Public Safety (Public Protection Orders) Act 2014, s 10.

²⁶ See Public Safety (Public Protection Orders) Act 2014, s 10(5)–(6).

²⁷ *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].

²⁸ *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.

²⁹ 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.

additional context to understanding an individual's risk. Tools are researched, tested and developed to refine their predictive accuracy.³⁰

- 11.33 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.³¹ 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.³² 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.³³ 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

- 11.34 There are some criticisms of risk assessment tools in the commentary on preventive detention, ESOs and PPOs.³⁴ These criticisms point to specific limitations of risk assessment tools:
- (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 individual in question to commit an offence because it is an extrapolation based on others' behaviour.³⁵
 - (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.³⁶ Beyond that, the results of a

³⁰ 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.

³¹ Lucy Moore *Literature Review — Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 19.

³² Susan Glazebrook "Risky Business: Predicting Recidivism" (2010) 17 *Psychiatry, Psychology and Law* 88 at 98–99.

³³ Lucy Moore *Literature Review — Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 18–19.

³⁴ 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].

³⁵ *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.

³⁶ 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.

risk assessment will not provide evidence as to how severe or how imminent potential reoffending may be.³⁷

- (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.³⁸ 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.³⁹ 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.⁴⁰
- (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.⁴¹ 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.⁴² Despite receiving the highest risk categorisation according to a particular tool, a person may not be of sufficiently high risk to satisfy the statutory test.⁴³

11.35 In the Issues Paper, we expressed a preliminary view that reform was not needed to address the limitations and that they were more appropriately addressed as matters of practice within the legal and procedural framework.⁴⁴ We outlined the practices that factored into this view and that ought to continue, which included the following:

³⁷ 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.

³⁸ Stephen D Gottfredson and Laura J Moriarty “Statistical Risk Assessment: Old Problems and New Applications” (2006) 52 *Crime & Delinquency* 178 at 183; and Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 94–95.

³⁹ Stephen D Gottfredson and Laura J Moriarty “Statistical Risk Assessment: Old Problems and New Applications” (2006) 52 *Crime & Delinquency* 178 at 184.

⁴⁰ Lucy Moore *Literature Review – Risk assessment of serious offending* (commissioned by Te Aka Matua o te Ture | Law Commission, 2023) at 16–17.

⁴¹ 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.

⁴² Susan Glazebrook “Risky Business: Predicting Recidivism” (2010) 17 *Psychiatry, Psychology and Law* 88 at 95.

⁴³ 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”.

⁴⁴ Issues Paper at [9.13]–[9.26].

- (a) **Oversight, research and calibration of individual tools.** Ara Poutama currently takes steps to calibrate and validate risk assessment tools.⁴⁵ 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 expect that, if a tool has not been subject to this oversight, the health assessor report will reflect this and be properly considered by the court.⁴⁶
- (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.⁴⁷ 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.⁴⁸
- (c) **Testing health assessor reports in court.** The case law shows that judges, opposing counsel or health assessors routinely note the limitations of risk assessment tools and assess the weight to be given to their results accordingly.⁴⁹ Instances where this has not occurred have been corrected on appeal.⁵⁰

Inappropriate use of risk assessment tools on Māori

11.36 Using a sample population affected by racial bias may perpetuate racially disparate risk profiling.⁵¹ 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.⁵² 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.

⁴⁵ See for example Peter Johnston “Assessing risk of re-offending: Recalibration of the Department of Corrections’ core risk assessment measure” (2021) 8 Practice: The New Zealand Corrections Journal 13.

⁴⁶ 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.

⁴⁷ *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.

⁴⁸ *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.

⁴⁹ 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].

⁵⁰ *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627.

⁵¹ 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.

⁵² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005).

- 11.37 It is now generally accepted that racism and unconscious bias exist within the criminal justice and corrections system.⁵³ Overrepresentation of Māori in it, Māori experiences of racism and negative stereotyping and other issues of systemic disadvantage may lead to life circumstances that are more likely to correlate with risk factors identified in some tools.⁵⁴ 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.⁵⁵
- 11.38 As we have observed throughout this review, there is limited evidence available to test this issue. Some aspects of the 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.⁵⁶

Conclusion

- 11.39 In the Preferred Approach Paper, we took the preliminary view that the issues could be addressed within the existing legal and procedural framework without the need for wider reforms. We have not received any feedback that dissuades us from that view.
- 11.40 We consider that reform is not required to address the limitations of risk assessment tools. We do not consider alternative regulatory approaches 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.
- 11.41 A blanket rejection of risk assessment tools would be inconsistent with their accuracy compared to non-structured clinical evaluation of risk and wide acceptance around the world. From this, and the views we have heard during consultation, we conclude that they are a necessary component of a psychological assessment and, when their results are explained adequately to the court, useful to help determine a person’s risk.
- 11.42 We have considered the suggestion put to us during consultation that a more comprehensive statutory framework could be put in place to govern and monitor which

⁵³ *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.

⁵⁴ 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.

⁵⁵ 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 a “slight/possible problem” in connection to “peer associations”, New Zealand Europeans were more likely to be assessed as having a “definite problem”.

⁵⁶ *Algorithm Charter for Aotearoa New Zealand* (Tatauranga Aotearoa | Stats NZ, July 2020) at 1 and 3.

risk assessment tools are used when they form part of a health assessment. We conclude, however, that this reform is not 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 would ensure the evidence provided by health assessors addresses the requirements with respect to the legislative tests.

- 11.43 We have also considered the alternative suggestion raised in consultation that an independent statutory body should be responsible for the functions related to risk assessment practice. Such an entity could have responsibility to train and accredit assessors as well as to approve and guide the use of risk assessment tools.⁵⁷ 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 similar 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.
- 11.44 During consultation, submitters agreed that risk assessment tools can perpetuate bias against Māori. We have not, however, identified viable reform beyond what can be achieved within existing law and procedure. We note that government has recognised that policy must address the overrepresentation of Māori in the criminal justice and corrections systems.⁵⁸ This work is ongoing and requires long-term, multi-generational effort. From our research and consultation, we have also observed recognition that an accurate understanding of a person's risk requires an assessment of a person in their individual cultural context. We encourage the increasing awareness of bias and expect risk assessment research and practice, including where conducted by Ara Poutama, will continue to grapple with this issue.⁵⁹

⁵⁷ 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].

⁵⁸ For example, *Hōkai Rangī: Ara Poutama Aotearoa Strategy 2019–2024* (Ara Poutama Aotearoa | Department of Corrections, 2019).

⁵⁹ For example, Armon J Tamatea “Culture is our business: Issues and challenges for forensic and correctional psychologists” (2017) 49 *Australian Journal of Forensic Sciences* 564.

OTHER EVIDENCE A COURT MAY CONSIDER

Current law

11.45 For ESO and PPO proceedings, a court may receive any evidence, whether or not it would otherwise be admissible in a court of law.⁶⁰ The PPO Act provides that the rules relating to privilege and confidentiality apply to evidence in PPO proceedings.⁶¹

Results of consultation

11.46 In the Preferred Approach Paper, we proposed that the new Act should continue the approach of the Parole Act and the PPO Act regarding the court's ability to receive and consider any evidence it sees fit. This reflected our view that a variety of evidence may be helpful to provide a complete understanding of a person's risk of reoffending and the support that may be needed to manage that risk. As provided for in the PPO Act, we specified that the rules applying to privilege and confidentiality as well as legal professional privilege should continue to apply.⁶²

11.47 Some submitters agreed with the proposal without further comment.⁶³ Others expressed concern about the wide scope of allowing the court to consider any evidence it saw fit.⁶⁴ TLANZ said that, although there is a need for flexibility, there should be safeguards to ensure evidence is reliable and relevant. The South Auckland Bar Association thought that "only relevant information ought to be taken into consideration once it has been vetted for veracity and reliability". The NZLS was concerned that consideration of unproven conduct "risks a court having to make a factual finding in an inappropriate arena". It acknowledged, however, that "judicial reasoning on the basis of allegations that have not resulted in convictions does occur within the criminal justice process". The Public Defence Service said that the seriousness of the consequences means that the proceedings should be conducted like a trial with ordinary rules of evidence applying.

Recommendation

R38

The new Act should provide that the court may receive and consider any evidence or information it thinks fit in proceedings under the new Act, 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.

⁶⁰ Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108(1).

⁶¹ Public Safety (Public Protection Orders) Act 2014, s 108(2); and see *Public Safety (Public Protection Orders) Bill – Final Departmental Report* (25 February 2014) at 14–15 on preserving these "important principles".

⁶² Preferred Approach Paper, P33 and [11.40]–[11.41].

⁶³ Bond Trust, Myra Crawford-Smith.

⁶⁴ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

- 11.48 We conclude that the new Act should continue the status quo regarding the court's ability to receive and consider evidence in ESO and PPO proceedings.⁶⁵ Most other jurisdictions also expressly allow for the court to take into account information from a broad range of sources. Our recommendation ensures that the court can consider a range of evidence, including additional information from Ara Poutama, from the individual themselves and from organisations that have supported the individual 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.
- 11.49 The broad application of this provision should also 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 (as we recommend in Chapter 12). These views may address how a person's background and connections to the 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.
- 11.50 For several reasons, we do not agree with the submission put to us that the ordinary rules of evidence should apply. First, the ordinary rules of evidence may exclude key evidence such as health assessment reports because they may, for example, involve hearsay. Second, the court must "be satisfied" the legislative tests are met. We consider this framing provides sufficient direction to prevent the court from considering irrelevant or unreliable matters. Given the severity of preventive measures, we expect the court will continue to exercise appropriate judgement as to the evidence it receives and considers.⁶⁶ Third, we are unaware of any problems in connection to ESO and PPO proceedings where the court can already consider a broader range of matters than what ordinary rules of evidence permit.
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⁶⁵ Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108.

⁶⁶ A recent decision of te Kōti Mana Nui | Supreme Court has explained what safeguards should apply when the court considers allegations of unproven offending. At the time of publication, this case is subject to publication restrictions. We discuss this issue further in Chapter 10.

CHAPTER 12

Proceedings under the new Act

INTRODUCTION

- 12.1 In this chapter, we consider several procedural matters relating to proceedings under the new Act. We address the following issues:
- (a) Whether proceedings under the new Act should fall under the courts' civil or criminal jurisdiction. We recommend that te Kōti Matua | High Court and te Kōti-ā-Rohe | District Court should hear and determine applications for preventive measures under their criminal jurisdiction.
 - (b) How decisions relating to the imposition of preventive measures should be challenged. We recommend that the new Act should provide for a right of appeal to te Kōti Pira | Court of Appeal against decisions relating to applications to impose, review, terminate or escalate a preventive measure.
 - (c) How the views of kin groups should be taken into account by the court when considering imposition of preventive measures. We recommend that the court should be required 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.
 - (d) What role victims should have in proceedings under the new Act and how to ensure their safety and privacy. We recommend that victims who are duly registered should be entitled to receive specified information regarding a person subject to a preventive measure and to make submissions to the court when it imposes or reviews a measure.
 - (e) The suppression of names, evidence, submissions and details of measures in proceedings. We recommend that proceedings under the new Act should generally be open to the public but that existing provisions allowing the court to make an order forbidding publication of certain elements of proceedings should be carried forward into the new Act, with some amendments.

WHETHER PROCEEDINGS UNDER THE NEW ACT SHOULD BE CRIMINAL OR CIVIL

Issue

- 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 relevance to this chapter is that, while preventive detention and ESOs are governed by criminal procedure, PPOs were designed as a civil regime. Applications for a PPO must be made by originating application to the High Court.¹
- 12.3 In the Issues Paper, we identified two concerns with the civil context of PPOs compared to the criminal process of preventive detention and ESOs, which related to lawyers practising in the area of preventive measures. First, these lawyers are likely to be experienced in working in the criminal jurisdiction but less familiar with the civil process. This can give rise to procedural inefficiencies. Second, they are likely to be approved legal aid providers for criminal matters but not for civil matters, and so a lawyer who has represented a person in all other aspects of the criminal process may be unable to act in respect of a PPO application — to the potential detriment of the client.²

Results of consultation

- 12.4 In the Preferred Approach Paper, we proposed that the High Court and the District Court should hear and determine applications for preventive measures under the new Act under their criminal jurisdiction.³ This followed from our proposal that the High Court should determine applications for residential preventive supervision and secure preventive detention and that the District Court should determine applications for community preventive supervision. We considered this approach addresses the problems with fragmentation of the current law noted above, recognises that the trigger for consideration of a preventive measure is criminal offending, and more accurately reflects the nature of preventive measures.⁴
- 12.5 All submitters who responded to this proposal supported it.⁵ Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) agreed that it would address the “unnecessary complication” of considering PPO applications as civil matters.

¹ Public Safety (Public Protection Orders) Act 2014, ss 8(1) and 104.

² 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 [4.15].

³ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P34.

⁴ Preferred Approach Paper at [12.5]–[12.6].

⁵ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service (subject to its previous comments about whether te Kōti-ā-Rohe | District Court should hear applications for community preventive supervision if the person concerned was originally sentenced in te Kōti Matua | High Court), South Auckland Bar Association, The Law Association of New Zealand.

Recommendation

R39

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

- 12.6 We recommend that applications for preventive measures should be handled under the courts' criminal jurisdiction.
- 12.7 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 will 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.
- 12.8 A possible concern with the use of the courts' criminal jurisdiction is that the imposition of a preventive measure may be more likely construed as second punishment. However, we do not consider the choice of the courts' criminal or civil jurisdictions determinative of this matter. Te Kōti Mana Nui | Supreme Court found that the PPO regime's positioning as a civil measure does not avoid PPOs being penalties in substance.⁶
- 12.9 As we explain in Chapter 4, the preventive measures we recommend are likely to continue to limit the right of those subject to preventive measures not to be punished twice for the same offence, regardless of them being imposed under criminal or civil jurisdiction. However, it is possible to construct a prospective post-sentence regime that would limit the protection against second punishment only to the extent justified in terms of section 5 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). We make recommendations throughout this Report that are designed to ensure that the regime is the least rights-intrusive possible.

RIGHTS OF APPEAL

Issue

- 12.10 Currently, there are different mechanisms for challenging decisions relating to the imposition of preventive detention, ESOs or PPOs. This creates both substantive differences in the available challenges to decisions and procedural inefficiencies.
- 12.11 This problem is exemplified by the approach to challenging a decision in relation to an ESO. In the Issues Paper, we explained how more than one appeal procedure applies.⁷ If a person wishes to challenge a court's decision in relation to an ESO (for example, making or declining to make an ESO or cancellation of an ESO), the available review mechanism

⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [135] and [138].

⁷ Issues Paper at [10.88]–[10.93].

is appeal to the Court of Appeal.⁸ These appeals are conducted as if they are appeals against sentence in the criminal jurisdiction.⁹ This means that the Court of Appeal must allow the appeal if it is satisfied there was an error in the decision.¹⁰

12.12 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), the person must first apply, in writing, for a review of the Parole Board's decision by the chairperson or a panel convenor.¹¹ If a person wishes to challenge the decision further, there is no right of appeal, but they can apply for judicial review.¹² This gives rise to two concerns:¹³

- (a) Judicial review is limited to examining whether the decision was lawful and complied with standards contained in administrative law rather than looking at whether the decision was the correct one.
- (b) Judicial review proceedings are civil in nature. As with PPO proceedings, discussed above, lawyers who act in relation to ESO matters will typically have expertise in, and be legal aid approved for, criminal proceedings but not civil proceedings. This can result in procedural inefficiencies and be to the detriment of the client.

Results of consultation

12.13 In the Preferred Approach Paper, we proposed that the new Act should provide a right of appeal to the Court of Appeal for challenging all decisions by the High Court and District Court in relation to applications for imposing, reviewing, terminating or escalating a preventive measure.¹⁴

12.14 All submitters who responded to this proposal supported it.¹⁵ The Law Association of New Zealand (TLANZ) considered that a right of appeal allowed both parties to make submissions and be properly heard compared to a judicial review process. It further suggested that the proposed approach would have prevented some of the issues raised in *Attorney-General v Grinder* and anticipated to be discussed on appeal to the Supreme Court.¹⁶

12.15 Two submitters made additional comments. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service suggested that consideration should also be given to creating a right of appeal from the District Court to the High Court. It was concerned that, with the requirement of a review by the court every three years (discussed in Chapter 18), the Court of Appeal would not be able to manage the workload. The NZLS noted that, under

⁸ Parole Act 2002, s 107R.

⁹ Parole Act 2002, s 107R(2).

¹⁰ Criminal Procedure Act 2011, s 250(2).

¹¹ Parole Act 2002, ss 67 and 107S.

¹² See for example *Coleman v Chief Executive of the Department of Corrections* [2020] NZHC 1033, where te Kōti Matua | High Court said the appropriate procedure to challenge the conditions of an intensive supervision order was judicial review (at [33]).

¹³ Issues Paper at [10.91]–[10.92].

¹⁴ Preferred Approach Paper, P35.

¹⁵ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

¹⁶ *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760. We discuss this further in Chapter 10.

this proposal, a right of appeal would be available to both the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) and the respondent. Currently, a prosecutor can only appeal with the Solicitor-General’s consent. The NZLS considered this approach should continue for rights of appeal under the new Act. It suggested this would ensure that “Crown Law independently considers whether an appeal is meritorious, rather than a Crown solicitor merely acting under instruction from Ara Poutama”.

Recommendation

R40

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-ā-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; or
- e. escalate a person to a more restrictive measure (including to a prison detention order).

R41

Part 6 of the Criminal Procedure Act 2011 should, with the necessary modifications, apply to the appeal as if it were an appeal against sentence.

R42

The lodging of an appeal should not prevent the decision appealed against taking effect according to its terms.

- 12.16 We recommend that there should be a right of appeal against all decisions by a court in relation to applications for preventive measures.
- 12.17 Our recommendation is for a right of appeal. We consider this is more appropriate than relying solely on judicial review. As we note above, judicial review is limited to examining whether the decision was lawful and complied with standards contained in administrative law. Because the imposition of a preventive measure involves a significant restriction on a person’s rights and freedoms, the correctness of the decision — rather than just its compliance with administrative law standards — should be open to re-examination.
- 12.18 This reflects the advice of the Legislation Design and Advisory Committee. Its *Legislation Guidelines* provide that there should be an adequate pathway to challenge decisions that affect a person’s rights.¹⁷ Additionally, in *Miller v New Zealand*, the United Nations Human Rights Committee considered 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

¹⁷ Legislation Design and Advisory Committee *Legislation Guidelines 2021 Edition* (September 2021) at [28.2].

- is arbitrary.¹⁸ This highlights the particular importance of a court being able to engage in a full review in order to evaluate the merits of preventive measures that involve detention.
- 12.19 A single right of appeal within a criminal jurisdiction also addresses practical concerns with the current split process for challenging ESO applications. It will enable greater procedural efficiency and continuity of counsel by allowing criminal lawyers to continue to act for clients and be legal aid approved for appeals processes.
- 12.20 As preventive measures will be administered as criminal proceedings, we consider that the process of appeal should be managed as closely as possible according to the Criminal Procedure Act 2011 (CPA). This also follows the Legislation Design and Advisory Committee’s guidance that “new legislation should rely on the CPA Act’s existing appeal rights, and not create bespoke appeal rights”.¹⁹ Under the CPA, the right of appeal applies to both parties in criminal proceedings.²⁰ This means that, under our recommendation, the right of appeal will apply both to the person subject to a preventive measure and the chief executive. Leave to appeal to the Court of Appeal should not be required.²¹ Any appeal brought by the chief executive should, however, require the consent of the Solicitor-General.²²
- 12.21 We recommend the Court of Appeal 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.²³ We consider the Court of Appeal has the appropriate seniority to hear appeals on these matters. We also consider this creates a single uniform approach challenging decisions relating to the imposition of a preventive measure. Our intention with this, and with our overarching approach to reform, is to reduce the fragmentation of the existing law. We do not wish to replicate some of the problems caused by fragmentation by creating multiple channels of appeal by, as suggested by the Public Defence Service, allowing the High Court to hear appeals against preventive measures imposed by the District Court.
- 12.22 We consider it is important for the new Act to clearly state the matters in relation to which a right of appeal would arise, and so our recommendation sets out the decisions against which a party could appeal. The reference to “preventive measures” in this recommendation 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.

¹⁸ *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].

¹⁹ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [28.2].

²⁰ Criminal Procedure Act 2011, ss 244 and 246.

²¹ Criminal Procedure Act 2011, ss 213(2) and 248(1)(a).

²² Criminal Procedure Act 2011, s 246(2). See also Cabinet Office Circular “Cabinet Directions for the Conduct of Crown Legal Business 2016” (30 March 2016) CO 16(2) at [29]; and “Appeals | Ngā Pira” in *The Solicitor-General’s Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (Te Tari Ture o te Karauna | Crown Law, December 2024) at [19].

²³ Parole Act 2002, s 107R(2).

- 12.23 For the avoidance of doubt, we think that appeals against review decisions to vary or terminate a preventive measure should not stay the effect of that decision. This is the case under the current law and in comparable jurisdictions.²⁴
- 12.24 Finally, our recommendation here sits alongside our recommendation in Chapter 18 that there should be a right of appeal against the decisions of the Review Authority to vary special conditions.

VIEWS OF KIN GROUPS

Issue

- 12.25 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, members of their kin groups should be able to share their views with the court. A kin group may be the person's family, whānau, hapū, marae or iwi. In the Issues Paper, we explained that the views these groups share may provide:²⁵
- (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.
- 12.26 Most submitters to the Issues Paper supported a requirement for the court to take into account views of kin groups when considering imposing a preventive measure. Members of Te Hunga Rōia Māori o Aotearoa | Māori Law Society said that the court should be required to consider these views to avoid it becoming a perfunctory exercise. The NZLS expressed some reservation, noting that judges and counsel involved in preventive proceedings can bring these views to the court's attention without the need for a specific statutory requirement.

Results of consultation

- 12.27 In the Preferred Approach Paper, we proposed that the court should be required 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 when it hears and determines applications for imposition or review of a preventive measure.²⁶
- 12.28 All submitters who responded to this proposal agreed.²⁷

²⁴ Parole Act 2002, s 107R(3). 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.

²⁵ Issues Paper at [9.28].

²⁶ Preferred Approach Paper, P36.

²⁷ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

- 12.29 We also proposed that the government should continue to develop and support ways to facilitate the court to hear views from family, whānau, hapū, marae, iwi and other people holding a shared sense of whānau identity.²⁸
- 12.30 All submitters who responded to this proposal agreed.²⁹ Several noted that funding is required to ensure that the views of kin are brought before the court effectively. The NZLS said there was likely to be some financial cost and that members of kin groups should not be unable to participate due to lack of funding.

Recommendations

R43

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.

- 12.31 We recommend that the court should be required 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 when it hears and determines applications for imposition or review of a preventive measure. 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. We consider that enabling kin groups to share their views when the courts make determinations regarding preventive measures will better facilitate tino rangatiratanga guaranteed under te Tiriti o Waitangi | Treaty of Waitangi.
- 12.32 In addition, this requirement complements our recommendation for people subject to preventive measures to be placed within the care of a Māori group such as a whānau, hapū, iwi or marae and may help maintain whakapapa and whanaungatanga connections (see Chapter 6). Submitters unanimously supported this proposal in the Preferred Approach Paper.
- 12.33 We consider that the law should not be prescriptive about the topics on which kin groups can express their views. The current law enables the courts to receive a wide range of evidence and information when considering whether to impose a preventive measure.³⁰ We recommend a similar approach — the court may receive and consider any information it thinks fit whether or not it would otherwise be admissible in other proceedings (see Chapter 11). This aligns with the views we received during consultation. Submitters considered that the law should be as flexible as possible to ensure views can be shared on the kin group's own terms and to enable the court to receive relevant information it might not otherwise obtain.

²⁸ Preferred Approach Paper, P37.

²⁹ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

³⁰ Sentencing Act 2002, s 27; Parole Act 2002, s 107H(2); and Public Safety (Public Protection Orders) Act 2014, s 108(1).

- 12.34 We recognise that some Māori may not be connected to the groups we have specified. As a result, we recommend that the court should also be able to hear from anyone who has a whānau-like relationship with the person concerned. This ensures that a person is not disadvantaged if their relationships are not of a particular kind.
- 12.35 Although our recommendation is the result of views we heard from Māori and we expect it to be of most relevance to Māori, we also include reference to family so that it applies more broadly.

R44

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

- 12.36 We recommend that the government should continue to develop and support ways to facilitate the court to hear views from members of a kin group during preventive measure proceedings.
- 12.37 Currently, there is 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 this recommendation.³¹ Also relevant is the evolving practice of providing cultural reports in the context of sentencing,³² the delivery of whānau-centred support programmes³³ and the creation of specific roles to assist the court or to provide guidance on court processes.³⁴
- 12.38 We recommend 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 recommendation envisions the continued implementation of current developments as well as encouraging further initiatives specific to proceedings that relate to preventive measures.
- 12.39 We agree with submitters that there will be associated financial cost and that this cost is necessary to ensure that kin groups are not excluded from participation.

³¹ 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 is another useful model of transformative change to the court system: Tāhū o te Ture | Ministry of Justice “Criminal Process Improvement Programme (CPIP)” (28 October 2022) <www.justice.govt.nz>.

³² 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].

³³ 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: Tāhū o te Ture | Ministry of Justice “Whakaorangia te Mana Tangata” <www.justice.govt.nz>.

³⁴ 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.

RIGHTS OF VICTIMS

- 12.40 Giving effect to the rights of victims of serious sexual and violent offences is an important consideration for proceedings under the new Act. There is increasing emphasis on victims in the criminal justice system.³⁵
- 12.41 In the Preferred Approach Paper, we summarised the rights victims have with respect to preventive detention, ESOs and PPOs. We proposed that the new Act should continue many of the rights victims have under the current law, particularly with regard to receiving information and sharing their views.
- 12.42 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;³⁶
 - (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;³⁷
 - (iii) make written and oral submissions to the Parole Board;³⁸
 - (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;³⁹ and
 - (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.⁴⁰
 - (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);⁴¹
 - (ii) receive notice of the outcome of any hearing;⁴²
 - (iii) at hearings, to make written submissions to the court and, with the leave of the court, to appear and make oral submissions;⁴³

³⁵ For example, the enactment of the Victims' Rights Act 2002 and subsequent reforms culminated in the publication of the Victims Code and the creation of the role of Chief Victims Advisor. See Kim McGregor "Putting victims at the heart of the criminal justice system" (2019) 7 Practice: The New Zealand Corrections Journal 8.

³⁶ 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).

³⁷ Parole Act 2002, s 43(2)(b) and (2A).

³⁸ Parole Act 2002, ss 49(4) and 50A. With the leave of the New Zealand Parole Board, the person may be represented by counsel or have another person speak for them.

³⁹ Parole Act 2002, s 50(1)(a)–(b).

⁴⁰ Victims' Rights Act 2002, ss 36 and 36A.

⁴¹ Parole Act 2002, s 107H(4).

⁴² Parole Act 2002, s 107H(7).

⁴³ Parole Act 2002, s 107H(5).

- (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;⁴⁴
 - (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;⁴⁵ 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.⁴⁶
- (c) In respect of PPOs:
- (i) victims have rights to receive notice: that an application for a PPO has been made;⁴⁷ of the outcome when an application is determined or suspended;⁴⁸ that an application for review of the order has been made;⁴⁹ of the outcome of a review;⁵⁰ that a PPO is replaced by a protective supervision order;⁵¹ that the chief executive or person subject to a protective supervision order applies for its review;⁵² or when a protective supervision order is cancelled;⁵³ but
 - (ii) victims have no rights to make submissions in proceedings relating to PPOs.

Notification

Results of consultation

12.43 In the Preferred Approach Paper, we proposed that the chief executive must notify each victim of a person considered for or subject to a preventive measure about certain matters. Our proposal specified that victims should be notified when an application for a preventive measure or review is made, what the outcome of that application was, when special conditions are varied or terminated and when a person subject to a preventive measure dies, escapes or is convicted of a breach of their conditions.⁵⁴

12.44 We also proposed that notification regarding special conditions could be withheld if disclosure would unduly interfere with the privacy of any other person.⁵⁵ This proposal maintains consistency with the current law where the Parole Board must notify victims

⁴⁴ Parole Act 2002, s 107K(6). The New Zealand 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).

⁴⁵ Parole Act 2002, s 107K(7).

⁴⁶ Parole Act 2002, s 107V.

⁴⁷ Public Safety (Public Protection Orders) Act 2014, s 8(2).

⁴⁸ Public Safety (Public Protection Orders) Act 2014, s 14.

⁴⁹ Public Safety (Public Protection Orders) Act 2014, ss 16(4) and 17(2).

⁵⁰ Public Safety (Public Protection Orders) Act 2014, s 18(5).

⁵¹ Public Safety (Public Protection Orders) Act 2014, s 93(4).

⁵² Public Safety (Public Protection Orders) Act 2014, ss 99(3) and 100(2).

⁵³ Public Safety (Public Protection Orders) Act 2014, s 102(d).

⁵⁴ Preferred Approach Paper, P38.

⁵⁵ Preferred Approach Paper, P39.

about release conditions for preventive detention and special conditions for ESOs but notification may be withheld if it would unduly interfere with the privacy of any person.⁵⁶

12.45 All submitters who responded to our proposal agreed that victims should be entitled to receive notifications about the matters relating to preventive measures specified.⁵⁷

12.46 Most of these submitters also supported the proposal that notifications regarding special conditions could be withheld if that would unduly interfere with the privacy of any person.⁵⁸ The NZLS said that withholding details about a person's location could be appropriate. It noted that people subject to a preventive measure have been forced to leave a community when that information has been revealed. This was counter-productive to their rehabilitation because they then lack the supports in place at the original location. The provision could also be used to protect the privacy of partners or other family members. The Bond Trust disagreed with the proposal — it did not think limiting access to information on the grounds of privacy was required.

Recommendations

R45

The chief executive of Ara Poutama Aotearoa | Department of Corrections should, as soon as practicable, notify 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 abandoned;
- 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 or termination 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; or
- h. that the person subject to community preventive supervision or residential preventive supervision has been convicted of a breach of their conditions.

R46

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.

⁵⁶ Parole Act 2002, ss 50 and 107K(8)(d).

⁵⁷ Bond Trust, Myra Crawford-Smtih, criminal lawyers from Te Tari Ture o te Karauna | Crown Law, South Auckland Bar Association.

⁵⁸ Myra Crawford-Smtih, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

- 12.47 We recommend that the new Act should provide that the chief executive should be responsible for notifying victims in the circumstances we specify. We consider that notifying victims of people considered for, or subject to, a preventive measure aligns with rights of victims under Part 3 of the Victims' Rights Act 2002 and how these rights apply regarding parole hearings for people subject to preventive detention and court proceedings relating to ESOs and PPOs.
- 12.48 We understand that receiving information is important to victims. The following considerations are relevant:
- (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.⁵⁹
 - (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 cause victims to experience further harm and distress affecting their recovery and reducing their confidence in the justice system.⁶⁰
 - (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.
- 12.49 We also recommend that victims be notified about what special conditions are imposed with respect to preventive measures and when they are varied or terminated. These notifications, however, may be withheld if providing that information would unduly interfere with the privacy of any other person. This reflects similar provisions in the current law that relate to release conditions for preventive detention and special conditions for ESOs.⁶¹ This restriction ensures that people connected to the person subject to special conditions are afforded privacy. Without this protection, these individuals may be at risk of adverse consequences such as public shaming or harassment. We conclude that the law should continue to provide some protection from those consequences.

Victims' submissions to the court

Results of consultation

- 12.50 In the Preferred Approach Paper, we proposed that victims should be entitled to make submissions to the court, although the ability to appear and make oral submissions should require the leave of the court. We also proposed that victims should be entitled to be represented by counsel and to have support people available when giving oral

⁵⁹ Manaaki Tāngata | Victim Support "Victim Notification Register" <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.

⁶⁰ Elaine Wedlock and Jacki Tapley *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner, March 2016) at 13–14.

⁶¹ Parole Act 2002, ss 50(2) and 107K(8)(d).

submissions. This reflects the current law that allows representation and/or support when a victim engages with parole hearings.⁶²

- 12.51 The Bond Trust and the South Auckland Bar Association agreed with the proposal without further comment. The NZLS agreed that the law should allow victims to be represented by counsel because this would increase the likelihood of submissions that are focused and useful to the court's determination. It also said that victims should be eligible for legal aid because otherwise the entitlement would be limited to those who could afford to retain a lawyer. Although victims are not currently eligible for legal aid regarding parole matters unless making an oral submission, it maintained that access to representation is justified because proceedings before the court are more formal.
- 12.52 Both TLANZ and criminal lawyers from Te Tari Ture o te Karauna | Crown Law cautioned that involving victims to the extent proposed may reinforce the notion that preventive measures are second penalties, which the overall approach seeks to avoid. Despite that, the criminal lawyers from Crown Law noted that experience from ESO hearings showed that victim involvement was rare but useful. It also said that the length of time that has elapsed since the conviction meant some victims found this later opportunity to be heard helpful.
- 12.53 TLANZ and another submitter questioned the appropriateness of victims' submissions being considered because they already had the opportunity to be heard at sentencing and at parole hearings. TLANZ also expressed doubt whether victims should be heard if their submissions did not relate directly to risk assessment. It said that permitting victims to be consulted at each stage could be costly and time-consuming and may become an "overly emotional or even vindictive exercise". It also pointed to an issue of fairness regarding the management of victim submissions in parole and ESO hearings. Such submissions were sometimes late and not disclosed to counsel or defendants. This could have a detrimental impact because there was no opportunity to address the concerns raised.

Recommendation

R47

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.

- 12.54 We recommend that victims should be entitled to make submissions to the court, although the ability to appear and make oral submissions should require the leave of the court. This adopts the current approach with respect to parole and ESO hearings though it gives greater rights to participation than provided for in regard to PPOs.

⁶² Preferred Approach Paper, P40 and [12.38]–[12.42].

- 12.55 Most submitters thought that there are advantages in ensuring victims' views are heard. Some echoed other feedback we received that victim participation is likely to be rare but that their views may still be valuable. Allowing victims to explain the harm inflicted could assist the court to assess what kind of reoffending risk the person concerned poses.
- 12.56 Although there remains a concern, raised by some submitters, that victims' views could be irrelevant to, or a distraction from, an analysis of a person's risk of reoffending, we consider that victims should continue to have the ability, subject to the leave of the court, to make submissions in preventive measures proceedings. We do not think it appropriate to remove victim participation entirely, and the court is capable of assigning proper weight to victims' submissions in its determination.⁶³
- 12.57 We also recommend that victims should be entitled to be represented by counsel in proceedings and/or have a support person or people present when making an oral submission to the court. The current law regarding parole hearings provides for representation and support if a victim makes an oral submission. The Parole Act 2002 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.⁶⁴ Our recommendation mirrors the provision for victims to be represented by counsel and/or support people when giving oral submissions in court.
- 12.58 Our recommendations do not provide for victims to receive notifications nor make submissions regarding annual reviews conducted by the Review Authority (see Chapter 18). Rather, victims may only receive notifications in relation to reviews conducted by the court. Unlike the court, the Review Authority does not have a decision-making function regarding whether a measure is imposed. We consider that it would be impractical for the Review Authority to solicit views from victims each year and potentially burdensome on victims to be involved on such a frequent basis.

Definition of victims

Results of consultation

- 12.59 In the Preferred Approach Paper, we proposed that the victims who should have rights to notifications and to submit are those to which Part 3 of the Victims' Rights Act applies.⁶⁵ In other words, the victims must:⁶⁶
- (a) have been victims of "specified offences" as defined in the Victims' Rights Act;⁶⁷ 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.
- 12.60 We also suggested that the victims must have been victims of qualifying offences under the new Act.

⁶³ The New Zealand 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].

⁶⁴ Parole Act 2002, s 49(4).

⁶⁵ Preferred Approach Paper, P41.

⁶⁶ Victims' Rights Act 2002, s 32B(1).

⁶⁷ "Specified offences" are defined in s 29 of the Victims' Rights Act 2002.

12.61 Submitters who responded agreed with the proposed definition.⁶⁸

Recommendation

R48

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.

12.62 We recommend that the rights in this section should apply to people who are victims of a qualifying offence committed by a person either being considered for, or subject to, a preventive measure. They must also have requested to be registered according to the requirements under the Victims' Rights Act.

12.63 This recommendation is broadly consistent with the category of victims who are entitled to notifications and to participate in relation to parole matters, ESOs and PPOs. These rights apply to victims who have requested that they be given information about an offender and have supplied their address (or that of a representative) in accordance with Part 3 of the Victims' Rights Act.⁶⁹

12.64 As we noted in the Preferred Approach Paper, Part 3 of the Victims' Rights Act requires that a person must be a victim of a "specified offence". However, some offences that we recommend should be qualifying offences are not a "specified offence". In particular, in Chapter 8, we recommend that certain imprisonable offences under the Films, Videos, and Publications Classification Act 1993 should 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 recommendations in this regard. The Victims' Rights Act establishes which victims ought to have ongoing rights to information. It is for the preventive regimes to reflect that policy decision rather than the other way around.

⁶⁸ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

⁶⁹ 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 New Zealand 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).

Protecting victims' safety and security

Results of consultation

- 12.65 In the Preferred Approach Paper, we proposed that similar protections for victims to those under the current law should apply under the new Act.⁷⁰ The Parole Act provides that victims' addresses or contact details should not be disclosed to an offender and prohibits retention of victims' written submissions by an offender.⁷¹ It is an offence to publish information that identifies or enables the identification of a victim.⁷² Further, certain information (including victim submissions) may be withheld from an offender if this prejudices the mental or physical health of the offender or endangers the safety of any person.⁷³ The Victims' Rights Act provides similar protections in regard to victim impact statements. Offenders may be shown victim impact statements but are prohibited from retaining copies.⁷⁴ The court may also withhold part of a statement to protect the physical safety of the victim.⁷⁵ In addition, the court has general powers to make directions or impose conditions on disclosure or distribution of statements where this "may be necessary to protect the victim's physical safety or security, emotional welfare, and privacy".⁷⁶
- 12.66 Most submitters who responded to our proposal agreed that protections are necessary and some also provided feedback about their extent or operation.⁷⁷ The South Auckland Bar Association said that any submissions made by a victim should be provided with sufficient time to ensure it can be responded to. The NZLS noted that the wording of our proposal was more restrictive than equivalent provisions in the Victims' Rights Act. It said:
- (a) the reasons for withholding information should include emotional harm and privacy;
 - (b) the court should be able to make directions or impose conditions about disclosure and distribution as it currently can with respect to victim impact statements;
 - (c) it should be clarified that, if information is withheld from an offender, it can be provided to their lawyer;
 - (d) the law should provide for situations where a victim wishes to speak publicly and be identified.
- 12.67 TLANZ had concerns about the proposed restriction on respondents retaining written submissions. It said that this may prevent counsel taking proper instructions. It also maintained that the respondent should be able to see and respond to all information as a matter of natural justice and that withholding information is not consistent with proceedings intended to be about prevention of risk rather than punishment.

⁷⁰ Preferred Approach Paper, P42.

⁷¹ Parole Act 2002, s 13(2).

⁷² Parole Act 2002, s 13(8).

⁷³ Parole Act 2002, s 13(3). Information withheld may be provided to the offender's counsel: s 13(5).

⁷⁴ Victims' Rights Act 2002, ss 23–24.

⁷⁵ Victims' Rights Act 2002, s 25.

⁷⁶ Victims' Rights Act 2002, s 27.

⁷⁷ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

Recommendation

R49

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, give directions or impose conditions on the disclosure or distribution of a victim's submission if, in its opinion, it is necessary to protect the physical safety or security, emotional welfare or privacy of the victim concerned; and
- c. making it an offence for any person to publish information provided to the court for the purpose of making a victim submission that identifies, or enables the identification of, a victim of a person subject to an application or a preventive measure.

- 12.68 We recommend that a person subject to a preventive measure or against whom an application has been made be prohibited from receiving any information that discloses a victim's address or contact details. This mirrors the Parole Act and provides a basic level of protection for the victim from harassment or reprisal. We also recommend that respondents be prohibited from retaining written submissions — this reflects both the Parole Act and the Victims' Rights Act restriction on the offender being able to retain copies of such information.
- 12.69 We do not agree with the suggestion that these recommendations place limitations on natural justice or counsel's ability to take instructions, as suggested by one submitter. Restricting access to a victim's address or contact details and prohibiting the retention of victims' submissions should not prevent the person or counsel accessing the content of those submissions. As provided for under the Parole Act, we expect that victim submissions will be made available for the purpose of assisting the respondent to make their own submissions. Victims' submissions should be made available in a timely way so that they may be responded to.
- 12.70 In addition, we recommend that the court should be able to give directions or impose conditions related to the disclosure or distribution of a victim's submissions where there are grounds to do so. We agree with the suggestion of the NZLS that restrictions on the disclosure and withholding of information should be consistent with the Victims' Rights Act. We therefore recommend the restrictions must be necessary to protect physical safety, emotional welfare or privacy of the victim. The court should be able to make directions or impose conditions like those listed in section 27(2) of the Victims' Rights Act applying to victim impact statements.
- 12.71 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 and dignity can be upheld and reduces the chances of re-victimisation or reprisal.

SUPPRESSION OF NAMES, EVIDENCE AND DETAILS OF PREVENTIVE MEASURES

Current law

- 12.72 The current law on preventive detention, ESOs and PPOs has various provisions governing the suppression of names and evidence in proceedings. These all draw on provisions of the CPA relating to public access and restrictions on reporting of criminal proceedings.
- 12.73 The starting point in the CPA is the long-standing principle of open justice, which is enshrined in the NZ Bill of Rights⁷⁸ and has been affirmed on multiple occasion by the courts.⁷⁹ This means that there is a strong presumption in favour of open court proceedings and publication.⁸⁰ This presumption is not absolute, however, and must be weighed against other competing interests. The CPA allows the court to suppress the identity of defendants, the identity of witnesses, the identity of victims, evidence and submissions.⁸¹ In these circumstances, the onus is on the applicant seeking suppression to satisfy the judge that suppression should be granted.⁸²
- 12.74 Sections 200 (court may suppress the identity of defendant) and 205 (court may suppress evidence and submissions) of the CPA set out grounds for making a suppression order. The respective lists of grounds in section 200 and in section 205 are similar but not identical.
- 12.75 The court may suppress the identity of the defendant under section 200 if publication would be likely to:
- (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence or any person connected with that person;
 - (b) cast suspicion on another person that may cause undue hardship to that person;
 - (c) cause undue hardship to any victim of the offence;
 - (d) endanger the safety of any person;
 - (e) lead to the identification of another person whose name is suppressed by order or by law;
 - (f) prejudice the maintenance of the law, including the prevention, investigation and detection of offences; or
 - (g) prejudice the security or defence of New Zealand.

⁷⁸ New Zealand Bill of Rights Act 1990, s 25(a): “the right to a fair and public hearing by an independent and impartial court”.

⁷⁹ 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.

⁸⁰ *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

⁸¹ Criminal Procedure Act 2011, ss 200–205. 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).

⁸² *Robertson v New Zealand Police* [2015] NZCA 7 at [44].

- 12.76 The court may suppress evidence and submissions under section 205 if publication would be likely to:
- (a) cause undue hardship to any victim of the offence;
 - (b) create a real risk of prejudice to a fair trial;
 - (c) endanger the safety of any person;
 - (d) lead to the identification of a person whose name is suppressed by order or by law;
 - (e) prejudice the maintenance of the law, including the prevention, investigation and detection of offences; or
 - (f) prejudice the security or defence of New Zealand.
- 12.77 Under both sections, the court must apply a two-stage test:⁸³
- (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.⁸⁴
 - (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 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.⁸⁵
- 12.78 In the context of the current law governing preventive measures:
- (a) As preventive detention is a sentence, the relevant provisions relating to suppression in criminal proceedings under the CPA 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 can be dealt with under the court’s inherent jurisdiction, applying the same considerations as in the CPA.⁸⁶ Section 110 of the PPO Act provides for the court to make an order forbidding publication of evidence and submissions broadly on the same threshold grounds set out in section 205(2) of the CPA.⁸⁷

⁸³ *M v R* [2024] NZSC 29 at [44]; and *Robertson v Police* [2015] NZCA 7 at [39]–[41].

⁸⁴ Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02].

⁸⁵ Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02A].

⁸⁶ *CJW v Chief Executive of the Department of Corrections* [2016] NZHC 469 at [14].

⁸⁷ 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.

- 12.79 Under the CPA, which applies to preventive detention and ESO proceedings, the court may also make an order to clear the court if a suppression order is not sufficient to avoid any of the following risks:⁸⁸
- (a) Undue disruption to the conduct of the proceedings.
 - (b) Prejudicing the security or defence of New Zealand.
 - (c) A real risk of prejudice to a fair trial.
 - (d) Endangering the safety of any person.
 - (e) Prejudicing the maintenance of the law, including the prevention, investigation and detection of offences.

Public court proceedings

- 12.80 The main question for consideration in this section is whether the new Act should continue the approach taken under the current law — should proceedings governing preventive measures generally be open to the public, and should the court have the power to suppress the publication of particular details?

Results of consultation

- 12.81 In the Preferred Approach Paper, we proposed that proceedings under the new Act should generally be open to the public.⁸⁹ We considered that there is a strong public interest in the outcome of proceedings governing preventive measures and that this approach would therefore uphold the well-established principle of open justice.⁹⁰ We also noted our proposed approach would logically follow from our proposal for proceedings to be heard under the courts' criminal jurisdiction and represent a continuation of the approach under the current law.⁹¹
- 12.82 All submitters who responded to this proposal supported it.⁹² The New Zealand Council for Civil Liberties commented that openness of proceedings is a “fundamental pillar of open justice, and even more vital when considering the human rights implications of preventive measures”. Some submitters expressed their support more conditionally.⁹³ The Bond Trust said that the potential reintegrative needs of the person should be paramount and not unreasonably prejudiced through open proceedings. The NZLS and the South Auckland Bar Association both considered that there should be the ability to close the court for applications and submissions that contain highly sensitive and private information — for example, the fact that an offender may have been sexually abused as a child.

⁸⁸ Criminal Procedure Act 2011, s 197.

⁸⁹ Preferred Approach Paper, P43.

⁹⁰ Preferred Approach Paper at [12.55].

⁹¹ Preferred Approach Paper at [12.54].

⁹² Bond Trust, Myra Crawford-Smith, 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 South Auckland Bar Association noted its support was based on its view that imposition of preventive measures should take place at sentencing.

⁹³ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

Recommendation

R50

Court proceedings concerning preventive measures should generally be open to the public.

- 12.83 We recommend that proceedings governing preventive measures should generally be public. By proceedings, we mean any proceedings relating to an application to impose, review, terminate or escalate a preventive measure. There was majority support for this approach from submitters.
- 12.84 This approach upholds the well-established and fundamental principle of open justice.⁹⁴ We consider this is the correct starting point. In our view, there is a strong public interest 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 open justice in ordinary criminal proceedings are not relevant (for example, its role in encouraging other witnesses to come forward).
- 12.85 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 Report 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 previously observed:⁹⁵
- 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.
- 12.86 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.
- 12.87 In reaching this view, we considered whether proceedings governing preventive measures may be more analogous to those heard in private 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.⁹⁶
- 12.88 Another consequence of our recommendation will be that discussion of special conditions to be imposed as part of community preventive supervision and residential preventive supervision will also be public.⁹⁷ This differs from the current approach where special

⁹⁴ *M v R* [2024] NZSC 29 at [44]; and *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

⁹⁵ Te Aka Matua o te Ture | Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [2.1].

⁹⁶ See Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 24–25; and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 129–130.

⁹⁷ At the same time, the court (as opposed to the New Zealand Parole Board) sets the conditions of an interim supervision order, so our recommendation 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. 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.

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 to engender “an atmosphere that encourages persons appearing before the Board to speak for themselves, and as freely and frankly as possible”.⁹⁸ This ensures that witnesses are able to give frank and honest evidence, including on personal and sensitive matters, 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.

- 12.89 We remain of the view that there is a legitimately strong public interest in the openness of proceedings relating to preventive measures because outcomes have direct consequences for public safety. In our view, this distinguishes them from other proceedings such as those in the Family Court discussed above.
- 12.90 Nevertheless, private and sensitive information can arise in proceedings governing preventive measures, and this should be accommodated within the new Act. Accordingly, we make recommendations below that the court should, as it does under the CPA, in certain circumstances have the power to make suppression orders or clear the court. These recommendations align with our discussion below that the principle of open justice can be limited by other competing interests.
- 12.91 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 punitive. 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. 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. Additionally, we consider our recommendations allowing for suppression orders and a cleared court may further mitigate any perceptions of hearings being punitive.

Court may make an order for suppression of names, evidence and details of preventive measures

Results of consultation

- 12.92 In the Preferred Approach Paper, we proposed that the court should continue to have the ability to make an order forbidding publication of the name or identifying details of a person who is subject to an application for a preventive measure, any evidence given and details of any measure subsequently imposed.⁹⁹ We also proposed that the new Act should continue the two-stage test currently applied by the courts under the CPA:¹⁰⁰ first, to consider whether any of the threshold grounds for suppression have been met; and second, whether an order forbidding publication should be made, weighing the competing interests of the relevant person for suppression and the public interest in open

⁹⁸ Parole Act 2002, s 49(1).

⁹⁹ Preferred Approach Paper, P44.

¹⁰⁰ Preferred Approach Paper, P45 and [12.67]–[12.78].

justice. In recognition of the fact that some existing grounds in the CPA are less relevant to preventive measures and some additional, more relevant grounds should be included, we proposed that the new Act should contain its own test rather than referring to the CPA.¹⁰¹

12.93 Submitters were broadly supportive of this proposed approach.¹⁰² Some submitters provided more detailed feedback and suggestions. We cover these below in the context of each relevant recommendation.

Recommendations

R51

The court should have the power 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;
- 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.

12.94 We recommend that, under the new Act, the court should be able to make an order forbidding publication of names and identifying details, evidence given or submissions made and any details of the measure imposed. Submitters who responded to this proposal agreed with this approach.

12.95 The principle of open justice can be limited by other competing interests. Our recommendation therefore continues the established approach under 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 recommend the inclusion of “any details of the measure imposed” as something that a court may suppress. We think that details of a particular measure — for example, any special conditions of community preventive supervision or residential preventive supervision — may be capable of identifying, if already suppressed, the identity of a person on whom the condition is imposed.

12.96 Criminal lawyers from Crown Law suggested an alternative proposal that would grant automatic name suppression for anyone subject to an application for a preventive measure until the application was determined. We do not recommend such an approach. The CPA provides for automatic suppression of a defendant’s identity only in the highly specific circumstances of incest or sexual conduct with a dependent family member.¹⁰³ The rationale for this provision is, explicitly, to protect the welfare of the complainant.¹⁰⁴

¹⁰¹ Preferred Approach Paper, P45 and [12.68].

¹⁰² Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

¹⁰³ Criminal Procedure Act 2011, s 201.

¹⁰⁴ See Criminal Procedure Act 2011, s 201(2).

This is a high bar for automatic suppression, which we do not consider is met in the context of the imposition of preventive measures.

- 12.97 We do not recommend 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 should remain in place.¹⁰⁵

R52

The court should have the power to make an order forbidding publication of a matter listed under R51 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 (the person);
- b. unduly impede the person's ability to engage in rehabilitation and reintegration;
- c. create a real risk of prejudice to a fair trial;
- d. cause undue hardship to any victim of the person's previous offending;
- e. endanger the safety of any person;
- f. lead to the identification of another person whose name is suppressed by order of law; or
- g. prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

- 12.98 We recommend that the new Act should continue the two-stage test currently applied by the courts in regard to suppression orders under the CPA. This will require the court to consider, first, whether any of the threshold grounds for suppression (as listed in the recommendation) are 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. The second stage of the test was developed by the courts. We do not restate it in the recommendation but expect that the courts will adopt the same approach as they have in interpreting the test under the CPA. All submitters who responded to this proposal supported this general approach, although some caveated their support based on individual elements of the test, which we discuss below.

- 12.99 The CPA treats the suppression of the name and identifying details of a defendant and the suppression of evidence and submissions separately. We do not consider it necessary to maintain different threshold grounds for each basis. We also think that providing one

¹⁰⁵ At the time of writing, the Government has stated it intends to amend the Criminal Procedure Act 2011 so that a court cannot issue a name suppression order for adults convicted of sexual offences unless the victim agrees: Paul Goldsmith "Better support for victims of sexual violence" (press release, 21 November 2024); and Amendment Paper No 216 to Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill. We do not consider that a victim's agreement should be required for a suppression order to be granted under the new Act. As we discuss, proceedings about preventive measures have different aims and considerations to ordinary criminal proceedings.

set of grounds for suppression of both the name and identifying details of a defendant and evidence and submissions simplifies the approach to be taken by the court.

- 12.100 Rather than continuing to refer to the existing tests in the CPA (as is the approach currently with ESOs), we recommend that the new Act should contain its own test. This is because of the different aims and considerations of ordinary criminal proceedings and preventive measures. In ordinary criminal proceedings, there is a strong public interest in the openness of proceedings to determine guilt and see justice administered. This is less strong 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. Additionally, as we explain in Chapter 5, a key purpose of the new regime will also be to support rehabilitation and reintegration to allow someone to be restored to a safe and unrestricted life in the community. Accordingly, we consider there are some grounds in the CPA that are less relevant in the context of preventive measures and some additional grounds more relevant to preventive measures that should be included.
- 12.101 Our recommendation retains the first ground under the existing tests in the CPA — that publication would cause undue 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.¹⁰⁶ We therefore envisage that our recommended “undue hardship” ground will 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 — and is therefore also relevant to the court’s consideration of whether to make an order to clear the court, discussed above.
- 12.102 A standard of “undue hardship” recognises that publication must cause something beyond mere hardship, as any kind of publicity is likely to always adversely impact the person concerned.¹⁰⁷ We favour this over the higher standard of “extreme hardship” currently contained in the CPA.¹⁰⁸ The criminal lawyers from Crown Law were concerned about the proposed test creating a different standard for name suppression for an eligible person in preventive measures proceedings than in ordinary criminal proceedings. It suggested that the test should remain one of “extreme hardship”, as in the CPA. We disagree. “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 see justice is administered and condemn the person’s behaviour. As we have noted above, this interest is less strong in the context of preventive measures, where guilt has already been established. We consider this lower standard of “undue” is appropriate because the imposition of a preventive measure is not intended to be punitive or denunciatory.

¹⁰⁶ Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA205.02(1)].

¹⁰⁷ “‘Undue hardship’ requires something more than the hardship that would be expected to occur through publication.”: Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02A(b)].

¹⁰⁸ 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 (*Lyll v Solicitor-General* [1997] 2 NZLR 641 (CA)).

12.103 Our recommendation includes a new threshold ground that requires the court to consider whether publication would unduly impede 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 a 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.”¹⁰⁹ 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:¹¹⁰

During the period of most publicity following delivery of these decisions, 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.

12.104 We consider, however, given the focus of our recommendations for a new Act on rehabilitation and reintegration, there is a benefit to making this consideration explicit.

12.105 The Public Defence Service considered that threshold of “unduly impedes” was too high and that the correct test should be whether publication would be likely to “impede” the person’s ability to engage in rehabilitation and reintegration. Our recommendation retains the “unduly impedes” threshold. As with hardship, we consider that publication will always be likely to affect someone’s ability to engage in rehabilitation and reintegration. The question is whether this is to such an extent that it outweighs the interest in the proceedings governing preventive measures being public. We consider a threshold of “undue” is appropriate and aligns with the approach taken by the courts in ordinary criminal proceedings.

12.106 We make some further comments on carrying over existing grounds under the CPA into the new Act:

- (a) Our recommendation retains the existing ground of creating a risk of prejudice to a fair trial. It is possible that the person against whom a preventive measure is sought is, or becomes, subject to criminal charges in respect of alleged offending yet to be proven. That alleged offending may be relevant to the court’s determination of whether a preventive measure should be imposed (see Chapter 10). It is important that the court’s consideration of that behaviour does not prejudice any later trial in relation to it.
- (b) Our recommendation 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 details of offending are unlikely to be discussed 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

¹⁰⁹ *Chief Executive, Department of Corrections v P* [2017] NZHC 135 at [23].

¹¹⁰ *Chief Executive of the Department of Corrections v CJW* [2016] NZHC 1082 at [81].

example, the potential for retaliatory or vigilante style action if their identity or location was made public).¹¹¹ 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 will take this into consideration as part of its assessment of whether publication is in the public interest.

- (c) Our recommendation retains the ground that publication may lead to the identification of another person. We 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.¹¹² 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.
- (d) Our recommendation also retains the ground that publication may prejudice the maintenance of the law. This 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.¹¹³ 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 are unlikely to 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 recommend its retention.

12.107 Our recommendation does not include the ground of prejudicing the security or defence of Aotearoa New Zealand that currently features in sections 200 and 205 of the CPA. This ground may be relevant where information could be disclosed that impacts the gathering of intelligence or relationships with foreign countries. This usually involves offences of espionage, sabotage or terrorism. However, these offences are not qualifying offences for preventive measures. We do not expect that proceedings that focus on the risk of committing a qualifying offence under the new Act raise issues relating to security or defence.¹¹⁴

¹¹¹ 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]).

¹¹² Simon France *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02(6)].

¹¹³ Simon France *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA200.02(4)].

¹¹⁴ Simon France *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA197.02(2)] and [CPA200.02(8)].

Power to clear the court

R53

The court should have the power to make an order to clear the court if satisfied that:

- a. the order is necessary to avoid:
 - i. undue disruption to the conduct of proceedings;
 - ii. a real risk of prejudice to a fair hearing;
 - iii. endangering the safety of any person;
 - iv. undue hardship to the person who is the subject of an application for, or subject to, a preventive measure; or
 - v. prejudicing the maintenance of the law, including the prevention, investigation and detection of offences; and
- b. a suppression order is not sufficient to avoid that risk.

12.108 We conclude that the court should have the power to clear the court if a suppression order would not be sufficient to avoid certain risks.

12.109 Our recommendation is based on the approach under section 197 of the CPA. This means that the court should have the power to clear the court for all or part of proceedings but only as a measure of last resort as, in most cases, a suppression will adequately safeguard the interest that requires protection.¹¹⁵

12.110 The factors we consider the court should be satisfied of in making such an order are based on those in section 197 of the CPA, with some amendment. As we explain above in the context of suppression orders, we consider that the factor of prejudicing the security or defence of New Zealand is not relevant to proceedings governing the imposition of preventive measures.¹¹⁶ Our recommendation also creates a new factor of “undue hardship to the person who is the subject of an application for, or subject to, a preventive measure”. This is intended to capture circumstances envisaged above, where the sharing of intimate or sensitive information would cause significant distress to the person concerned. As envisaged by our recommended test, however, and our discussion on suppression, we consider that, in most cases, suppression will adequately safeguard the interest requiring protection.

¹¹⁵ Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA197.01].

¹¹⁶ Criminal Procedure Act 2011, s 197(2)(a)(ii).

PART 5:

ADMINISTRATION OF PREVENTIVE MEASURES



CHAPTER 13

Overarching operational matters

INTRODUCTION

- 13.1 In this chapter, we consider operational matters that are relevant to all three of the preventive measures we recommend in other chapters of this Report — community preventive supervision (Chapter 14), residential preventive supervision (Chapter 15) and secure preventive detention (Chapter 16). These are the matters we cover:
- (a) **Who should be responsible for administering the new preventive measures.** We recommend that Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) should continue to be responsible for the administration of preventive measures. We make the following accompanying recommendations. First, Ara Poutama may enter into management contracts with external entities for the operation of residential or secure facilities. Second, there should be procedures for addressing complaints from people subject to preventive measures. Third, facilities should be subject to periodic inspections.
 - (b) **Guiding principles for the administration of the new preventive measures.** We recommend that probation officers (for community preventive supervision) and facility managers and their staff (for residential preventive supervision and secure preventive detention) must have regard to guiding principles when exercising powers under the new Act. The guiding principles aim to ensure that they their powers in a way that is consistent with the rights of the people subject to preventive measures.
 - (c) **Entitlement to rehabilitative treatment and reintegration support.** We recommend that people subject to preventive measures should be entitled to receive rehabilitative treatment and reintegration support and that Ara Poutama must ensure sufficient rehabilitative treatment and reintegration support is available to them.

OPERATIONAL RESPONSIBILITY

Current law

- 13.2 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 2002.¹
- 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.² 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”.³
- 13.4 Prison and residence management contracts must satisfy several requirements.⁴ 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.⁵ 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.⁶
- 13.5 A manager of a prison operated by a contractor 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 An extended supervision order (ESO) may require a person to reside at an approved address and stay there for up to 24 hours per day.⁷ Some people subject to ESOs are detained at facilities on prison grounds or in the community, which we discuss further in Chapter 15. The Parole Act does not detail how these facilities should be run or by whom. Rather, the requirements arise from the standard and special conditions to which people are subject. Programme conditions that involve the placement of the offender in the care of any appropriate person or agency are particularly relevant.⁸ Currently, some facilities for people subject to ESOs are run by Ara Poutama and others by external contractors.⁹

Results of consultation

- 13.7 In the Preferred Approach Paper, we considered which government agency should be responsible for the administration of preventive measures under the new Act. We

¹ Ara Poutama Aotearoa | Department of Corrections and Tāhū o te Ture | Ministry of Justice are jointly responsible for the administration of the Parole Act 2002.

² Corrections Act 2004, s 198.

³ Public Safety (Public Protection Orders) Act 2014, s 130.

⁴ Corrections Act 2004, s 199; and Public Safety (Public Protection Orders) Act 2014, s 131.

⁵ Corrections Act 2004, s 199(2); and Public Safety (Public Protection Orders) Act 2014, s 131(2).

⁶ Corrections Act 2004, s 199(2)(b); and Public Safety (Public Protection Orders) Act 2014, s 131(2)(b).

⁷ Parole Act 2002, ss 15(3)(a) and (ab), 33(2)(c)(ii) and 107K(1).

⁸ Parole Act 2002, ss 15(3)(b), 16(c) and 107K(3)(bb)(i).

⁹ Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Assessment: Programme conditions for Extended Supervision Orders* (2 August 2023) at [31]–[38].

- recognised concerns about Ara Poutama’s performance in managing prisoners.¹⁰ We nevertheless proposed that Ara Poutama should be the government department responsible for the operation of the new preventive measures. We made this proposal because of Ara Poutama’s institutional knowledge and its experience in detaining and supervising people considered at risk of reoffending.¹¹
- 13.8 Most submitters who responded to this proposal agreed with it.¹² Other submitters favoured an approach where a health agency is responsible or otherwise provides input.¹³ The New Zealand Council for Civil Liberties (NZCCL) echoed the Chief Ombudsman’s submission to the Issues Paper that Ara Poutama was underperforming in managing prisoners. The NZCCL submitted it was “greatly alarmed” that Ara Poutama “appears incapable of fulfilling its current responsibilities”.
- 13.9 Our proposal about operational responsibility was accompanied by proposals that facility managers should be appointed by the chief executive and that they should comply with guidelines or instructions from the chief executive.¹⁴ Submitters who responded agreed with these proposals.¹⁵ Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) added that there should be an explicit requirement for the chief executive to develop such guidelines or instructions.
- 13.10 We further proposed that Ara Poutama should be able to enter into facility management contracts with appropriate external entities.¹⁶ The Bond Trust and one other submitter agreed with the proposal.
- 13.11 The Law Association of New Zealand (TLANZ) stated the only organisations capable of taking on facility management contracts were those that are currently providing supported accommodation to people on parole. However, these organisations are already at capacity, it added. It would, therefore, be more likely that Ara Poutama will end up running facilities on prison land that are “not conducive to pro-social life and have significant issues”.
- 13.12 The NZLS was hesitant about the proposal because of concerns about private companies managing prisons. It added that, in contrast, the Salisbury Street Foundation has a proven reputation for decreasing recidivism and improving outcomes for those who stay at its residence. If external entities contracted to manage facilities were to operate like the Salisbury Street Foundation, that would go some way towards addressing concerns.
- 13.13 We also proposed that residential and secure facilities should 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.¹⁷

¹⁰ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [13.25]–[13.26].

¹¹ Preferred Approach Paper, P46.

¹² Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

¹³ Myra Crawford-Smith, New Zealand Council for Civil Liberties.

¹⁴ Preferred Approach Paper, P47 and P48.

¹⁵ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

¹⁶ Preferred Approach Paper, P49.

¹⁷ Preferred Approach Paper, P67 and P78.

- 13.14 We received broad support from submitters who addressed this proposal.¹⁸ The Bond Trust added that inspections by specialised inspectors should also occur “as may be reasonable” in response to complaints received. The NZLS suggested that the parameters for a complaint to inspectors should be considered, including whether a right to complain should be limited to breaches of specified rights or entitlements. It supported a broader ability to complain about administrative acts, decisions and omissions.
- 13.15 The Chief Ombudsman highlighted, in general terms, the importance of safeguards for people subject to preventive regimes, including clear lines of accountability and comprehensive appeal, review and complaint processes. He said any regime that can be imposed for lengthy or potentially indefinite periods warrants a particularly high level of scrutiny and safeguards.

Recommendations

Responsible agency

R54

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

- 13.16 We conclude that Ara Poutama should continue as the government department responsible for the operation of preventive measures. It has institutional knowledge and experience in detaining and supervising people considered at risk of reoffending. In all comparable jurisdictions we have analysed, preventive measures are managed by the same agency that operates the wider corrections system.
- 13.17 We acknowledge submitters’ concerns about Ara Poutama’s performance in managing prisoners. However, in our view, it is preferable that Ara Poutama address these concerns rather than shifting responsibility to a new or different agency. Costs and other efforts required to establish a new agency are likely to be significant.
- 13.18 In cases where a court imposes an intervening prison sentence on a person already subject to a preventive measure, the person may transition from release on parole back to the original preventive measure (we explain this procedure in Chapter 18). If Ara Poutama has responsibility for both the parole regime and the preventive measures, it can ensure continuity of responsible staff and make the transition as smooth as possible. No other agency could provide that continuity, because administering parole falls within Ara Poutama’s responsibilities.
- 13.19 Our recommendations in this chapter and elsewhere in this Report are intended to make the duties on Ara Poutama clear and to put review and accountability mechanisms in place. For example, later in this chapter, we recommend guiding principles for probation officers and facility managers on how to exercise their powers and duties. We also recommend that Ara Poutama should be obliged to provide rehabilitative treatment and reintegration support. In Chapter 18, we recommend three-yearly court reviews and annual reviews by a Review Authority to provide scrutiny and oversight.

¹⁸ Bond Trust, Myra Crawford-Smith, 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 of New Zealand.

13.20 Some submitters favoured the alternative option that we described in the Preferred Approach Paper — that a health agency should operate the preventive measures to help shift the focus of the regime towards rehabilitative treatment. We recognise some advantages in this suggestion. Some people within the regime will present with mental health needs, disabilities and complex behavioural conditions (see the discussion of this issue in Chapter 5). However, many other people within the regime will not require care and treatment in a health context.¹⁹ Therefore, Ara Poutama is better suited to be the agency with primary responsibility. We expect Ara Poutama would cooperate with, and receive support from, health agencies to provide appropriate care and treatment when needed.

Facility managers

R55 The chief executive of Ara Poutama Aotearoa | Department of Corrections should appoint facility managers.

R56 For facilities operated under a facility management contract, the contractor should appoint facility managers, subject to approval by the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R57 The chief executive of Ara Poutama Aotearoa | Department of Corrections should have the power to issue guidelines and instructions with which all facility managers should be required to comply.

13.21 We recommend that the chief executive should appoint facility managers for residential preventive supervision and secure preventive detention facilities. This is currently the case with prison managers under the Corrections Act and residence managers under the PPO Act.²⁰

13.22 In relation to facilities run by an external entity through a management contract, the contractor should appoint the facility manager, subject to the chief executive's approval (see our recommendation on facility management contracts below).

13.23 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. Facility managers should be required to comply with them. This aligns 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.²¹

¹⁹ Te Kōti Mana Nui | Supreme Court explained that it is unfeasible for the preventive regimes to apply only to those with recognised mental health conditions or intellectual disabilities. It reasoned, among other things, that “[n]ot all offending is attributable to mental illness or intellectual disability, and nor is a propensity to offend always diagnostic of mental illness or intellectual disability”: *Attorney-General v Chisnall* [2024] NZSC 178 at [224].

²⁰ Corrections Act 2004, s 11(1)(a); and Public Safety (Public Protection Orders) Act 2014, s 115(1)(a).

²¹ Corrections Act 2004, s 196; and Public Safety (Public Protection Orders) Act 2014, s 120.

Facility management contracts

R58

The chief executive of Ara Poutama Aotearoa | Department of Corrections should have the power to 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).

R59

Every facility management contract should:

- a. provide for objectives and performance standards no lower than those that apply to Ara Poutama Aotearoa | Department of Corrections;
- b. provide for the appointment of a suitable person as facility manager; 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.

R60

The chief executive of Ara Poutama Aotearoa | Department of Corrections should have the power to take control of externally administered facilities in emergencies (as defined in section 134 of the Public Safety (Public Protection Orders) Act 2014).

- 13.24 As noted above, Ara Poutama can already task external organisations with the operation of facilities for people subject to preventive measures.²² We conclude that facility management contracts should continue to be available under the new Act.
- 13.25 External organisations may bring different skills and expertise than Ara Poutama. They may be better placed to cater to the different behavioural, cultural or disability-related needs that people subject to residential preventive supervision or secure preventive detention may have. For example, iwi organisations or charitable organisations may be better suited than Ara Poutama to create an environment that is informed by te ao Māori and tikanga. As another example, the NZLS named the Salisbury Street Foundation as a provider that has a proven reputation for decreasing recidivism and improving outcomes for those who stay at its residence.
- 13.26 The operation of a detention facility by an entity other than a government agency is a sensitive issue. A prison operator holds considerable power over those imprisoned. Delegating this power to a contractor may risk lowering the standard of government accountability.²³ It will be important for this risk to be appropriately addressed, including by requiring all operators to adhere to the same laws and performance standards that

²² Corrections Act 2004, s 198; Public Safety (Public Protection Orders) Act 2014, s 130; and Parole Act 2002, ss 15(3)(b) and 16.

²³ 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.

Ara Poutama must follow and to be subject to the same review and monitoring mechanisms.

- 13.27 In addition, Ara Poutama has a practice of defining under which circumstances the chief executive is entitled to take over control of the facility or of certain aspects of the administration (step-in rights) in previous and existing prison management contracts. A step-in right could, for example, be that the chief executive is entitled to take over management of the facility where the contractor has persistently failed to meet performance targets. Currently, only one prison management contract — for the management of Auckland South Corrections Facility — is operational in Aotearoa New Zealand. It provides for detailed step-in rights. In the past, Ara Poutama has made use of step-in rights to intervene in Serco's management of Mount Eden Corrections Facility, which is now run by Ara Poutama.
- 13.28 We also consider that, in line with current provisions under the Corrections Act and the PPO Act, the chief executive should be able to take over control of facilities in emergencies (as defined in section 134 of the PPO Act).²⁴ This safeguard should be contained in the new Act rather than in management contracts to clarify that it overrides any provision in the management contract.

Investigations and inquiries into breaches of the new Act

R61

The chief executive of Ara Poutama Aotearoa | Department of Corrections should appoint suitably qualified people to be independent inspectors. The chief executive should ensure that the number of inspectors appointed is sufficient for the operation of the new Act.

R62

Anyone should be able to complain to an inspector about a breach of the rights of a person subject to a preventive measure.

R63

An inspector may, on their own initiative or on receipt of a complaint against a probation officer, facility manager or facility staff, commence an investigation into an alleged breach of the new Act or any conditions imposed, or guidelines or directions issued under it. An inspector may decide not to investigate a complaint if satisfied that the complaint is frivolous or vexatious.

R64

If, after investigating a complaint, the inspector is satisfied that the complaint has substance, the inspector should, as soon as is reasonable in the circumstances, either:

- a. conduct an inquiry (in accordance with the Inquiries Act 2013); or
- b. report the matter, together with any recommendations, to the relevant probation officer or facility manager.

²⁴ Public Safety (Public Protection Orders) Act 2014, s 134. See also Corrections Act 2004, s 199H.

R65 An inspector should have the power to commence an inquiry into an alleged breach of the new Act or any conditions imposed, or guidelines or directions issued under it, on their own initiative. An inspector should commence an inquiry if directed to do so by the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R66 An inquiry should result in an inquiry report being prepared, which the inspector should send to:

- a. the relevant probation officer or facility manager;
- b. the chief executive of Ara Poutama Aotearoa | Department of Corrections;
- c. the person subject to the preventive measure concerned; and
- d. if applicable, any person who complained on behalf of the person subject to the preventive measure concerned.

- 13.29 We recommend that the new Act should provide for the appointment of suitably qualified people as independent inspectors.
- 13.30 The inspectors should be able to investigate, and inquire into, alleged breaches of the new Act by a probation officer, a facility manager or facility staff. The chief executive should be required to appoint an appropriate number of independent inspectors.²⁵ Our recommendations are in response to submitters' comments that the new Act should clarify the procedure for dealing with complaints about breaches of the new Act. The recommendations are modelled on the investigation and inquiry procedure provided for under the PPO Act.²⁶
- 13.31 Like independent inspectors under the PPO Act, inspectors under the new Act should be appointed by the chief executive.²⁷ They should not be otherwise employed or engaged by Ara Poutama. We do not make further recommendations on the operational details of independent inspectors. However, we suggest that, like under the PPO Act, the Minister of Corrections should from time to time, with the concurrence of the Minister of Finance, fix the remuneration of inspectors. Administrative support could be provided by Ara Poutama.
- 13.32 An inspector should be able to investigate a matter on their own initiative, for example, as the result of a periodic inspection of a facility (see our recommendation below). They should also be required to investigate in response to a complaint made by any person about a breach of the rights of a person subject to a preventive measure unless satisfied that the complaint is frivolous or vexatious.²⁸

²⁵ Compare Public Safety (Public Protection Orders) Act 2014, s 127(1)–(2).

²⁶ Public Safety (Public Protection Orders) Act 2014, ss 78–84 and 127.

²⁷ Compare Public Safety (Public Protection Orders) Act 2014, s 127(1) and (3).

²⁸ Compare Public Safety (Public Protection Orders) Act 2014, s 81(2). This provision also exempts the inspector from investigating complaints that are “not made in good faith”. We consider that it is sufficient to exclude frivolous or vexatious applications from the duty to investigate.

- 13.33 If an investigation into a complaint yielded the need for a more thorough process to determine whether a breach of the Act has occurred, the inspector should be able to commence an inquiry in accordance with the Inquiries Act 2013.
- 13.34 An inspector should have the power to commence an inquiry either on their own initiative following an investigation or if directed to do so by the chief executive. An inquiry should typically be more extensive and detailed than investigations. In conducting an inquiry, we recommend the inspector have the same powers and authority to summon witnesses and receive evidence as are conferred on an inquiry by the Inquiries Act.²⁹
- 13.35 The inquiry should result in an inquiry report being prepared, which the inspector should be required to send to the relevant probation officer or facility manager, the chief executive, the person subject to the preventive measure concerned and, if applicable, any person who complained on behalf of the person.³⁰
- 13.36 If, on the other hand, an investigation itself can ascertain whether a breach of the Act has occurred and how to remedy it, the inspector should report back to the probation officer or facility manager. In that case, the inspector should not inquire into the breach more extensively. Instead, they should recommend to the probation officer or facility manager how to remedy the breach. In both cases, the relevant probation officer or facility manager should be responsible for taking the steps needed to remedy a breach.³¹

Inspections of facilities

R67

Residential facilities and secure facilities should be subject to:

- a. examination by a National Preventive Mechanism under the Crimes of Torture Act 1989; and
- b. inspections every six months by inspectors appointed under the new Act to address the facilities' compliance with all requirements under the new Act.

R68

An inspection by an inspector appointed under the new Act should result in an inspection report being prepared, which the inspector should send to the relevant facility manager and the chief executive of Ara Poutama Aotearoa | Department of Corrections.

- 13.37 In Chapters 15 and 16, we recommend that people subject to residential preventive supervision or secure preventive detention should be detained in residential or secure facilities, respectively.
- 13.38 We conclude that, as “places of detention”, both residential and secure facilities should be subject to National Preventive Mechanism examination under the Crimes of Torture Act. The Minister of Justice should be required to designate a National Preventive Mechanism for this purpose. The Matawhāiti Residence for people on PPOs is currently

²⁹ The provisions of the Inquiries Act 2013 would apply accordingly. The exception is s 28, which relates to costs. Compare Public Safety (Public Protection Orders) Act 2014, s 83.

³⁰ Compare Public Safety (Public Protection Orders) Act 2014, s 83(4).

³¹ Compare Public Safety (Public Protection Orders) Act 2014, s 84.

subject to inspections by the National Preventive Mechanism under the Crimes of Torture Act.

- 13.39 Inspections under the Crimes of Torture Act are geared specifically towards the prevention of torture and ill-treatment. To provide for a supplementary, broader inspection mandate, we recommend that the independent inspectors appointed under the new Act (see our recommendation above) should also periodically inspect residential and secure facilities.
- 13.40 The new Act should require that periodic inspections carried out by the independent inspectors appointed under the new Act must occur at least every six months.³² The ambit of inspection should be to address a facility's compliance with all requirements under the new Act. The inspector should send the inspection report to the relevant facility manager and the chief executive.

GUIDING PRINCIPLES

Current law

- 13.41 The laws that currently govern preventive measures set out guiding principles for making decisions and exercising powers. The Corrections Act sets out a range of broad principles to guide persons who exercise powers and duties under the Act.³³ The PPO Act's principles section applies to “[e]very person or court exercising a power” under the Act.³⁴ The Parole Act's principles are different — they guide New Zealand Parole Board (Parole Board) decisions on whether and under what conditions to release an offender.³⁵ They do not apply to probation officers exercising their powers under the Parole Act to activate or relax parole or ESO conditions granted to them.³⁶
- 13.42 Decision-makers under all three Acts — Corrections Act, PPO Act and Parole Act — are also bound by the NZ Bill of Rights. This includes probation officers 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 of parole and ESOs:
- (a) Te Kōti Matua | High Court held in *Wilson v New Zealand Parole Board* that, when assessing the lawfulness of a special condition for Mr Wilson to attend church only with his probation officer's approval, “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”.³⁷
 - (b) Te Kōti Pira | Court of Appeal noted in *McGreevy v Chief Executive of the Department of Corrections* that, in the context of an intensive monitoring condition for Mr

³² Compare Public Safety (Public Protection Orders) Act 2014, s 78(2).

³³ Corrections Act 2004, s 6.

³⁴ Public Safety (Public Protection Orders) Act 2014, s 5.

³⁵ Parole Act 2002, s 7.

³⁶ 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).

³⁷ *Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [42].

McGreevy, the implementation of special conditions by Ara Poutama must be consistent with his freedoms of movement and residence.³⁸

- (c) The High Court noted in *Pengelly v New Zealand Parole Board* 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.³⁹

Issue

- 13.43 There have been instances where decision-makers under the preventive regimes have not exercised their powers in accordance with the NZ Bill of Rights. In the case of *Te Whatu v Department of Corrections*, the High Court found that the probation officer exercised a power in relation to a standard condition in breach of the NZ Bill of Rights.⁴⁰ Mr Te Whatu was subject to the standard condition of non-association with anyone specified by the probation officer.
- 13.44 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. 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”.⁴¹
- 13.45 In *Attorney-General v Chisnall*, te Kōti Mana Nui | Supreme Court considered how the limits the ESO and PPO regimes place on human rights can be demonstrably justified for the purposes of section 5 of the NZ Bill of Rights.⁴² The Court held that it was essential that the regimes were administered in a way that intrudes on rights to the least extent. It concluded that the parts of the ESO regime that do not entail detention are the least rights-intrusive approach available for achieving the purpose of the legislation.⁴³ The Court was clear, however, that this conclusion depended on the probation officer ensuring, in each case, that the standard conditions of the ESO are “applied in a manner no more extensive than necessary to meet those risks”. That, the Supreme Court continued, was “what a rights-compliant approach to decision-making” requires.⁴⁴

Results of consultation

- 13.46 In the Preferred Approach Paper, we proposed a set of guiding principles. Their aim would be to ensure that probation officers and facility managers exercise their powers under the new Act in accordance with the NZ Bill of Rights.⁴⁵

³⁸ *McGreevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [20]–[21].

³⁹ *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [83].

⁴⁰ *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362.

⁴¹ *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362 at [33]–[34].

⁴² *Attorney-General v Chisnall* [2024] NZSC 178.

⁴³ *Attorney-General v Chisnall* [2024] NZSC 178 at [230].

⁴⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [230].

⁴⁵ Preferred Approach Paper, P52.

13.47 Most submitters who responded to this proposal agreed with it.⁴⁶ The NZCCL added that the proposed guiding principles stem directly from the NZ Bill of Rights and that their application ought to be obvious. However, it submitted, they have not been respected in the past, and these explicit statements should bring improvement. The NZLS submitted the proposal could be improved by adding a guiding principle that requires probation officers and facility managers to ensure the person subject to the measure is not subjected to second punishment.

Recommendations

R69

Probation officers, as well as facility managers and their staff, should have regard to the following guiding principles when exercising their powers:

- a. People subject to community preventive supervision must not be subject 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 must 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 must, to the extent compatible with the safety of the community, be given appropriate opportunities to demonstrate rehabilitative progress and prepared for moving to a less restrictive preventive measure or unrestricted life in the community.

The need for guiding principles

13.48 Probation officers and facility managers (and their staff) are currently bound by the NZ Bill of Rights and will continue to be bound by it under the new Act. To comply with the NZ Bill of Rights, they will need to ensure a preventive measure is implemented in a manner that is no more restrictive than necessary.⁴⁷

13.49 To make this clear, the new Act should guide probation officers and facility managers and staff on how to comply with the NZ Bill of Rights. According to the Legislation Design and Advisory Committee's *Legislation Guidelines*, statements of principle can be used to "guide and limit the exercise of powers and duties under [...] legislation".⁴⁸ The guiding principles will also help to give effect to the purposes of the new Act that we recommend in Chapter 5.

13.50 Some areas of our recommendations (such as the recommended legislative tests for imposing and reviewing measures and the conditions of residential and secure facilities)

⁴⁶ Bond Trust, Myra Crawford-Smith, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁴⁷ See *Attorney-General v Chisnall* [2024] NZSC 178 at [230] and [256].

⁴⁸ 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>. 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.

are designed to give effect directly to the NZ Bill of Rights and the purposes of the new Act. It is, however, not possible to be as prescriptive for how probation officers and facility managers (and their staff) should 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. Therefore, we recommend 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

- 13.51 We consider 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;⁴⁹ and
 - (c) secure facility managers and their staff exercise powers under the Act relating to the running of a secure facility.
- 13.52 We do not recommend that the guiding principles should inform the imposition of a preventive measure or special conditions (as is currently the case under the Parole Act). Guiding principles that must be read alongside the legislative tests we recommend in Chapter 10 would cause 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 recommend in Chapter 18. Therefore, the guiding principles only apply to the operation of a preventive measure once the measure has been imposed.

Content and wording

- 13.53 The wording of the recommended guiding principles is based on one of the PPO Act's principles and on a similar provision under German law.⁵⁰ German law provides guiding principles for state legislation.
- 13.54 The guiding principles we recommend give effect to the policy of the new Act, as expressed in the purpose provision we recommend in Chapter 5.
- 13.55 The first two principles are about minimising restrictions and maximising autonomy and quality of life for people subject to preventive measures. These 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.⁵¹ They respond to the issue we have

⁴⁹ 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.

⁵⁰ Public Safety (Public Protection Orders) Act 2014, s 5(d); and German Criminal Code (Strafgesetzbuch — StGB), s 66c.

⁵¹ See also *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

identified above that the law could better ensure that probation officers' implementation of conditions is consistent with human rights.

- 13.56 The third principle is about giving people opportunities within the bounds of their conditions to demonstrate that they have made rehabilitative progress. This principle is linked to the purpose of supporting someone to live a safe and unrestricted life in the community. It responds to concerns that people subject to preventive measures often lack opportunities to demonstrate that their risk of serious reoffending has decreased. 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 power to do so (under community preventive supervision and residential preventive supervision); and
 - (b) allowing regular supervised outings into the community or moving a person to a less intensely supervised self-contained living unit within a facility (under residential preventive supervision and secure preventive detention).
- 13.57 We do not recommend elevating a public safety principle above other principles. We have received feedback that this could be used to rationalise declining any relaxation of a person's restrictions even if progress is evident. This focus could compromise long-term community safety because it would harm rehabilitation and reintegration prospects for the person concerned. It would also be at odds with the purpose provision we recommend in Chapter 5, which clarifies that community safety is one of the three overall aims of the new Act.
- 13.58 We do not recommend 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 we recommend in Chapter 10 and the review mechanisms we recommend in Chapter 18. Preventive measures, including any conditions, can only be imposed by the courts in accordance with the legislative tests, and they can remain in place only if courts confirm them in periodic reviews in accordance with the legislative tests. The tests and review mechanisms should guarantee that any preventive measure imposed is the least restrictive measure necessary to protect the community from serious reoffending. This is why we do not think this particular guiding principle for probation officers or facility managers and staff is needed.
- 13.59 Lastly, we do not recommend a guiding principle that any person exercising powers under the new Act must comply with the NZ Bill of Rights generally or with the right not to be subjected to second punishment specifically. The latter was suggested by a submitter. The people who exercise powers under the new Act are bound by the NZ Bill of Rights by virtue of the NZ Bill of Rights itself. The guiding principles specify *how* probation officers and facility managers (and their staff) must exercise discretion to comply with the NZ Bill of Rights.

ENTITLEMENT TO REHABILITATIVE TREATMENT AND REINTEGRATION SUPPORT

Current law

13.60 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.⁵² Section 52 is intended to give effect to this guiding principle:

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.

13.61 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.⁵³

13.62 A person subject to a PPO is only entitled to receive rehabilitative treatment if the treatment “has a reasonable prospect of reducing the risk to public safety posed by the resident”.⁵⁴

Issues

13.63 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 restate two specific issues here.

Treatment for people subject to preventive detention is often deferred

13.64 Ara Poutama will refer prisoners on preventive detention to rehabilitative programmes only when it considers their release to be imminent. This is either because the sentence will expire or because the Parole Board may direct the release of the prisoner on parole. The reasons 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.⁵⁵

13.65 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.

⁵² Corrections Act 2004, s 6(1)(h).

⁵³ Parole Act 2002, s 15(3)(b).

⁵⁴ Public Safety (Public Protection Orders) Act 2014, s 36.

⁵⁵ See for example *Smith v Attorney-General* [2020] NZHC 1848 at [122] and [189].

- 13.66 Jurisprudence under the International Covenant on Civil and Political Rights (ICCPR) holds that the “preventive” period of detention must be “aimed at the detainee’s rehabilitation and reintegration into society”.⁵⁶ 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”.⁵⁷ Otherwise, the detention will be considered arbitrary for the purposes of article 9 of the ICCPR.
- 13.67 Although the domestic and international jurisprudence have to date been broadly accepting of the provision of rehabilitative treatment to people subject to preventive detention in Aotearoa New Zealand, comparative experience in Germany provides precedent for enhanced entitlements.⁵⁸ 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.⁵⁹ 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”.⁶⁰
- 13.68 The relevant provision expressly refers to the requirement to develop tailored treatment options if “standardised” treatment options “do not appear promising”.⁶¹ In the judgment that prompted the law reform, the German Federal Constitutional Court had emphasised that suitable therapeutic treatment must not be denied solely on the grounds that efforts and cost would exceed standardised treatment options the facility in question offers.⁶²
- 13.69 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”.⁶³ Consequently, there needs to be “exceptional circumstances warranting the conclusion that the prisoner’s continued detention had become arbitrary” as a result of lacking treatment.⁶⁴ We regard the European position as broadly consistent with the position taken by the UNHRC in respect of article 9 of the ICCPR.

⁵⁶ United Nations 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].

⁵⁷ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.2].

⁵⁸ Te Kōti Mana Nui | Supreme Court in *Attorney-General v Chisnall* [2024] NZSC 178 referred to the German approach to preventive detention as one of the “other plausible options which are likely to be less rights intrusive” than the ESO and PPO regimes (at [234]–[235]). See also *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [165]–[172].

⁵⁹ German Criminal Code (Strafgesetzbuch — StGB), s 66c(1)(1).

⁶⁰ German Criminal Code (Strafgesetzbuch — StGB), s 66c(1)(1)(b).

⁶¹ German Criminal Code (Strafgesetzbuch — StGB), s 66c(1)(1)(a).

⁶² BvR 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011 at [111].

⁶³ *James v United Kingdom* (2013) 56 EHRR 12 (ECtHR) at [194].

⁶⁴ *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1 at [45].

Greater focus on rehabilitation required for rights consistency of post-sentence orders

- 13.70 The duties to provide treatment to people subject to ESOs or PPOs are either non-existent or heavily qualified. In relation to people subject to an ESO, there is no statutory obligation on the chief executive to provide rehabilitative treatment. People subject to a PPO are only entitled to receive rehabilitative treatment if it “has a reasonable prospect of reducing the risk to public safety posed by the resident”.⁶⁵
- 13.71 Several submitters to the Issues Paper agreed with our suggestion there that the focus on therapeutic and rehabilitative treatment should be more prominent and that people detained should have stronger rights to treatment.⁶⁶
- 13.72 After our public consultation process, the Supreme Court held in *Attorney-General v Chisnall* that, because of the limited provision of rehabilitation, the ESO and PPO regimes authorise unjustified limitations on the NZ Bill of Rights protection against second punishment. The Court held that the aspects of the regimes authorising detention intruded on rights more than to the least extent necessary.⁶⁷
- 13.73 The Court reasoned, among other things, that “rehabilitation and a therapeutic approach cannot be said to lie at the core” of either the ESO or the PPO regime.⁶⁸ It stated that limiting rehabilitative treatment to cases where there is “a reasonable prospect of reducing the risk to public safety posed by the resident” is an assessment of the likely benefit to the community rather than the resident.⁶⁹ This, the Supreme Court continued, suggested “an overly narrow view of what amounts to rehabilitation”.⁷⁰

Results of consultation

- 13.74 In the Preferred Approach Paper, we proposed that people subject to a preventive measure should be entitled to receive rehabilitative treatment and reintegration support and that Ara Poutama should ensure sufficient rehabilitative treatment and reintegration support is available.⁷¹
- 13.75 Almost all submitters who responded to this proposal agreed with it.⁷² Dr Jordan Anderson added that the ready availability of appropriate rehabilitative support is essential. She submitted that providing adequate funding and creating an appropriate therapeutic environment in which rehabilitation can occur will be important. The NZCCL added that the courts would likely read such an entitlement into the new Act in any case to achieve rights consistency but that stating them explicitly is beneficial nonetheless. Te Kāhui Tātari Ture | Criminal Cases Review Commission submitted that the proposed entitlements to rehabilitative treatment and reintegration support should naturally extend

⁶⁵ Public Safety (Public Protection Orders) Act 2014, s 36.

⁶⁶ Preferred Approach Paper at [13.21]–[13.23].

⁶⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [242]–[244].

⁶⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

⁶⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

⁷⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

⁷¹ Preferred Approach Paper, P53.

⁷² Dr Jordan Anderson, Bond Trust, Chief Ombudsman, Myra Crawford-Smith, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Royal Australian and New Zealand College of Psychiatrists, The Law Association of New Zealand.

to any individual serving any sentence of imprisonment, including during any minimum period of imprisonment.

- 13.76 The Chief Ombudsman welcomed the focus on a stronger entitlement to rehabilitative treatment and reintegration support for people under preventive measures than is available under the current law. However, he remained concerned about the ability of Ara Poutama to give effect to its strengthened obligations to ensure sufficient rehabilitative treatment and support. He submitted that, despite Ara Poutama having domestic and international obligations to provide appropriate rehabilitative and reintegrative opportunities to people in custody, ongoing staff shortages have significantly impacted access to these services. He noted that he had commented extensively on the lack of rehabilitative opportunities and interventions in prisons and in Matawhāiti Residence in various reports and submissions.
- 13.77 The NZLS supported the proposal but noted the current constraints on the provision of rehabilitative programmes and emphasised that the availability of funding and resources will likely be an issue. It considered that the funding for rehabilitative treatment and reintegration support for people subject to preventive measures should not come at the expense of prisoners serving criminal sentences.
- 13.78 The Royal Australian and New Zealand College of Psychiatrists submitted that forensic mental health services and other social support services promote positive mental health and may significantly decrease a prisoner's risk of reoffending and the need for preventive measures to be imposed. It said any restriction of freedom must be matched with the provision of adequate interventions and resources to assist in rehabilitation and long-term care.
- 13.79 One person who is subject to preventive detention and currently on parole said that, although the support he received in prison was a positive experience, people subject to preventive detention are deprioritised for treatment and reintegration support and need to give way to prisoners who are closer to their release date. This is in line with feedback we received earlier in the review from other people subject to indeterminate sentences.

Recommendations

R70

The new Act should provide that people subject to a preventive measure are entitled to receive rehabilitative treatment and reintegration support.

R71

Ara Poutama Aotearoa | Department of Corrections should ensure sufficient rehabilitative treatment and reintegration support is available to people subject to a preventive measure so that the duration of the preventive measure is limited to the shortest period necessary to protect the community from the high risk the person will commit a further qualifying offence.

- 13.80 We conclude that people subject to preventive measures should have a stronger entitlement to rehabilitative treatment and reintegration support than under the current law. This is to give effect to our broader aim to reorient preventive measures towards rehabilitation and reintegration. The recommendation 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.

- 13.81 In our view, 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 part of the recommendation corresponds to the new Act's recommended purpose that limits on a person's freedoms must be the least restrictive available and proportionate to the reoffending risk.
- 13.82 The Supreme Court concluded in *Attorney-General v Chisnall* that a less rights-intrusive approach to preventive measures requires the mandatory provision of rehabilitation.⁷³ The Court explained that a rehabilitative focus is critical because rehabilitation enables the person "to address the causes of the offending, thereby minimising the extent and length of any restraint".⁷⁴ In addition, as the Court recognised, a rehabilitative focus also "more clearly" distinguishes these regimes from punishment.⁷⁵
- 13.83 We share submitters' concerns that rehabilitative and reintegrative interventions may not be adequately resourced. The approach we recommend emphasises the need for sufficient resourcing. It 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 support the person to safe and unrestricted life in the community at the earliest reasonable opportunity.
- 13.84 Our recommendations for rehabilitative treatment and reintegration support sit alongside the recommendations we make in Chapters 15 and 16. We recommend there that the law should affirm residents' and detainees' rights to medical treatment and other healthcare appropriate to their conditions as well as to participation in therapeutic, recreational, cultural and religious activities.⁷⁶
- 13.85 In our recommendations, 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. 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 and practical life skills needed for life in the community.⁷⁷ 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

⁷³ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

⁷⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [236].

⁷⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [236].

⁷⁶ We make these recommendations only in the context of residential preventive supervision or secure preventive detention because people subject to community preventive supervision would be in a position to seek medical treatment and other healthcare and wellbeing services themselves.

⁷⁷ *Reintegration Services: Evidence Brief* (New Zealand Government, April 2016) at 1.

support”. The terminology under the current law varies between different statutes.⁷⁸ The courts, too, use varying language in this context.⁷⁹

NEEDS ASSESSMENTS AND SUPERVISION PLANS

Results of consultation

- 13.86 In the Preferred Approach Paper, we proposed that a person subject to a preventive measure should have their medical, educational and social needs assessed as soon as practical after the measure is imposed.⁸⁰
- 13.87 Most submitters who responded to this proposal agreed with it.⁸¹ Dr Jordan Anderson agreed that a needs assessment was essential but submitted that the provision should be more specific as to when the assessment should occur. The NZLS supported the proposal, assuming that such an assessment would be informed by the health assessor’s report. It submitted that it may be worth specifying that the health assessor’s report will be taken into account when undertaking the assessment.
- 13.88 TLANZ submitted that the assessment should take place before the preventive measure is imposed. It stated that the outcome of a person’s needs assessment should be part of the information available to the court when determining an application for imposing a preventive measure.
- 13.89 We also proposed that, on the basis of the needs assessment, a treatment and supervision plan should be drawn up that sets out how the person should be treated and supervised throughout their time subject to a preventive measure.⁸² The plan should include the person’s reasonable needs, which steps need to be taken to work towards the person’s restoration to safe and unrestricted life in the community and other matters. Most submitters who gave feedback on this proposal agreed with it.⁸³
- 13.90 The NZLS supported the proposal in principle but noted that the plan should avoid giving false hope to people who have no real prospect of attaining a free and unrestricted life in the community. One submitter emphasised the importance of appropriate reviews of the treatment and supervision plan.
- 13.91 Dr Jordan Anderson submitted that the treatment and supervision plan should be confirmed within a specified amount of time after a preventive measure is imposed.
- 13.92 TLANZ submitted that the proposed treatment plan (as well as the needs assessment) should be part of the application process for a preventive measure. That would ensure that the court has a clear understanding of the person’s needs and the planned

⁷⁸ The Parole Act 2002 and the Corrections Act 2004 refer to “rehabilitative or reintegrative programmes”. The Corrections Act 2004 also mentions “activities that may contribute to their rehabilitation and reintegration into the community”, whereas the Public Safety (Public Protection Orders) Act 2014 refers to “rehabilitative treatment” in some provisions but to “rehabilitation and reintegration” in others.

⁷⁹ 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]. Te Kōti Mana Nui | Supreme Court refers to “rehabilitative and therapeutic support” and slight variations of that terminology in *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

⁸⁰ Preferred Approach Paper, P56.

⁸¹ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

⁸² Preferred Approach Paper, P57.

⁸³ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

rehabilitative steps from the outset. It added that a set timeline for finalising the treatment plan after the imposition of the measure would promote consistency and accountability.

13.93 Lastly, we proposed that the person responsible for assessing the person's needs and developing and administering the treatment and supervision plan should be the probation officer in the case of community preventive supervision and the facility manager in the case of residential preventive supervision and secure preventive detention.⁸⁴

13.94 Some submitters agreed.⁸⁵ The NZLS supported the proposal but considered that there should be an expectation that those completing needs assessments have training and expertise in creating, developing and administering treatment and supervision plans.

13.95 Other submitters disagreed. One submitter suggested that, instead, a team of people should be responsible and follow a collaborative, multi-disciplinary approach. A team should include probation personnel, facility managers and health professionals as well as whānau or appropriate Māori iwi or hapū. TLANZ submitted it was concerned that probation officers were not well equipped for this task.

Recommendations

R72

The new Act should provide 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. needs related to education;
- e. needs related to therapeutic, recreational, cultural and religious activities;
- f. needs related to building relationships with the person's family, whānau, hapū, 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.

⁸⁴ Preferred Approach Paper, P58.

⁸⁵ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

R73

The new Act should provide that each person subject to a preventive measure must have a treatment and supervision plan developed with them as soon as practicable after the completion of the initial needs assessment. 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. opportunities to participate in life in the community for people subject to residential preventive supervision or secure preventive detention;
- 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.

R74

The person responsible for assessing the person's needs and developing and administering the treatment and supervision plan should be:

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

R75

When undertaking a needs assessment or developing a treatment and supervision plan, the responsible person should be required to make reasonable efforts to consult with the person subject to the preventive measure.

13.96 The success of a person's entitlement to adequate rehabilitative treatment and reintegration support will depend on the extent to which a person's needs are identified and understood. We therefore recommend a comprehensive initial needs assessment and a coordinated treatment and supervision plan to respond to the needs identified in a structured, consistent and methodical manner.

13.97 There is precedent for a needs assessment and a management plan in the PPO Act.⁸⁶ The PPO Act's provision on needs assessments serves as the basis for our recommendation,

⁸⁶ Public Safety (Public Protection Orders) Act 2014, ss 41–44. See also *Chief Executive, Department of Corrections v Waiti* [2024] NZHC 1682, in which the 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]).

but we have expanded the list of matters to be assessed to include other factors we consider important such as mental health needs and building positive relationships.

- 13.98 Similarly, the PPO Act's provision on management plans has informed our recommendation on a treatment and supervision plan. Again, our recommendation differs significantly from the current law. It is tailored to give effect to the reorientation of the new Act and contains fewer qualifications.

Providing rehabilitation where prospects are doubtful

- 13.99 We recognise that, for some people, safe and unrestricted life in the community may be a long-term or even unrealistic goal. We agree with submitters that treatment and supervision plans should not create false hopes. We remain of the view, however, that working to diminish reoffending risk to the point where restrictions can be relaxed or removed entirely should be the goal for all people subject to preventive measures. We expect those responsible for developing treatment and supervision plans will be able to navigate the tension between a realistic appraisal of a person's risks and setting a plan that puts them on a pathway to unrestricted life in the community.

- 13.100 The Supreme Court in *Attorney-General v Chisnall*, made similar comments about the need to provide rehabilitation even if it is unclear how the person will respond:⁸⁷

There may be doubt that some offenders will benefit from rehabilitation. That should not remove the obligation to work with them. First, such assessments are not infallible and do change over time for some offenders. Secondly, while rehabilitation in the ordinary sense of the word may not be possible, such as in the case of an offender with an untreatable personality disorder, it may be possible to educate and support them to avoid situations in which offending could occur so as to increase the amount of liberty they can be permitted to have.

Minimising restrictions through the needs assessment and the supervision plan

- 13.101 The needs assessment and the supervision plan will help to ensure that people are subject to preventive measures no longer than necessary and that restrictions on their freedoms are relaxed as quickly as possible while ensuring public safety. The resulting documents will be important evidence during periodic reviews and when assessing applications to vary or terminate preventive measures (discussed further in Chapter 18).

- 13.102 The initial needs assessment should serve as a starting point for a person's rehabilitative treatment and reintegration support and other activities designed to improve their wellbeing. We agree with the submission that reports by health assessors will be highly relevant to the needs assessment but consider that the scope of the needs assessment should go beyond considering the person's risk. It is intended to give a detailed account of the person's physical and mental state and to indicate from which therapeutic, social or educational 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.

⁸⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [237].

13.103 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 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.

Timing of the needs assessment and the supervision plan

13.104 The initial needs assessment should occur after the imposition of the preventive measure. The treatment and supervision plan should be drawn up once the initial assessment has been done.

13.105 We disagree with the submission that these steps should occur before a preventive measure is imposed for the following reasons:

- (a) Planning a person's management during a preventive measure would inappropriately prejudice the court's ruling as to whether the measure should be imposed.
- (b) Undertaking a needs assessment and drawing up a supervision and treatment plan would be inefficient and difficult before imposition of a measure. The plan cannot be fully developed until it is clear what preventive measure the court will impose and with what conditions.
- (c) The initial needs assessment would serve a different purpose than the health assessments prepared to inform the legislative tests for imposing a preventive measure. It would not primarily focus on the level of a person's reoffending risk but on the steps that would need to be taken in what sequence and in what environment for the best chance to reduce the risk while promoting the person's overall wellbeing.

13.106 We maintain that the initial needs assessment and the drawing up of the treatment and supervision plan should occur "as soon as practical" rather than before a fixed deadline, as was suggested by one submitter.

13.107 We anticipate that both the assessment and the developing of the plan will be an iterative process between the person responsible and the person subject to the measure. The activities and goals set out in the plan will also often depend on the specific environment a person is in and what types of activities are available there.

13.108 For these reasons, we think that the person responsible should have some flexibility in deciding when to complete the assessment and draw up the plan. Nevertheless, we clarify that both are intended to be completed at the start of the preventive measure. It will need to be in place well before the application for the first annual review by the Review Authority is made.

13.109 The treatment and supervision plan can — and, in some circumstances, must — be reviewed both by a court and the Review Authority (see Chapter 18). It should be understood as a living document that can be adapted to the progress of the person in question.

Person responsible for the needs assessment and the supervision plan

- 13.110 The person responsible for the needs assessment and the development of the supervision plan should be the person who has primary responsibility for overseeing the individual subject to the preventive measure. For community preventive supervision, this should be the probation officer. For residential preventive supervision or secure preventive detention, this should be the manager of the respective facility.
- 13.111 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 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.
- 13.112 It is likely that the person undertaking a needs assessment and developing a treatment and supervision plan will also 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 facility or a probation officer can provide. For example, a person may require additional support with respect to a disability, complex behavioural needs, housing needs or educational needs. We therefore suggest that Ara Poutama should work with relevant agencies to obtain the information and cooperation it requires.
- 13.113 One submitter suggested that multi-disciplinary teams should be responsible for undertaking needs assessments and developing supervision plans. We disagree. A person's reoffending risk is usually attributable to a range of factors. In some cases, a person's mental illness or intellectual disability will be relevant, while in other cases, it will not.⁸⁸ We therefore do not consider that a statutory requirement for a formal multi-disciplinary team is necessary. Rather, we consider probation officers and facility managers should seek expertise from various disciplines as needed on a case-by-case basis.
- 13.114 In addition, we expect the person responsible for undertaking needs assessments and developing treatment and supervision plans will obtain cultural advice appropriate to the person subject to the preventive measure. In particular, if the person identifies as Māori, we expect the person responsible will obtain advice from people with knowledge of mātauranga Māori.
- 13.115 Lastly, 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.⁸⁹ The responsible person should take their views into account.

⁸⁸ See *Attorney-General v Chisnall* [2024] NZSC 178 at [224].

⁸⁹ See Public Safety (Public Protection Orders) Act 2014, s 41(3).

IMPLICATIONS FOR REHABILITATIVE TREATMENT AND REINTEGRATION SUPPORT DURING DETERMINATE PRISON SENTENCES

- 13.116 We recommend 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. Some submitters, too, raised this issue.
- 13.117 As discussed above and in Chapter 5, there are concerns that the treatment currently provided to prisoners is insufficient. We 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.
- 13.118 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 ideally be made available as soon as possible. This is to help the person in question avoid the need for a preventive measure altogether (or reduce the restrictiveness of any preventive measure imposed).
- 13.119 This approach is similar to the German approach to preventive detention. The relevant provision in the German Criminal Code requires that, where the court has reserved the imposition of preventive detention, the person must be provided with the same level of treatment during their prison sentence as they would receive if preventive detention were subsequently imposed.⁹⁰
- 13.120 We recognise 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.⁹¹
- 13.121 The United Nations Human Rights Committee implied in *Isherwood v New Zealand* that lacking treatment during the person's punitive sentence period alone would not have resulted in a finding of arbitrary detention.⁹² 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.

⁹⁰ German Criminal Code (Strafgesetzbuch — StGB), s 66c(2).

⁹¹ *Kaiyam v United Kingdom* (2016) 62 EHRR SE13 (ECtHR) at [67].

⁹² *Isherwood v New Zealand* (2021) 14 HRNZ 21 (UNHRC) at [8.5]–[8.6].

CHAPTER 14

Community preventive supervision

INTRODUCTION

- 14.1 In Chapter 3, we recommend that the law should provide for a new measure called community preventive supervision. This should be the least restrictive preventive measure under the new Act. It should allow people to live in the community subject to supervision.
- 14.2 In this chapter, we consider how community preventive supervision should operate in practice. We discuss:
- (a) issues with some of the standard conditions for parole and extended supervision orders (ESOs); and
 - (b) issues with how probation officers manage standard and special conditions and monitor compliance with them.
- 14.3 To address these issues, we recommend reforming the law that governs how people subject to a preventive measure are managed in the community.
- 14.4 We recommend targeted changes to the standard and special conditions that are available under the current law on parole and ESOs. We also recommend that probation officers should manage, and monitor compliance with, standard and special conditions of community preventive supervision.
- 14.5 We make some recommendations that are relevant to community preventive supervision in other chapters of this Report. These recommendations include that a court should impose special conditions in accordance with a new legislative test (Chapter 10), that a new set of guiding principles should apply to the conduct of probation officers (Chapter 13) and that more stringent review mechanisms should apply to preventive measures (Chapter 18).

CURRENT LAW

Measures for managing people in the community

- 14.6 Under the current law, the three ways in which a person subject to a preventive measure can be managed in the community are:
- (a) parole for people on preventive detention;

- (b) ESOs; and
- (c) protective supervision orders, which the court imposes after cancelling a public protection order (PPO).

Preventive detention

14.7 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). If a person subject to preventive detention is released on parole, that person is automatically subject to the following standard release conditions for parole for the rest of their life (unless the Parole Board varies or discharges the conditions):¹

- (a) The offender must report in person to a probation officer in the probation area in which the offender resides as soon as practicable, and not later than 72 hours, after release (or after moving to a new probation area).
- (b) The offender must report to a probation officer and notify the probation officer of their residential address and their employment when the probation officer directs it.
- (c) The offender must not move to a new residential address in another probation area without the prior written consent of the probation officer.
- (d) The offender must give the probation officer reasonable notice before moving from their residential address and must advise the probation officer of the new address.
- (e) The offender must not reside at any address at which a probation officer has directed the offender not to reside.
- (f) The offender must not leave or attempt to leave New Zealand without the prior written consent of a probation officer.
- (g) The offender must, if a probation officer directs, allow the collection of biometric information.
- (h) The offender must not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the offender not to engage or continue to engage.
- (i) The offender must not associate with any specified person, or with persons of any specified class, with whom the probation officer has, in writing, directed the offender not to associate.
- (j) The offender must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.

14.8 The person may also be subject to any special conditions imposed by the Parole Board for a period that the Parole Board specifies.² The Parole Board may impose any special condition that is designed to:³

- (a) reduce the risk of reoffending by the offender;
- (b) facilitate or promote the rehabilitation and reintegration of the offender; or

¹ Parole Act 2002, s 14.

² Parole Act 2002, s 29AA.

³ Parole Act 2002, s 15(2)(a)–(c).

- (c) provide for the reasonable concerns of victims of the offender.
- 14.9 The Parole Act 2002 provides a non-exhaustive list of the types of special conditions that may be imposed.⁴
- 14.10 People subject to preventive detention who are released on parole are subject to recall to prison for the rest of their lives.⁵ Breaching any parole condition is an offence punishable by imprisonment of up to one year or a fine not exceeding \$2,000.⁶

Extended supervision orders

- 14.11 People on ESOs are subject to standard conditions that include all the parole standard release conditions – with two minor modifications:
- (a) Standard ESO conditions require that the offender obtain written consent from the probation officer before moving to any new residential address whereas the parole standard release conditions only require this if the offender is moving to another probation area.⁷
- (b) Standard ESO conditions require that the offender must not associate with, or *contact*, specified people, whereas the parole standard release conditions only require that the offender must not associate with specified people.⁸
- 14.12 ESO standard conditions also include three additional conditions that are not parole standard release conditions:
- (a) The offender must obtain the prior written consent of a probation officer before changing his or her employment.⁹
- (b) The offender must not associate with, or contact, a person under the age of 16 except with the prior written approval of a probation officer and in the presence and under the supervision of an adult who has been informed about the relevant offending and who has been approved in writing by a probation officer as suitable to undertake the role of supervision.¹⁰
- (c) The offender must not associate with, or contact, a victim of the offender without the prior written approval of a probation officer.¹¹
- 14.13 All standard ESO conditions apply automatically and for the whole duration of the order when an ESO is imposed.¹² They can be varied or discharged by the Parole Board upon application by the person subject to the ESO or a probation officer.¹³

⁴ Parole Act 2002, s 15(3).

⁵ Parole Act 2002, s 60(1).

⁶ Parole Act 2002, s 71(1).

⁷ Compare s 14(1)(c) and (e) with s 107JA(1)(c) of the Parole Act 2002.

⁸ Compare s 14(1)(h) with s 107JA(1)(k) of the Parole Act 2002.

⁹ Parole Act 2002, s 107JA(1)(f).

¹⁰ Parole Act 2002, s 107JA(1)(i).

¹¹ Parole Act 2002, s 107JA(1)(j).

¹² Parole Act 2002, s 107J.

¹³ Parole Act 2002, s 107O(1).

- 14.14 People on ESOs may also be subject to special conditions, which the Parole Board may add to the standard conditions on a case-by-case basis. These are the same special conditions that are available to a person on parole and imposed using the same test.¹⁴
- 14.15 The only addition is a special condition imposing intensive monitoring allowing for monitoring up to 24 hours a day. It can be imposed as an ESO condition but not as a release condition for parole. An intensive monitoring condition, unlike other conditions, must be ordered by a court.¹⁵ We discuss intensive monitoring conditions in more detail in Chapter 15.
- 14.16 The Parole Board may impose special conditions at any time before the end of an ESO upon application either by the chief executive of Ara Poutama Aotearoa | Department of Corrections or a probation officer.¹⁶ It must notify the person concerned and every victim if it is considering imposing any special conditions.¹⁷ The Parole Board must specify the duration of any special conditions imposed.¹⁸ Some particularly restrictive or invasive special conditions may not be imposed for longer than 12 months.¹⁹
- 14.17 Breaching any ESO condition is an offence punishable by up to two years' imprisonment.²⁰

Protective supervision orders

- 14.18 If a PPO is cancelled and a person is to be released from detention, the court must impose a protective supervision order on the person concerned.²¹ A protective supervision order allows the court to impose any requirements that the court considers necessary to:²²
- (a) reduce the person's reoffending risk;
 - (b) facilitate or promote their rehabilitation or reintegration into the community; or
 - (c) provide for reasonable concerns of victims.
- 14.19 To date, no person has been made subject to a protective supervision order.

The role of probation officers

- 14.20 People subject to preventive measures in the community are supervised by probation officers who are responsible for, among other things:²³
- (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;

¹⁴ Parole Act 2002, ss 15 and 107K(1).

¹⁵ Parole Act 2002, s 107IAC.

¹⁶ Parole Act 2002, s 107K(1).

¹⁷ Parole Act 2002, s 107K(6).

¹⁸ Parole Act 2002, s 107K(3)(a).

¹⁹ Residential restrictions under which the offender is required to be at the residence at all times and intensive monitoring can only be imposed for the first 12 months of an ESO: Parole Act 2002, s 107K(3)(b) and (ba).

²⁰ Parole Act 2002, ss 107T–107TA.

²¹ Public Safety (Public Protection Orders) Act 2014, s 93(1).

²² Public Safety (Public Protection Orders) Act 2014, s 94.

²³ Corrections Act 2004, s 25.

- (c) supervising people released subject to a protective supervision order 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.

COMMUNITY PREVENTIVE SUPERVISION AS A STAND-ALONE PREVENTIVE MEASURE

- 14.21 In Chapter 3, we recommend that community preventive supervision should provide a means of supervising a person in the community to address the reoffending risks they present, similar to ESOs.
- 14.22 Community preventive supervision is needed for people whose risk of reoffending can be managed without them residing at a specialised facility but who would pose a risk to the community if wholly unsupervised. Providing for this type of preventive measure is in line with the law in comparable jurisdictions.
- 14.23 Community preventive supervision will serve as an important transitional step for people who have been subject to the more restrictive preventive measures of residential preventive supervision or secure preventive detention. It will enable them to live in the community subject to safeguards.
- 14.24 Consequently, we recommend below the continuation (with minor amendment) of the standard and special conditions pursuant to which people subject to ESOs can live under supervision in the community.

A community-based preventive measure

- 14.25 It is important that community preventive supervision is genuinely community-based and that it does not authorise the detention of those subject to the measure.
- 14.26 In *Attorney-General v Chisnall*, te Kōti Mana Nui | Supreme Court reinforced the importance of the distinction between community-based preventive measures and detention.²⁴ The Supreme Court found that, because ESOs and PPOs are so restrictive, the statutory regimes governing their imposition enable the imposition of penalties. As post-sentence regimes, the Court held that they engage the protection against second punishment under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).²⁵
- 14.27 As we explain further in Chapter 3, the Court held that the detention-authorising aspects of the current law relating to ESOs are an unjustified limit on this right. Although post-sentence detention might be capable of justification (so long as it is prospective), the current law is not the least rights-intrusive model available to meet the need for community safety.
- 14.28 On the other hand, in relation to the aspects of the ESO regime that do not authorise detention, the Supreme Court held they were a justified limitation on the protection from second punishment. The Court was satisfied that the statutory regimes enable

²⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [256], [259] and [261]–[262].

²⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [133]–[138].

supervision in the community in a way that is the least rights-intrusive model available.²⁶ The Court explained that, while ESOs of this kind do impose restrictions, they enable the person's reintegration by remaining in the community. The Court concluded that the restrictions are designed and "appropriately calibrated" to enable the risk of reoffending to be minimised.²⁷ The Court said it proceeded on the basis that probation officers would ensure that the standard conditions are applied in a manner that is no more extensive than necessary to meet those risks.²⁸

- 14.29 The judgment in *Attorney-General v Chisnall* reinforces the view we expressed in the Preferred Approach Paper that it is desirable that the law authorise community-based supervision and detention, respectively, through entirely separate preventive measures. As the Supreme Court recognised, addressing reoffending risks through community-based supervision is materially different to a model involving post-sentence detention in terms of the severity of its interference with the human rights protection against second punishment. A court's decision to impose the respective measures will therefore involve different considerations as to whether the imposition is justified (which is a core element of the legislative tests we recommend in Chapter 10).
- 14.30 Our recommendations below will, therefore, establish community preventive supervision as a stand-alone measure. We make several recommendations to maintain the separation between community-based preventive measures and preventive measures that authorise detention. The imposition of detention should only be achieved through residential preventive supervision or secure preventive detention, which we discuss further in Chapters 15 and 16.

STANDARD CONDITIONS

- 14.31 Having established the basis for community preventive supervision as a stand-alone preventive measure, we now turn to more specific issues with the current law regarding certain restrictive conditions.

Issue

- 14.32 Several people we spoke with during consultation who were subject to ESOs thought their ESO conditions were unduly restrictive. They explained that ESO conditions, intensive monitoring in particular, limited their opportunities to work, study, travel or connect with their whānau. More generally, they raised the need for greater flexibility. They said there needed to be greater ability and more willingness for probation officers to relax conditions. Some said they would willingly submit to greater surveillance if it meant they could have more freedoms and opportunities.²⁹
- 14.33 Other submitters raised similar concerns in response to the Issues Paper.³⁰ The Chief Ombudsman noted in his submission that he received "a range of complaints" from

²⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [230].

²⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [230].

²⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [230].

²⁹ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [14.28].

³⁰ Preferred Approach Paper at [14.29].

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”.³¹

- 14.34 Some submitters 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. They submitted that some conditions relating to employment, association and restrictions on movement were detrimental to the reintegration of people subject to ESOs.³²
- 14.35 One standard ESO condition in particular has attracted criticism in our engagement and consultation. It 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.³³
- 14.36 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. However, in 2014, Parliament expanded the scope of the ESO regime beyond child sex offenders.
- 14.37 As a result, the condition may now not always be justified. The current law may result in a person not being able to associate with their own children even if their offending was unrelated to sexual violence against children or young people.
- 14.38 In *Pengelly v New Zealand Parole Board*, te Kōti Matua | High Court 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.³⁴ The Supreme Court in *Attorney-General v Chisnall* expressed a concern that this condition may not be responsive to the particular risk a person subject to an ESO poses.³⁵

Results of consultation

- 14.39 In the Preferred Approach Paper, we proposed a list of standard conditions to apply to all community preventive supervision measures.³⁶ We based the list on section 107JA of the Parole Act, with some adjustments. Notably, we did not include a standard condition not to associate with people under the age of 16.
- 14.40 In response to the Preferred Approach Paper, submitters generally agreed with the conditions we proposed.³⁷ Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service had concerns that the language used to define the conditions in our proposal was inaccessible. They thought

³¹ Preferred Approach Paper at [14.29(a)].

³² Preferred Approach Paper at [14.29(c)].

³³ Preferred Approach Paper at [14.27].

³⁴ *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [82]–[84]. See also *C v New Zealand Parole Board* [2021] NZHC 2567 at [159].

³⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [257].

³⁶ Preferred Approach Paper, P59.

³⁷ Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

that the conditions should be phrased in plainer language to better assist people with understanding them.

14.41 Some submitters raised issues in relation to specific standard conditions:

- (a) The NZLS had concerns that some people would be unable to comply with the condition to obtain prior written consent from the probation officer to move to a new residential address if their address changes very frequently — for example, if they are in unstable housing arrangements. It noted that, unlike other conditions, this duty was not qualified by a phrase such as “as soon as practicable”.
- (b) The NZLS also suggested the condition to take part in a rehabilitative and reintegrative needs assessment should mention that the people affected have a right to refuse to undergo medical treatment.
- (c) The Law Association of New Zealand (TLANZ) submitted that the condition relating to the collection of biometric information should mirror the current provisions in the Parole Act and comply with the Privacy Commissioner’s biometrics code (once the code is finalised).

14.42 Additional feedback on the Preferred Approach Paper from an individual currently on parole from preventive detention emphasised how much of an impact parole can have on one’s life. He described being subject to recall as very hard: “You lose your accommodation, employment and support network because people don’t trust you anymore.” He explained he felt he was at the “whim” of Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) and that he could be recalled for something “really small”. This echoes the feedback we received from people subject to parole and ESOs during consultation on the Issues Paper.

Recommendations

R76

Community preventive supervision should comprise standard conditions and any additional special conditions imposed by te Kōti-ā-Rohe | District Court.

R77

When te Kōti-ā-Rohe | District Court imposes community preventive supervision, the following standard conditions should automatically apply. The person subject to community preventive supervision (the person) 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 community preventive supervision measure;
- 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 the person is moving to a new probation area;
- e. not reside at any address at which a probation officer has, in writing, 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 in writing, 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, in writing, directed the person not to engage or continue to engage;
- j. not associate with, or contact, a victim of their offending without the prior written approval of a probation officer; and
- k. not associate with, or contact, any specified person, or with people of any specified class, whom the probation officer has, in writing, directed the person not to associate with or contact unless the probation officer has defined conditions under which association or contact is permissible.

14.43 We conclude that the new Act should provide a set of standard conditions to apply automatically when community preventive supervision is imposed.

14.44 Providing for standard conditions signals to the Court that Parliament deems certain conditions to be automatically justified if the legislative tests for imposing the measure are met.³⁸ It also has the advantage of simplifying te Kōti-ā-Rohe | District Court's task of imposing community preventive supervision. If all conditions were imposed by discretion, the Court would have to undertake a proportionality analysis for each condition.

³⁸ *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 at [78].

- 14.45 Most comparable jurisdictions we have analysed provide for a mix of standard and special conditions.³⁹ We found fewer examples of community supervision orders where all conditions were imposed individually at the court's discretion.⁴⁰
- 14.46 Many of the recommended standard conditions of community preventive supervision confer powers on the probation officer to administer the conditions. This allows the probation officer to individualise how the standard conditions apply to a specific person. As we explain in Chapter 13, the probation officer must exercise their powers consistently with the guiding principles we recommend in that chapter and with the NZ Bill of Rights.

Standard conditions continued

- 14.47 Our recommendation adopts, with some amendments, the existing standard ESO conditions listed in section 107JA of the Parole Act. This includes retaining all reporting, notification and prior approval conditions and the condition not to associate with a victim.
- 14.48 We have not identified particular problems that have arisen from these standard conditions and see no reason to depart from them.
- 14.49 Our approach also maintains the existing statutory language. We acknowledge submitters' concerns about the accessibility of the language used. However, we consider that there are benefits to retaining existing language that probation officers and the courts are familiar with and experienced in applying. We consider accessibility concerns are best addressed in the way conditions are explained to the person rather than by the phrasing of the legislation itself.
- 14.50 This is why we recommend below that people subject to community preventive supervision should be entitled to be informed about conditions in a way that ensures that the person understands their nature and effect. We make similar recommendations in relation to residential preventive supervision and secure preventive detention in Chapters 15 and 16.
- 14.51 We briefly set out our reasoning for two standard conditions on which submitters commented.

Written permission for address change

- 14.52 We recommend retaining this condition as proposed in the Preferred Approach Paper. We acknowledge the NZLS's concerns that a requirement to obtain written permission to move to a new residential address might not be practically feasible for someone who does not have stable housing. Some people may have to change their address at short notice, depending on their living arrangements. However, we understand that facilitating stable housing for people on parole or ESOs is one of the standard tasks a probation officer undertakes.

³⁹ 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.

⁴⁰ 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).

- 14.53 If, despite the probation officer's best efforts, a person subject to community preventive supervision encounters housing issues, we expect a probation officer will work as pragmatically as possible with the person concerned. While there may be practical difficulties for some, we do not think that this issue merits departing from the consent requirement as a standard condition.
- 14.54 In any case, it is unlikely that a person will be prosecuted for breaching the condition in this situation. Our relevant recommendation in Chapter 17 excludes liability for breaching conditions if there is a reasonable excuse.

Collection of biometric information

- 14.55 Our recommendation retains the standard condition allowing the collection of biometric data. We acknowledge the concerns of TLANZ that this should comply with privacy rights. The collection of biometric information may also constitute a search for the purposes of the NZ Bill of Rights.⁴¹ We contemplate that, consistent with the current law, biometric information should be collected only to:⁴²
- (a) manage people subject to community preventive supervision to ensure public safety;
 - (b) identify people subject to community preventive supervision before they leave Aotearoa New Zealand; and
 - (c) enforce the condition that the person must not leave the country without their probation officer's consent.

Standard non-association condition amended

- 14.56 Our recommendation includes an amended version of the existing standard ESO condition not to associate with, or contact, people whom the probation officer has, in writing, directed the person subject to the measure not to associate with or contact.
- 14.57 We received feedback that the current wording of that condition grants probation officers broad discretion and that this can be problematic. For example, in the case of *Te Whatu v Department of Corrections*, the High Court found that a probation officer's exercise of discretion in relation to a standard condition was in breach of the NZ Bill of Rights.⁴³
- 14.58 The probation officer directed Mr Te Whatu to refrain from associating with or contacting his adult partner of then seven years, even though he had offended only against children. 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".⁴⁴
- 14.59 At the same time, a standard non-association condition fulfils an important function by allowing probation officers to make decisions in response to dynamic changes in

⁴¹ See for example *G v Commissioner of Police* [2022] NZHC 3514, [2023] 2 NZLR 107 at [153].

⁴² Compare Parole Act 2002, ss 14A and 107JB.

⁴³ *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362.

⁴⁴ *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362 at [33].

someone's behaviour or circumstances. It will be difficult for the District Court to anticipate such developments when imposing special conditions.

- 14.60 We therefore recommend maintaining the non-association standard condition. To facilitate a more nuanced approach, however, we recommend rephrasing the condition to allow for association or contact on a conditional basis rather than only a binary basis of allowing it or not.
- 14.61 This will mean that a probation officer can define requirements or circumstances for contacting or associating with specified people (or classes of people). For example, it may be safe to allow a person subject to community preventive supervision to have contact with their co-offenders (in case they are family members, for instance) – but only if the contact is supervised. Allowing association subject to supervision or other safeguards may provide for greater flexibility, thus better protecting against unnecessary infringement of a person's freedom.
- 14.62 We also think there will be sufficient safeguards in place to prevent abuse of discretion. The safeguards include the guiding principles set out in Chapter 13, to which probation officers will be bound, and the annual reviews of conditions by the Review Authority set out in Chapter 18.

Standard conditions removed

A condition requiring the person to take part in a rehabilitative and reintegrative needs assessment

- 14.63 We do not recommend the continuation of a condition that requires a person to take part in a rehabilitative and reintegrative needs assessment. Our reasons are as follows:
- (a) We do not think compulsory participation in a rehabilitative and reintegrative needs assessment is warranted. We doubt that true participation in a needs assessment can be forced, because it would require the person in question to speak honestly about, for example, any needs relating to mental health, education or personal relationships. We expect that participation in an assessment will only be useful when done on a voluntary basis.
 - (b) If the assessment was included as a voluntary condition, it would merely duplicate the needs assessment we recommend in Chapter 13 that a probation officer be required to complete in consultation with the person subject to community preventive supervision.
 - (c) Lastly, it is possible that some aspects of an assessment may be considered medical treatment and therefore engage the right to refuse medical treatment under section 11 of the NZ Bill of Rights.⁴⁵

A condition not to associate with people under the age of 16

- 14.64 We recommend removing, as a standard condition, the requirement for the prior approval of a probation officer to associate with, or contact, people under the age of 16.

⁴⁵ For example, in *Smith v Attorney-General*, the Court noted that a psychological screening test carried out on a prisoner in a therapeutic context constituted medical treatment: *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [100]. See also Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ 2015) at 11.9.4–11.9.9.

- 14.65 We consider there should be a rational connection between someone's risk and the conditions imposed to address that risk. As we have observed above, this is not always the case with a standard condition of non-association with people under the age of 16.
- 14.66 All submitters who responded to this issue agreed. Additionally, none of the comparable jurisdictions we have examined provide for a standard supervision condition that restricts contact with children under 16.
- 14.67 Our recommendation provides for alternative options for restricting someone's contact and association with people under 16 when necessary:
- (a) A requirement of non-association with people under the age of 16 will continue to be available for the court to impose as a special condition. The court will, in accordance with our recommendation below, be able to make a more tailored special condition regarding association with people under the age of 16. It could, for example, impose a special condition requiring the probation officer's approval for such contact and direct that supervision by a suitable person during the meeting is necessary. We discuss this further below in our recommendations on special conditions.
 - (b) Even without such a special condition, a probation officer, if they consider it necessary, may activate the proposed standard non-association condition discussed above and apply it to association and contact with people under the age of 16 in accordance with the guiding principles we outline in Chapter 13.

SPECIAL CONDITIONS

- 14.68 In Chapter 10, we recommend that the relevant court should have jurisdiction to impose both the preventive measure itself and any special conditions. The test for imposing special conditions should be integrated into the legislative tests for imposing a preventive measure.
- 14.69 In this chapter, we discuss which special conditions the new Act should list as examples and which special conditions should be prohibited.

Results of consultation

- 14.70 In the Preferred Approach Paper, we presented a non-exhaustive list of types of special conditions that should be available under the new Act.⁴⁶
- 14.71 Submitters generally supported the suggested special conditions.⁴⁷ However, the NZLS and the Public Defence Service both had concerns that some of the available special conditions could blur the boundary between community preventive supervision and residential preventive supervision. The NZLS was particularly concerned about the condition to stay at the place of residence for up to 12 hours per day, while the Public Defence Service focused on electronic monitoring.
- 14.72 We also proposed that special conditions should, by default, be imposed for the same period as the preventive measure but that shorter periods could be specified by the court.⁴⁸

⁴⁶ Preferred Approach Paper, P60.

⁴⁷ Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁴⁸ Preferred Approach Paper at [14.63]–[14.65].

- 14.73 In their responses, some submitters highlighted the importance of periodic reviews of special conditions.⁴⁹ The NZLS submitted that some conditions would only be appropriate initially after a person's release from custody and that not all conditions are suitable to be imposed for the full duration of a measure.
- 14.74 The Public Defence Service disagreed with the proposal to make special conditions for electronic monitoring and residential restrictions available for the full duration of community preventive supervision. Instead, they were in favour of a 12-month limit for such conditions, after which they may be renewed.
- 14.75 Lastly, we also proposed that there be some special conditions that should not be allowed to be imposed as part of community preventive supervision.⁵⁰ These were conditions that constitute detention (with one exception) and intensive monitoring (in-person, line-of-sight monitoring). Submitters broadly agreed with us that these types of special conditions should not be available for community preventive supervision.⁵¹
- 14.76 Submitters made other comments in relation to specific special conditions, which we address when discussing our recommendations below.

Recommendations

R78

The new Act should provide that the kinds of special conditions that te Kōti-ā-Rohe | District Court may impose under R76 include, without limitation, conditions:

- a. to reside at a particular place;
- b. to be at the place of residence for up to eight hours in a 24-hour period;
- c. not to use a controlled drug or a psychoactive substance and/or consume alcohol;
- d. not to associate with any person, persons or class of persons;
- e. to take prescription medication;
- f. not to enter, or remain in, specified places or areas at specified times or at all times;
- g. not to associate with, or contact, a person under the age of 16, 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;
- h. to submit to the electronic monitoring of compliance with any conditions that relate to the whereabouts of the person; and
- i. not to use any electronic device capable of accessing the internet without supervision.

⁴⁹ Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

⁵⁰ Preferred Approach Paper at [14.60]–[14.62].

⁵¹ Preferred Approach Paper, P61. Submitters in support were Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

R79

The new Act should provide that a person subject to community preventive supervision must not be made subject to a special condition that requires them to take prescription medication unless the person:

- a. has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
- b. consents to taking the prescription medication.

R80

The new Act should provide that a person subject to community preventive supervision does not breach their conditions if they withdraw consent to taking prescription medication.

- 14.77 In addition to the standard conditions, we conclude that it should be possible to add special conditions when imposing community preventive supervision. As we explain in further detail in Chapter 10, we recommend that the special conditions should be imposed by the District Court rather than the Parole Board.
- 14.78 Enabling the court to impose special conditions in this way will allow the community preventive supervision regime to be tailored to the individual reoffending risks of each person. We prefer this approach to an approach with greater reliance on standard conditions, which risks imposing unnecessary conditions on some and omitting conditions that might be needed for others.
- 14.79 As we recommend in Chapter 10, the court should impose special conditions to the extent that they meet the legislative test set out in that chapter. To provide additional guidance for the court on what types of special conditions are appropriate, we recommend that the new Act should include a list of example special conditions.
- 14.80 We recommend a non-exhaustive list, as opposed to a definitive catalogue, to allow the court to respond to individual risk profiles with sufficient flexibility. The list of example conditions should also guide the court in how much discretion it may award to probation officers in activating and administering individual conditions.
- 14.81 Our recommendation is based on the current list of examples in section 107K of the Parole Act with some amendment. We have not identified major problems or concerns with these existing special conditions. Additionally, the legislation in comparable jurisdictions 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).⁵²

⁵² 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).

14.82 We comment in the following sections on the reasons for recommending that some particularly intrusive conditions be continued, some new standard conditions be added and some other standard conditions be removed.

Example conditions continued

A requirement to be at the place of residence at certain times

14.83 We recommend that, under community preventive supervision, a requirement to be at the approved residence at certain times should be available as a special condition. However, the new Act should not allow for such a requirement for longer than eight hours in a 24-hour period. We explain this time limit further below in the context of prohibited conditions. The requirement is intended to allow for a nightly curfew condition, which is a standard approach to managing people subject to parole. Only in exceptional circumstances would it apply to different hours of the day (for example, if the person concerned worked night shifts).

A condition requiring electronic monitoring

14.84 We consider that electronic monitoring strikes an appropriate balance between the person's freedom of movement and public safety. It is needed to detect if a person subject to community preventive supervision enters an area they are prohibited from entering (such as school grounds) and to enforce curfews. Monitoring a person in the community is an important measure for allowing, and demonstrating, rehabilitative progress without exposing the public to undue risk.

A condition to take prescription medication

14.85 A condition to take prescription medication should continue to be subject to the person's consent, in line with their right to refuse medical treatment.⁵³ We disagree with the views of some submitters that it should be possible to proceed without the person's consent in some cases. We further recommend that withdrawing consent should not result in a breach of conditions. However, the failure to take the medication may give rise to the imposition of more restrictive conditions or the escalation to more restrictive preventive measures.

14.86 The main reason for including this special condition is to signal to the court and the Review Authority that other special conditions or a more restrictive preventive measure may be required if a person withdraws their consent to continuing the prescribed medication. This would be the case if the lack of medication resulted in an increased reoffending risk.

New example conditions added

14.87 We recommend adding two example special conditions 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.

⁵³ Parole Act 2002, s 15(4) and (5); and New Zealand Bill of Rights Act 1990, s 11.

- (b) We also recommend 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. It is also intended to modernise the list of special condition examples given that internet access was not nearly as readily available when the Parole Act was adopted as it is today.

Example conditions removed

A condition relating to finances and earnings

14.88 We recommend omitting conditions relating to a person's finances or earnings from the list of examples, which are currently listed as an example of a special condition under the Parole Act.⁵⁴ Our understanding is that the Parole Board typically sets this type of condition when the index offending is related to finance, for example, fraud.⁵⁵ Given that the scope of the new Act should be restricted to serious sexual and violent offending, it is unnecessary to include this type of condition as an example. We recognise there may be circumstances where such a condition would be justified, for example, where a person may have a financial income from the proceeds of serious sexual or violent crime. In these cases, it will still be open to the court to impose such a special condition as the list of examples is non-exhaustive.

A condition requiring participation in a rehabilitative or reintegrative programme

14.89 We recommend that the special condition under the current law that requires a person to participate in a rehabilitative or reintegrative programme should not be included as an example condition for community preventive supervision for these reasons:

- (a) We doubt whether compulsory participation in a programme is an effective pathway towards rehabilitation and reintegration. Rather, programmes tend to be effective at reducing the risk a person will reoffend only where they are a willing and engaged participant.
- (b) As pointed out by the NZLS in their submission, certain parts of rehabilitative programmes such as participation in psychotherapy likely engage the right to refuse to undergo medical treatment.⁵⁶ A limitation on the right to refuse to undergo medical treatment can be justified only in very specific and rare circumstances.⁵⁷
- (c) Requiring a person to participate in a programme may constitute detention, especially if coupled with other conditions that restrict free movement. We are mindful of previous cases where the courts have found that people have been

⁵⁴ This is currently included in s 15(3)(a) of the Parole Act 2002.

⁵⁵ For example *Parole Board decision concerning Christopher George WRIGHT* (21 October 2021); and *Parole Board decision concerning Shaun Joseph KEENAN* (2 June 2021).

⁵⁶ *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [100]; and *Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [43]. See also Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ 2015) at 11.9.4–11.9.9.

⁵⁷ Certain public health measures have been held to constitute justified limitations on the right not to undergo medical treatment. See Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ 2015) at 11.9.21–11.9.24.

detained when subject to these kinds of conditions.⁵⁸ We discuss concerns with how programmes have been used to detain people in Chapter 15.

- 14.90 The absence of a programme condition as an example special condition will not preclude a court from imposing a programme condition. However, the condition will only be available if it satisfies the legislative tests we recommend in Chapter 10. The tests are that, without the condition, the person would be at high risk of reoffending, that the condition is the least restrictive option for managing that risk and that the condition would only place limits on the person's rights and freedoms that can be justified. We doubt that compulsory participation in a programme will usually satisfy these tests.
- 14.91 For these reasons, we consider that any rehabilitative or reintegrative programme offered to people on community preventive supervision should normally be undertaken on a voluntary basis only. This is why we do not include the condition in the recommended list of example conditions relevant to community preventive supervision.
- 14.92 Even if no special condition *requiring* the participation of a person in a programme is imposed, Ara Poutama must make sufficient rehabilitative treatment and reintegration support available, as we recommend in Chapter 13. It is important that people subject to community preventive supervision are encouraged to participate in programmes and supported in doing so.

List of prohibited conditions

R81

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

- a. Any kind of detention.
- b. An intensive monitoring condition (in-person, line-of-sight monitoring).

- 14.93 As explained above, we think the conditions of community preventive supervision should not allow for the detention of those subject to the measure. We therefore recommend that the new Act should contain specific safeguards to ensure that the conditions are not used to detain people. In particular, we recommend that the new Act should state the maximum length of time a special condition can require a person to remain at a particular residence in a 24-hour period. There should also be a prohibition on intensive monitoring.
- 14.94 In the Preferred Approach Paper, we proposed that the duration be limited to 12 hours in a 24-hour period. Some submitters voiced concerns that this was too long. A condition requiring a person to stay at their residential address for up to 12 hours in a 24-hour period or to be subject to electronic monitoring would blur the boundaries between community preventive supervision and residential preventive supervision.
- 14.95 We have reconsidered our proposal and now recommend that the new Act prohibit a person from being required to be at a residential address for more than eight hours in a 24-hour period.

⁵⁸ See for example *Coleman v Chief Executive of the Department of Corrections* [2010] NZCA 210 at [32]; and *C v New Zealand Parole Board* [2021] NZHC 2567 at [67]–[68].

- 14.96 In *C v New Zealand Parole Board*, the High Court summarised the tests for when the restrictions on a person constitute detention for the purposes of the NZ Bill of Rights.⁵⁹ Referring to the case law, the Court explained that restraints may amount to detention “where it results in a substantial intrusion on personal liberty”.⁶⁰ This involves “consideration of the nature, purpose, extent and duration of the constraint”. It is a matter of “fact and degree”.⁶¹
- 14.97 In past cases, the courts have found restrictions of 12 hours or more in a 24-hour period to amount to detention for the purposes of the Habeas Corpus Act 2001 and the NZ Bill of Rights.⁶² However, the Kōti Pira | Court of Appeal found in the case of *Drever v Auckland South Corrections Facility* that a nightly curfew of eight hours did not constitute detention for the purposes of a habeas corpus application.⁶³ Therefore, we consider that restraints on a person’s freedom of movement during a nightly curfew of up to eight hours, while otherwise allowing them to reintegrate into the community, will be unlikely to amount to detention.

Period of special conditions

R82

Special conditions should, by default, be imposed for as long as the preventive measure is in place. The Kōti-ā-Rohe | District Court, should, however, have the power to specify a shorter period for individual special conditions where it would otherwise not be the least restrictive measure.

- 14.98 We conclude that the duration of special conditions should not be limited to a specific period that differs from the period of the preventive measure itself.
- 14.99 A time limit on certain special conditions could lead to the unintended consequence of the court having to impose a more restrictive measure in the absence of the expired special conditions that would have allowed a person to be managed safely under community preventive supervision.
- 14.100 Although some submitters supported limiting the duration of certain conditions, we remain concerned that this may inadvertently mean a person must be moved to a more restrictive measure. We consider that the recommendations for annual reviews we make in Chapter 18 will achieve the same level of scrutiny as one submitter’s suggestion to review such conditions after 12 months and renew them if necessary.
- 14.101 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. Most conditions of community preventive supervision limit the freedoms of movement, association and peaceful assembly. Our recommendation that the court may specify a

⁵⁹ *C v New Zealand Parole Board* [2021] NZHC 2567.

⁶⁰ *C v New Zealand Parole Board* [2021] NZHC 2567 at [57].

⁶¹ *C v New Zealand Parole Board* [2021] NZHC 2567 at [57].

⁶² *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, [2020] NZAR 801 at [24]–[32]; and *C v New Zealand Parole Board* [2021] NZHC 2567 at [65]–[68].

⁶³ *Drever v Auckland South Corrections Facility* [2019] NZCA 346 at [24]–[30].

shorter period for a special condition will help the court to make the least restrictive measure possible.

14.102 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) every two years. It also requires Parole Board reviews of programme conditions and residential restrictions if imposed concurrently every two years.⁶⁴ We consider that the review obligations we recommend in Chapter 18 are sufficient for all types of special conditions available under the new Act.

THE ROLE OF PROBATION OFFICERS

Results of consultation

14.103 In the Preferred Approach Paper, we proposed that probation officers should be the people responsible for supervising those subject to community preventive supervision and for monitoring their compliance with conditions.⁶⁵ Submitters supported this proposal.⁶⁶

14.104 The Public Defence Service cautioned that only probation officers with specialised training should be “responsible for monitoring compliance and any decision making in respect of any of the preventive measures”. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) said probation officers have particular expertise and that they can ensure a coordinated approach to managing the needs of the people they supervise and address any risk factors that might arise.

14.105 The Bond Trust submitted that probation officers should ensure decisions are proportionate to the risks and are the least restrictive necessary. The Public Defence Service said that, where probation officers may “direct” people or where their consent is needed, they should do so in writing. This, it argued, would be evidence if disputes over condition breaches arise later.

Recommendation

R83

Probation officers should be responsible for monitoring people’s compliance with conditions of community preventive supervision.

14.106 We conclude that probation officers should be responsible for supervising those on community supervision orders and monitoring their compliance with the conditions of their orders. They should do so in accordance with the guiding principles for the administration of the new preventive measures (see our recommendation in Chapter 13).

14.107 Probation officers are currently responsible for all types of community supervision in the context of community sentences, parole conditions or ESO conditions. Ara Poutama,

⁶⁴ 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.

⁶⁵ Preferred Approach Paper, P63 and [14.66]–[14.67].

⁶⁶ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

which employs probation officers, has thus gained considerable experience in managing people with reoffending risks in the community. Most comparable jurisdictions we have assessed assign compliance monitoring to people with roles equivalent to probation officers in Aotearoa New Zealand.⁶⁷

- 14.108 We do not consider members of other professions would be better suited to manage people subject to community preventive supervision. The Criminal Bar Association submitted in its response to the Issues Paper that psychologists should replace probation officers with regard to supervision orders. We do not agree with this suggestion. 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. Indeed, the RANZCP, in its response to the Preferred Approach Paper, emphasised the importance of probation officers in responding to issues that fall outside the scope of health professionals.
- 14.109 The Public Defence Service submitted that only probation officers with specialised training should manage people subject to preventive measures. We agree and expect that all probation officers will receive suitable training for their responsibilities under the new Act. We also agree that probation officers should issue their directions in writing. We understand this to be common practice already.⁶⁸
- 14.110 In Chapter 6, we recommend that Māori groups should be able to manage people subject to preventive measures. For community preventive supervision, we suggest that Ara Poutama consider the most suitable ways to provide probation officer oversight when a Māori group is involved. This could be that a probation officer is assigned to work with the group. In addition or as an alternative, a member of the group could be trained and appointed to exercise the function of probation officer.

⁶⁷ 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.

⁶⁸ See for example *Te Whatu v Department of Corrections* [2017] NZHC 3233, (2017) 11 HRNZ 362 at [11].

THE RIGHTS OF PEOPLE SUBJECT TO COMMUNITY PREVENTIVE SUPERVISION

R84 The new Act should state that the rights of people subject to community preventive supervision are only limited by standard and special conditions imposed on them in accordance with the new Act.

R85 The new Act should clarify that the following rights (minimum entitlements) of a person subject to community preventive supervision may not be limited by a probation officer:

- a. Every person subject to community preventive supervision is entitled to be informed about conditions, instructions, entitlements, obligations and decisions that affect them. The information must be provided in a way that ensures that the person understands its nature and effect.
- b. Every person subject to community preventive supervision is entitled to be dealt with in a respectful manner, having regard to the person's cultural and ethnic identity, language, and religious or ethical beliefs.
- c. Every person subject to community preventive supervision is entitled to make complaints about the probation officer responsible for managing their conditions to an inspector appointed in accordance with the new Act.

14.111 We conclude that the new Act should clarify that rights of people subject to community preventive supervision are only restricted to the extent that the new Act limits them. The new Act might limit them by standard and special conditions imposed on them in accordance with the Act or by directions issued by the probation officer pursuant to standard or special conditions.

14.112 We recommend that some of the rights of people subject to community preventive supervision should not be restricted by probation officers under any circumstances. These are the person's rights to be informed about relevant legal acts or decisions that affect them, to be dealt with in a respectful manner and to make complaints about their probation officer.

CHAPTER 15

Residential preventive supervision

INTRODUCTION

- 15.1 In Chapter 3, we recommend that the law should provide for a new measure called residential preventive supervision. This should be a stand-alone, middle-tier preventive measure — more restrictive than community preventive supervision (see Chapter 14) but less restrictive than secure preventive detention (see Chapter 16).
- 15.2 In this chapter, we consider how residential preventive supervision should operate in practice. We discuss:
- (a) issues with residential restrictions and programme conditions under the current framework for parole or extended supervision orders (ESOs); and
 - (b) issues with intensive monitoring conditions under the current framework for ESOs.
- 15.3 To address these issues, we recommend reforming the law that governs how people can be detained in residential settings through the introduction of residential preventive supervision.
- 15.4 Residential preventive supervision is intended for those people at serious risk of reoffending who do not need to be made subject to secure preventive detention but cannot be safely placed into the community without detention in the controlled environment of a residential facility. As part of its risk management function, residential preventive supervision could also serve as a closely monitored environment that can offer effective rehabilitative and reintegrative interventions and other support to residents. Lastly, it could function as a reintegrative bridge between secure preventive detention and community preventive supervision.
- 15.5 We recommend that residential preventive supervision should comprise standard and special conditions imposed by te Kōti Matua | High Court. Residential preventive supervision will require a person to be detained at a residential facility, but, unlike with secure preventive detention, the facility should not have features to physically prevent the person from leaving. We make further recommendations on how residential facilities should be established and run and what the rights of the people detained there should be.

CURRENT LAW

- 15.6 Under the current law, when people are subject to a preventive measure in the community, they are managed pursuant to standard and special conditions. This applies to people subject to preventive detention who have been released from prison on parole and to people subject to ESOs. Some special conditions can operate to be so restrictive that, in effect, they make someone in the community subject to detention without appropriate procedural safeguards. This chapter focuses on three of the most restrictive special conditions:¹
- (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 conditions (which, unlike the other special conditions, are only available for ESOs and can only be imposed following a court order).

Residential restrictions

- 15.7 Residential restrictions require a person subject to parole or an ESO:²
- (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 New Zealand Parole Board (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).
- 15.8 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 restrictions and consent to them residing there.³ A requirement to be at their residence at all times (as opposed to specified times) may apply for no longer than 12 months — for an ESO, this must be within the first 12 months of the term of the order.⁴ A small number of exceptions to residential restrictions apply.⁵

¹ Parole Act 2002, s 15(3)(ab), (b) and (g).

² Parole Act 2002, s 33(2).

³ Parole Act 2002, s 35. Note that the requirement of s 35(c) does not apply to residential restrictions as ESO conditions: s 107K(1A).

⁴ Parole Act 2002, ss 33(3) and 107K(3)(b).

⁵ A person may leave their residence despite a residential restriction to seek urgent medical or dental treatment, to avoid or minimise a serious risk of death or injury to themselves or any other person or for humanitarian reasons approved by a probation officer: Parole Act 2002, s 33(4). Further grounds to leave a residence apply if the residential restriction is in place for 24 hours per day, 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).

Programme conditions

- 15.9 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.⁶ 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.⁷
- 15.10 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.

Intensive monitoring

- 15.11 Intensive monitoring is a special ESO condition that the Parole Board may only impose if ordered to do so by a court.⁸ It is defined as:⁹
- ... 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.
- 15.12 The 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”.¹⁰ Intensive monitoring 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”.¹¹
- 15.13 Intensive monitoring can only be ordered for the first 12 months of an ESO and only once, even if subsequent ESOs are imposed later.¹²

RESIDENTIAL PREVENTIVE SUPERVISION AS A NEW STAND-ALONE PREVENTIVE MEASURE

Issue

- 15.14 The Parole Board has placed some people subject to ESOs on combinations 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

⁶ Parole Act 2002, ss 15(3) and 107K(1).

⁷ Parole Act 2002, s 16(c).

⁸ Parole Act 2002, s 107IAC(1).

⁹ Parole Act 2002, s 107IAC(2). The term “intensive monitoring” was introduced by the Parole (Extended Supervision Orders) Amendment Act 2014, which decoupled intensive monitoring from “at all times” residential restrictions: Parole (Extended Supervision Orders) Amendment Act 2014, ss 16 and 18.

¹⁰ *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 at [39].

¹¹ Parole Act 2002, s 107K(3)(bb)(i).

¹² Parole Act 2002, ss 107IAC(3) and (5) and 107K(3)(ba).

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.

- 15.15 In 2023, the High Court in *New Zealand Parole Board v Attorney-General* found the Parole Board’s practice to be unlawful.¹³ 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.¹⁴ 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”.¹⁵ The Court concluded that “[t]he provision creates distance between ESOs and something necessarily custodial in nature, in circumstances where ESOs already represent a second penalty”.¹⁶
- 15.16 Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) was concerned that this judgment would jeopardise the ongoing extended supervision of 26 offenders who were subject to a combination of residential restrictions and programme conditions.¹⁷ 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.¹⁸
- 15.17 In response, Parliament repealed the provision in the Parole Act that prohibited being required to reside with a programme provider.¹⁹ The repeal allows the practice of requiring people to remain at certain facilities through a combination of residential restrictions and programme conditions to continue. This arrangement can extend beyond the 12-month period that otherwise applies to an “at all times” residential restriction.²⁰ 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.²¹

¹³ *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611.

¹⁴ *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).

¹⁵ *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [74].

¹⁶ *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [83].

¹⁷ Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Programme conditions for Extended Supervision Orders* (2 August 2023) at [64]–[66].

¹⁸ Ara Poutama Aotearoa | Department of Corrections *Regulatory Impact Statement: Programme conditions for Extended Supervision Orders* (2 August 2023) at [31]–[38].

¹⁹ Parole Amendment Act 2023, s 4.

²⁰ Parole Act 2002, ss 33(2) and 107K(3)(b).

²¹ Parole Act 2002, s 107RC.

- 15.18 The courts have found combinations of programme conditions and residential restrictions amount to detention for the purpose of human rights law.²² The courts have said that 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.²³ In *Attorney-General v Chisnall*, te Kōti Mana Nui | Supreme Court stated that “residential restrictions may be imposed that are so significant as to amount to a detention, and that intensive monitoring may also effect a detention of the subject”.²⁴
- 15.19 This means that, because of the 2023 amendments, the Parole Board may effectively impose detention on people subject to ESOs through programme conditions and residential restrictions.
- 15.20 We consider that such a significant intrusion on liberty should be its own type of preventive measure, not a combination of special conditions. We do not think that rehabilitative and reintegrative programmes, as they are currently run, are an appropriate 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).²⁵ 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.
- 15.21 The possibility of effectively restricting freedom of movement 24 hours per day by combining programme conditions and residential restrictions also lacks safeguards that are typically required for detention. The Parole Board is authorised to impose combinations of programme conditions and residential restrictions after the court has imposed an ESO. The court, when assessing whether an ESO is justified, does not, therefore, have oversight on the extent to which the ESO will restrict the person’s rights and freedoms. In addition, Parole Board decisions are not subject to full appeal rights. We consider that detention should be imposed by a court and subject to full appeal rights.

²² 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.

²³ 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.

²⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [47].

²⁵ *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.

Results of consultation

- 15.22 In the Preferred Approach Paper, we proposed that the law could be improved through the introduction of residential preventive supervision. We explained it would be a stand-alone preventive measure to replace the current practice of detaining people on ESOs through programme conditions and residential restrictions. It would operate as a mid-level preventive measure for those whose risk does not justify secure preventive detention but still require a structured and monitored living environment.²⁶
- 15.23 Of the submitters who commented on the proposal, most agreed with the graded approach towards risk and how it would provide the court with more options to consider the most appropriate measure for a particular person.²⁷ Some submitters, however, disagreed with the proposal for residential preventive supervision. They were concerned that post-sentence restrictions involving detention would be unjustified limitations on human rights.²⁸
- 15.24 The Law Association of New Zealand (TLANZ) questioned whether the proposal was feasible given existing shortages and pressures on Ara Poutama staffing levels and resources.
- 15.25 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service submitted that the detention character of residential preventive supervision should be reflected in the name of the measure. They suggested the measure should be termed “residential preventive detention”.

Conclusions

- 15.26 The current practice of using programme conditions and residential restrictions to impose 24-hour detention through ESOs is problematic. It has, however, arisen from a legitimate need to fill the gap of appropriate risk management between public protection orders (PPOs) and supervision in the community through ESOs.
- 15.27 Accordingly, we conclude 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.

Support in academic literature

- 15.28 Residential preventive supervision will constitute detention except where conditions are relaxed by the facility manager (see below). However, the literature we have reviewed suggests that there are good arguments for a residential preventive measure even if it amounts to detention. We summarise the three main advantages below.
- 15.29 **Detention allows for responsive interventions.** A person’s dynamic risk factors (such as acute mental health needs, drug and alcohol issues, relationship break-downs and so on) can change rapidly.²⁹ Change will often depend on immediate situations (such as spending

²⁶ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P2 and [3.41]–[3.42].

²⁷ 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.

²⁸ Dr Jordan Anderson, Daniel Jackson.

²⁹ James Bonta and DA Andrews *The psychology of criminal conduct* (7th ed, Routledge, Abingdon (UK), 2023) at 18–20.

- time with drug users) and immediate emotional states (such as anger and desires for revenge).³⁰ These dynamic risk factors can be difficult to monitor and respond to if the person is in the community but not supported in a residential setting.
- 15.30 Relatedly, people considered at risk of reoffending may lack pro-social connections with others 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.³¹
- 15.31 **Detention can better provide opportunities for intensive treatment and targeted support.** Research suggests that treatment programmes can be most effective when they are “intensive” and implemented in a therapeutic residential environment.³² Programmes are considered “intensive” if they take up a significant portion of a person’s day in structured and supervised programme activities.³³ Institutional settings that likely amount to detention provide an opportunity to deliver these types of programmes.³⁴
- 15.32 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.³⁵ Residential settings are a prerequisite for more intensive interventions.³⁶ These observations and recommendations are consistent with the views put to us in engagement and

³⁰ James Bonta and DA Andrews *The psychology of criminal conduct* (7th ed, Routledge, Abingdon (UK), 2023) at 18–20.

³¹ See the comments of the majority of the 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]).

³² 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.

³³ 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(1) *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.

³⁴ Jennifer L Skeem and Devon L L Polaschek “High Risk, Not Hopeless: Correctional Interventions For People At Risk For Violence” (2020) 103 *Marquette Law Review* 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.

³⁵ 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].

³⁶ 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].

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.

- 15.33 **Detention in a residential facility can provide supported reintegration.** People who are considered at risk of reoffending may have limited pro-social support in the community.³⁷ They may not have people to rely on for emotional, social and practical support. Long periods in prison can further damage the links to any social resources they may have had before. People released from long-term prison sentences can experience social isolation and have challenges developing relationships.³⁸
- 15.34 This was the experience of several people we interviewed who had been released from prison. They described feeling ostracised, overwhelmed by everyday tasks and life in the community and anxious that the community might “find out” about them.
- 15.35 A facility that provides a supported and controlled environment can operate as a “bridge” between prison and the community.³⁹ It can provide a graded and supported return to participation in the wider community. An absence of a supportive, pro-social environment, on the other hand, may mean people revert to habitual antisocial behaviour.⁴⁰

Examples in other jurisdictions

- 15.36 In addition to the support for residential preventive measures in academic literature, there are also practical examples. Several comparable jurisdictions provide for supervision orders that implicitly allow for the detention of offenders in residential facilities.⁴¹ Two of the jurisdictions we considered expressly provide for residential supervision in residential facilities.
- 15.37 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.⁴² 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.⁴³
- 15.38 In Canada, the Parole Board or another authority may require an offender to reside at facilities called “community correctional centres”.⁴⁴ Community correctional centres are

³⁷ 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].

³⁸ *Initial Insights into Experiences of Release, Community Integration and Recall for Individuals on the Order for Lifelong Restriction* (July 2023) at 22–23 and 30.

³⁹ *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].

⁴⁰ *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].

⁴¹ We looked at the Australian jurisdictions, Canada, England and Wales, Ireland, Scotland and Northern Ireland.

⁴² *Serious Offenders Act 2018 (Vic)*, s 32.

⁴³ *Serious Offenders Act 2018 (Vic)*, ss 34(1)(a) and 179.

⁴⁴ *Corrections and Conditional Release Act SC 1992 c 20*, s 133(4)–(4.2).

designed to provide for a “structured transition period from full custody to a more independent community living environment”.⁴⁵

Appropriate safeguards for a detention-authorising preventive measure

- 15.39 As we discuss in Chapter 4, the imposition of post-sentence orders — including residential preventive supervision — engages the right not to be subject to second punishment. The Supreme Court in *Attorney-General v Chisnall* distinguished between preventive measures that authorise detention and preventive measures that do not authorise detention. It said that PPOs clearly authorise detention and clarified that ESOs could amount to detention if they comprised special conditions such as residential restrictions or intensive monitoring.⁴⁶
- 15.40 While the Court found standard ESO conditions that enabled a person to live in the community were justified limitations on the right not to be subject to second punishment, it held that the detention-authorising parts of the current ESO regime were an unjustified limitation on that right.⁴⁷ The Court held that the detention-authorising aspects of the regimes were not the least rights-intrusive model available to meet the objectives of community safety.⁴⁸ It did, however, note that, if designed and implemented differently, detention-authorising measures *can be* justified.⁴⁹
- 15.41 We recognise that the indeterminate detention of a person after they have completed a prison sentence is exceptionally restrictive.⁵⁰ It is a most severe intrusion on a person’s rights and freedoms. We nevertheless recommend that the law should provide for a measure that detains people at risk of serious reoffending while allowing them to reside in the community. It will serve as an important reintegrative bridge for people whose risk of reoffending is not so severe as to require detention in a secure facility but too great to be left in the community without closer supervision.
- 15.42 As we explain in Chapter 14, this reinforces the need to make residential preventive supervision a stand-alone preventive measure. Additional reforms are needed to ensure it is as least rights-intrusive as possible and provides safeguards that are appropriate for a detention-authorising measure. These reforms include the following:
- (a) Residential preventive supervision should be imposed by the High Court and only if the court is satisfied that residential preventive supervision is the least restrictive preventive measure adequate to address the risk of reoffending and overall justified (Chapter 10).
 - (b) Residential facilities should be periodically inspected, and there should be a mechanism for complaints about the management of facilities to be investigated and addressed (Chapter 13).

⁴⁵ *Overcoming Barriers to Reintegration: An Investigation of Federal Community Correctional Centres* (Office of the Correctional Investigator, 8 October 2014) at 5.

⁴⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [47].

⁴⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [256], [260] and [262].

⁴⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [235]–[244].

⁴⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [144] and [235].

⁵⁰ Compare *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

- (c) The new Act should contain guiding principles to ensure that a person's freedoms are not restricted any more than necessary while subject to a preventive measure (Chapter 13).
- (d) The new Act should provide for greater entitlements to rehabilitative treatment and reintegration support (Chapter 13).
- (e) Both the High Court and an independent Review Authority should review a resident's residential preventive supervision periodically (Chapter 18).

Resourcing

15.43 We acknowledge the resourcing concerns noted in TLANZ's submission. We address resourcing implications of adequate rehabilitative treatment and reintegration support in Chapter 13.

Terminology

15.44 We acknowledge the suggestion from some submitters that the measure should be termed "residential preventive *detention*" rather than "residential preventive *supervision*".

15.45 As we explain below, a condition of residential preventive supervision is to be at the residence at all times unless authorised by the facility manager. We try to be clear throughout this Report that the measure is undoubtedly a form of detention.

15.46 However, we conclude that use of the term "supervision" better signals that people will not be held in a secure facility and should progressively move towards more freedoms within the community and that the time that they are required to stay at the facility should decrease over the duration of the measure being in force. We consider that the "residential" descriptor in residential preventive supervision captures its nature sufficiently clearly.

STANDARD AND SPECIAL CONDITIONS

15.47 Having established the basis for residential preventive supervision as a stand-alone preventive measure, we now turn to more specific issues with the current law regarding certain restrictive conditions.

Issues

Residential restrictions not clearly defined in legislation

15.48 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.⁵¹

15.49 Under the current law, there are special procedural and eligibility requirements for imposing residential restrictions:

⁵¹ 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].

- (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.⁵²
 - (b) Residential restrictions may only be imposed if the occupants of the relevant residence consent.⁵³
 - (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.⁵⁴
 - (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.⁵⁵
- 15.50 It is important to clearly define residential restrictions to know when these further requirements apply. In *Woods v Police*, the Supreme Court considered this issue in the context of sentencing and commented that “[d]esirably, there should be greater legislative clarity”.⁵⁶
- 15.51 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 intensive monitoring and residential restrictions. In some cases, the Parole Board imposes residential restrictions to commence upon the expiry of an intensive monitoring condition. This is on the understanding that intensive monitoring, on its own, has the effect of restricting a person’s movements. However, it is not clear whether intensive monitoring really does restrict where a person can go or whether it merely requires that the person be monitored and accompanied.⁵⁷

Issues relating to intensive monitoring

- 15.52 There are four main issues that relate to intensive monitoring conditions.⁵⁸
- 15.53 First, there is currently no statutory test or guidance on the criteria to be considered when an order requiring the Parole Board to impose an intensive monitoring condition is sought.⁵⁹ The courts have, however, formulated a high test for imposing this condition.⁶⁰

⁵² Parole Act 2002, s 34.

⁵³ Parole Act 2002, s 35(b).

⁵⁴ Parole Act 2002, ss 35(c) and 107K(1A).

⁵⁵ Parole Act 2002, ss 33(3) and 107K(3)(b).

⁵⁶ *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.

⁵⁷ Te Kōti Matua | High Court in *New Zealand Parole Board v Attorney-General* [2023] NZHC 1611 at [64] pointed out that residential restrictions and intensive monitoring were one combined condition when first introduced.

⁵⁸ Preferred Approach Paper at [15.30]–[15.42].

⁵⁹ Issues Paper at [10.96]–[10.99].

⁶⁰ The courts generally use the test formulated in *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 Tuliloa* [2021] NZHC 745 at [51].

- Some submitters to the Issues Paper said that there should be a legislative test or guidance for imposing intensive monitoring under the new Act.⁶¹
- 15.54 Second, the Parole Act does not permit an intensive monitoring condition to be added after an ESO is ordered. The court may make an order requiring the Parole Board to impose an intensive monitoring condition only “at the same time” as making the ESO itself.⁶²
- 15.55 Problems arose from this issue in *Chief Executive of the Department of Corrections v Kerr*.⁶³ 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 intensive monitoring condition on Mr Kerr. However, the Court held that it did not have jurisdiction to add an intensive monitoring condition to the existing ESO.⁶⁴
- 15.56 As a matter of practice, in subsequent cases where Ara Poutama has wished to add an intensive monitoring 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 intensive monitoring condition. Courts have granted such applications.⁶⁵
- 15.57 Third, an intensive monitoring 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.⁶⁶
- 15.58 The 12-month limitation on intensive monitoring means that a person whose risk is being managed effectively by an ESO with an intensive monitoring condition may, after the maximum time for intensive monitoring has ended, instead be placed on a more restrictive setting to manage continued risk.⁶⁷ This could be through a PPO or through the courts imposing restrictive conditions that provide for maximum monitoring without meeting the definition of intensive monitoring. Problems have arisen in some cases where the High Court had to go to some lengths to find appropriate arrangements after the 12-month period for intensive monitoring had ended.⁶⁸
- 15.59 Fourth, the law and the practical implementation of intensive monitoring conditions do not align.⁶⁹ The law authorises a degree of intensity that does not appear to be needed, or made use of, in practice.
- 15.60 An intensive monitoring condition allows for “line of sight” person-to-person monitoring for up to 24 hours per day.⁷⁰ The practice of intensive monitoring in residential facilities,

⁶¹ Preferred Approach Paper at [15.48(a)].

⁶² Parole Act 2002, s 107IAC(1).

⁶³ *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139.

⁶⁴ *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139 at [12]–[14].

⁶⁵ For example *Chief Executive of the Department of Corrections v Clements* [2021] NZHC 1383.

⁶⁶ Parole Act 2002, ss 107IAC(3) and (5) and 107K(3)(ba).

⁶⁷ Issues Paper at [10.105]–[10.111].

⁶⁸ *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].

⁶⁹ Preferred Approach Paper at [15.41]–[15.42].

⁷⁰ See for example *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 at [39].

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”.⁷¹ Although staff are always aware of the location of residents, line-of-sight monitoring is only undertaken during outings into the community.

Results of consultation

- 15.61 In the Preferred Approach Paper, we proposed that residential preventive supervision should be implemented through a combination of standard and special conditions.⁷² We set out a list of standard conditions for residential preventive supervision, which provides for the detention of people at a residential facility and for electronic monitoring. Our proposal would also require people to adhere to conditions necessary for the safe running of the facility — for example, submitting to searches and not possessing prohibited items.
- 15.62 Our proposal did not include intensive monitoring in its current form. Instead, we proposed that line-of-sight monitoring should only be required for supervised outings away from the residential facility and that the facility manager should be able to relax this requirement at their discretion. We considered the invasiveness of person-to-person line-of-sight monitoring for 24 hours per day is not justified because current practice demonstrates that less invasive alternatives such as CCTV and motion sensors at a residential facility are sufficient to maintain security.
- 15.63 Of the submitters who responded to this proposal, most agreed with our approach.⁷³ The New Zealand Council for Civil Liberties said our proposal for residential preventive supervision was a clear improvement compared to the status quo. Only Dr Jordan Anderson was wholly opposed to requiring a person who has completed a finite prison sentence to reside within a residential facility. She stated this could only be punitive and would therefore amount to second punishment. In her view, the creation of more state-run institutions requiring people to reside there is inappropriate in the wake of the recent release of the report of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions.
- 15.64 The Public Defence Service had concerns that the language used to define the conditions in our proposal was inaccessible. It thought that the conditions should be phrased in plainer language to better assist people with understanding them.
- 15.65 Submitters made other comments in relation to specific conditions, which we address when discussing our recommendations below.

Recommendations

R86

Residential preventive supervision should comprise standard conditions and any additional special conditions imposed by te Kōti Matua | High Court.

⁷¹ *Chisnall v Chief Executive of Department of Corrections* [2022] NZCA 402 at [30] (emphasis added).

⁷² Preferred Approach Paper, P64.

⁷³ Bond Trust, Myra Crawford-Smith, New Zealand Council for Civil Liberties.

R87

When te Kōti Matua | High Court imposes residential preventive supervision, the following standard conditions should automatically apply. The person subject to residential preventive supervision (the resident) 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 in writing;
- d. be subject to in-person, line-of-sight monitoring during outings unless the facility manager directs otherwise in writing;
- e. not have in their possession any prohibited items (as currently defined in section 3 of the Public Safety (Public Protection Orders) Act 2014);
- f. submit to rub-down searches or searches of their room (in accordance with sections 89 and 93–96 of the Corrections Act 2004) for the purpose of detecting a prohibited item 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, whom the facility manager has, in writing, directed the resident not to associate with or contact unless the facility manager has defined conditions under which association or contact is permissible.

- 15.66 We conclude that residential preventive supervision, like community preventive supervision, should be implemented through a set of standard conditions, supplemented by special conditions (see below).
- 15.67 Providing for a set of standard conditions in statute simplifies the High Court's task of imposing residential preventive supervision because the court does not need to consider the imposition of each condition on an individual basis.
- 15.68 We also recommend that, through the design of the standard conditions, some discretion should be given to the managers of residential facilities for day-to-day operations.
- 15.69 Where possible, our recommendation maintains existing statutory language that the courts are experienced in applying. We acknowledge submitters' concerns about the accessibility of the language used. However, we consider accessibility concerns are best addressed in the way conditions are explained to the person rather than by the phrasing of the legislation itself. This is why we recommend below that residents should be entitled to be informed about conditions in a way that ensures that the person understands their nature and effect.
- 15.70 We do not recommend a set of coercive powers for residential facility managers that stand independently from powers derived from standard and special conditions. Under the current law, probation officers have coercive powers only to the extent that standard or special ESO conditions provide for them. The absence of additional coercive powers

is an important feature that will distinguish residential preventive supervision from secure preventive detention.

Residential conditions and electronic monitoring

- 15.71 Residents should be required to reside at a specified residential facility and to stay at the facility unless permitted to leave. These two residential conditions are a defining feature of residential preventive supervision and should therefore be standard conditions. We avoid the opaque term “residential restrictions” given the criticism discussed above that the term is not properly defined in the legislation. We consider our recommended condition to be more descriptive and clearer.
- 15.72 The High Court should be responsible for specifying in which residential facility a person must reside. We make this recommendation to allow a person to be placed in an environment that is as conducive to their rehabilitation and reintegration as possible (for example, a facility close to their whānau).
- 15.73 The standard conditions imposed on a person should be the same in every residential facility, and facility managers should only be able to relax conditions based on the same guiding principles that apply across all facilities. However, within the requirements of the statutory framework, facility managers and their staff should be able to develop their own approach to providing the best environment for rehabilitation and reintegration of residents. The court should decide which approach best matches the profile and the needs of a specific person. For example, if a person has expressed that they respond better to rehabilitative approaches grounded in te ao Māori, the court could direct that they are to reside in a facility that operates in accordance with tikanga Māori (subject to statutory requirements).
- 15.74 In its submission, the Public Defence Service queried how a resident could be moved from one facility to another if the move was urgently required. There are several reasons why a change of facility may be required, for example, because of family needs, employment opportunities, new rehabilitation opportunities or hostile dynamics between residents.
- 15.75 We are confident that our recommendations throughout this Report can provide a responsive approach that addresses this concern. We recommend in Chapter 18 that a Review Authority established under the new Act should have the power to transfer a resident from one residential facility to another if necessary.
- 15.76 In some instances, however, the risk a person poses may escalate to the point where it is no longer safe to manage them in any residential facility. We recommend avenues to escalate a person to a more restrictive measure in Chapter 17, and we recommend that a more restrictive measure should be available on an interim basis in Chapter 10.
- 15.77 Given that a residential facility will not physically prevent people from leaving, it should be possible for staff to track residents’ whereabouts at all times through electronic monitoring as a standard condition. We recommend that the new Act should provide for electronic monitoring in the same way as 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.
- 15.78 There were suggestions in consultation on the Preferred Approach Paper to limit the duration of residential and electronic monitoring conditions. We remain concerned,

however, that limiting the availability of those conditions may mean a person is moved to secure preventive detention when, if the conditions were to endure, the person could remain under residential preventive supervision and enjoy a better quality of life. We consider our recommendations put forward in Chapter 18 for annual reviews achieve the same level of scrutiny as one submitter's suggestion to review such conditions after 12 months and renew them if necessary.

In-person, line-of-sight monitoring

- 15.79 Intensive monitoring, in the form of full-time line-of-sight monitoring as provided for under the current law, is a severe limitation on the residents' rights to privacy and liberty. The degree of invasiveness inherent to intensive monitoring is not justified given other means of monitoring at and around the facility such as the presence of facility staff, CCTV and motion sensors are available.
- 15.80 We recommend requiring 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. We consider that this restricted form of intensive monitoring will be justified in continuing beyond the 12-month period currently allowed for intensive monitoring. Our recommendation reflects the current practice in residential facilities to limit in-person, line-of-sight monitoring to outings into the community.
- 15.81 The availability of line-of-sight monitoring during outings beyond 12 months avoids escalating people to secure preventive detention only because line-of-sight monitoring is no longer available. An illustration of this problem under the current law was the (later quashed) judgment *Deputy Chief Executive of the Department of Corrections v McCorkindale*, in which the High Court granted a PPO because an ESO with an intensive monitoring condition was no longer available due to the maximum intensive monitoring duration of 12 months.⁷⁴
- 15.82 Where an ESO with intensive monitoring is still available and sufficient to address the person's risk, the court must not impose a PPO.⁷⁵ However, the risks posed by a person must be of a serious nature to warrant intensive monitoring. It may be unrealistic for risks of this level to have subsided within 12 months. This means that the court will, in most cases, have to revisit the PPO application once the 12 months of intensive monitoring have lapsed.
- 15.83 If a person could only be safely managed through line-of-sight monitoring at all times, 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 secure preventive detention instead.

Prohibited items

- 15.84 We recommend, as a standard condition, that residents must comply with directions issued by the facility managers in relation to prohibited items to maintain the orderly functioning and safety of a residential facility. We consider that the term "prohibited item"

⁷⁴ *Deputy Chief Executive of the Department of Corrections v McCorkindale* [2017] NZHC 2536 at [89]–[93].

⁷⁵ *Chisnall v Department of Corrections* [2019] NZCA 510 at [38]; and *Douglas v Chief Executive of Department of Corrections* [2024] NZCA 634 at [81].

should be given the same meaning as currently defined under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).⁷⁶

- 15.85 Residents should be required to submit to searches and confiscations of prohibited items in their possession. We recommend that residents should only be required to submit to searches of their person that are rub-down searches.⁷⁷ We agree with submitters' feedback that searches should only be conducted with decency and sensitivity and in a manner that affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search.⁷⁸ Otherwise, the search would risk violating the person's rights under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).⁷⁹
- 15.86 We recommend that the new Act should refer to the relevant restrictions of the Corrections Act 2004 on how rub-down searches and searches of people's property may be conducted.⁸⁰ The handling of prohibited items and searches generally must also comply with the guiding principles set out in Chapter 13.
- 15.87 The facility manager should not be able to use force to search a person or confiscate an item. Rather, the resident would be in breach of a standard condition, thus committing an offence, by not complying. We discuss the consequences of condition breaches in detail in Chapter 17.

Non-association conditions

- 15.88 We recommend maintaining as a standard condition that residents must not associate with, or contact, people whom the facility manager has directed the resident not to associate with or contact.
- 15.89 We also recommend rephrasing the condition to allow for association and contact on a conditional basis rather than presenting a binary choice of allowing association or not. This will mean that a facility manager can define requirements or circumstances for contacting or associating with specified people (or classes of people). For example, it may be possible to allow a resident to have contact with their co-offenders (in case they are family members, for instance) — but only if the contact is supervised.
- 15.90 We make a similar recommendation in Chapter 14 in the context of special conditions of community preventive supervision.

Not included: condition to take part in a rehabilitative and reintegrative needs assessment

- 15.91 As in our recommendation for standard conditions of community preventive supervision in Chapter 14, we do not recommend the continuation of a condition that requires a person to take part in a rehabilitative and reintegrative needs assessment. Our reasons are as follows:

⁷⁶ Public Safety (Public Protection Orders) Act 2014, s 3 definition of "prohibited item".

⁷⁷ As defined in s 89 of the Corrections Act 2004.

⁷⁸ Compare Corrections Act 2004, s 94(2); and Search and Surveillance Act 2012, s 125(3).

⁷⁹ See for example *R v Pratt* [1994] 3 NZLR 21 (CA); and *R v Grayson* [1997] 1 NZLR 399 (CA) at 407.

⁸⁰ This includes that a rub-down search must only be carried out by staff of the same sex as the person being searched. In special cases, the person being searched may choose the sex of the person who is to search them. Compare Corrections Act 2004, s 94A.

- (a) We do not think compulsory participation in a rehabilitative and reintegrative needs assessment is warranted. We doubt that true participation in a needs assessment can be forced, because it would require the person in question to speak honestly about, for example, any needs relating to mental health, education or personal relationships. We expect that participation in an assessment will only be useful when done on a voluntary basis.
- (b) If the assessment was included as a voluntary condition, it would merely duplicate the needs assessment we recommend in Chapter 13 that a probation officer be required to complete in consultation with the person subject to residential preventive supervision.
- (c) Lastly, it is possible that some aspects of an assessment may be considered medical treatment and therefore engage the right to refuse medical treatment under section 11 of the NZ Bill of Rights.⁸¹

Special conditions

R88

The new Act should provide that the kinds of special conditions that te Kōti Matua | High Court may impose under R86 include, without limitation, conditions:

- a. not to use a controlled drug or a psychoactive substance and/or consume alcohol;
- b. not to associate with any person, persons or class of persons;
- c. to take prescription medication;
- d. not to enter, or remain in, specified places or areas at specified times or at all times;
- e. not to associate with, or contact, a person under the age of 16 except with the prior written approval of a facility manager 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 facility manager as suitable to undertake the role of supervision; and
- f. not to use any electronic device capable of accessing the internet without supervision.

R89

The new Act should provide that the resident may not be made subject to a special condition that requires them to take prescription medication unless the resident:

- a. has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
- b. consents to taking the prescription medication.

⁸¹ For example, in *Smith v Attorney-General*, the Court noted that a psychological screening test carried out on a prisoner in a therapeutic context constituted medical treatment: *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [100]. See also Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ, 2015) at 11.9.4–11.9.9.

R90

The new Act should provide that the resident does not breach their conditions if they withdraw consent to taking prescription medication.

General aspects

- 15.92 It should be possible for the High Court to add special conditions to the standard conditions of residential preventive supervision as needed on a case-by-case basis. As we explain further in Chapter 10, we recommend that the special conditions should be imposed by the High Court rather than the Parole Board.
- 15.93 Enabling the Court to impose special conditions in this way will allow the residential preventive supervision regime to be tailored to the individual reoffending risks of each person. For example, a special condition imposed on a child sex offender could be that they must not access the internet without monitoring by or on behalf of the facility manager.
- 15.94 We prefer this approach to greater reliance on standard conditions. A more extensive list of standard conditions would risk imposing unnecessary conditions on some and omitting conditions that might be needed for others.
- 15.95 The list of example conditions should also guide the court in how much discretion it may award to facility managers in activating and administering individual conditions. Some special conditions such as conditions not to enter certain places or areas will only be relevant for a person once the facility manager relaxes some of the standard conditions.
- 15.96 We recommend a non-exhaustive list, as opposed to a definitive catalogue, to allow the court to respond to individual risk profiles with sufficient flexibility. We recommend in Chapter 14 in the context of community preventive supervision that special conditions should, by default, be imposed for as long as the measure itself is in place (although the court may define a shorter period). We think the same should apply for special conditions for residential preventive supervision.

Not included: condition to participate in a rehabilitative or reintegrative programme

- 15.97 We recommend that the special condition under the current law that requires a person to participate in a rehabilitative or reintegrative programme should not be included as an example condition:
- (a) As we explain in more detail in Chapter 14, we consider that meaningful engagement in psychological treatment cannot be forced and that minimising the time a person is subject to a preventive measure is a powerful incentive for participation.
 - (b) Some aspects of rehabilitative programmes such as participation in psychotherapy will likely engage the right to refuse to undergo medical treatment affirmed by

section 11 of the NZ Bill of Rights.⁸² A limitation on the right to refuse to undergo medical treatment can be justified only in very specific and rare circumstances.⁸³

- (c) The nature of residential preventive supervision as a structured living environment with an emphasis on community engagement will be inherently reintegrative. Therefore, the preventive measure itself will, in our view, achieve most of the purposes for which the Parole Board imposes programme conditions under the current law. We therefore anticipate that programme conditions will serve less purpose under the new Act.

15.98 The absence of a programme condition as an example special condition will not preclude a court from imposing a programme condition. However, the condition will only be available if it satisfies the legislative tests we recommend in Chapter 10. As we explain in Chapter 14, we doubt that compulsory participation in a programme will usually satisfy these tests.

15.99 For these reasons, we consider that any rehabilitative or reintegrative programme offered to residents should normally be undertaken on a voluntary basis only. We therefore exclude the condition from the recommended list of example conditions for residential preventive supervision.

15.100 Even if no special condition *requiring* the participation of a person in a programme is imposed, Ara Poutama must make sufficient rehabilitative treatment and reintegration support available, as we recommend in Chapter 13. It is important that residents are encouraged to participate in programmes and supported in doing so.

ESTABLISHMENT AND OPERATION OF RESIDENTIAL FACILITIES

Results of consultation

15.101 In the Preferred Approach Paper, we proposed that the chief executive should have legal custody of residents under residential preventive supervision, while the facility manager should be entrusted with the residents' care and be responsible for the day-to-day operation of the facility.⁸⁴

15.102 All submitters who commented on this proposal supported it.⁸⁵ TLANZ added that the new Act should clarify that, for the purposes of the NZ Bill of Rights, acts done by facility staff members of a contractor should be treated as done by the government. The Public Defence Service submitted that facility managers should receive special training and that the directions they may issue in accordance with standard or special conditions should be given in writing.

⁸² *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [100]; and *Wilson v New Zealand Parole Board* [2012] NZHC 2247 at [43]. 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.

⁸³ Certain public health measures have been held to constitute justified limitations on the right not to undergo medical treatment. See Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (2nd ed, LexisNexis NZ, 2015) at 11.9.21–11.9.24.

⁸⁴ Preferred Approach Paper, P65 and [15.70]–[15.71].

⁸⁵ Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association of New Zealand.

- 15.103 We also proposed that the responsible Minister should be responsible for designating a residential facility by New Zealand Gazette notice.⁸⁶
- 15.104 A majority of submitters who responded to this proposal supported it.⁸⁷ The NZLS and the Public Defence Service submitted that the Minister should only be allowed to designate a facility if satisfied that it meets certain minimum standards. For example, the NZLS elaborated, the facility should be “truly centred in the community” so that it does not become an extension of the prison environment. Otherwise, there would be a risk that the people in question would not be able to genuinely reintegrate into the community. The Public Defence Service and TLANZ stated that, for security reasons, the location of residential facilities should not be published in a New Zealand Gazette notice.

Recommendations

R91

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

- 15.105 Under the new Act, it should be made clear which facilities are being used as residential facilities. We recommend that the responsible Minister should designate them by New Zealand Gazette notice. This is to ensure that there is a comprehensive record of all residential facilities so that periodic inspections can be carried out.
- 15.106 Ideally, residential facilities should be embedded within communities. We acknowledge the difficulties that Ara Poutama is facing in operating residential facilities for people subject to ESOs or parole because of neighbourhood opposition. Nevertheless, we support efforts to embed residential facilities within communities rather than locating them in remote areas or on prison grounds. In our view, rehabilitation and reintegration into the community cannot properly occur if people subject to preventive measures remain wholly separated from it. 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.
- 15.107 We consider that refraining from publishing the location of a residential facility in the New Zealand Gazette, as some submitters have suggested, could, once the locations of the facilities become public knowledge, create an unhelpful public perception that the government has not been sufficiently transparent.

R92

The new Act should provide that rooms or units at a residential facility should be materially different from prison cells and provide each resident with privacy and a reasonable level of comfort.

- 15.108 In line with the purposes of the new Act set out in Chapter 5, we recommend that residential facilities should resemble normal life in the community to the extent consistent with the orderly functioning and safety of the facility.

⁸⁶ Preferred Approach Paper, P66 and [15.80]–[15.81].

⁸⁷ Bond Trust, Myra Crawford-Smith, The Law Association of New Zealand.

- 15.109 The Supreme Court held in *Attorney-General v Chisnall* that “significant statutory recognition of the need to ensure the circumstances and conditions of the detention are distinct from the circumstances and conditions of imprisonment” is needed, among other measures, to ensure that detention-authorising preventive measures do not impair the protection against second punishment more than necessary.⁸⁸
- 15.110 We consider that, for a residential facility to be materially different from prison and to have a reasonable level of comfort, each resident must have their own room or unit with a separate bathroom and, where reasonably practical, a kitchenette.

R93 The chief executive of Ara Poutama Aotearoa | Department of Corrections should have legal custody of the residents.

R94 The facility manager should be entrusted with the residents’ care and be responsible for the day-to-day operation of the facility.

R95 The manager of a residential facility should be able to delegate any of their powers under standard or special conditions to suitably qualified staff.

- 15.111 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 recommend maintaining this rule under the new Act in relation to the custody of people subject to residential preventive supervision.
- 15.112 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. Similar responsibility should lie with the manager of a residential facility. They should typically be on site and be able to delegate tasks to staff.
- 15.113 We agree with submitter feedback that residential facility managers should receive training on their powers and responsibilities under the new Act. We expect this will occur as part of the transition to the regime under the new Act. We do not consider this needs to be included as a law reform recommendation.
- 15.114 We also agree that, when facility managers exercise their discretion under standard or special conditions by issuing directions or granting approvals, they should do so in writing. As we explain in Chapter 13, facility managers must comply with the NZ Bill of Rights, regardless of whether the facility is run by Ara Poutama or by a contractor.
- 15.115 Lastly, we recommend that the facility manager should be able to delegate powers under standard or special conditions to facility staff. We anticipate that some situations in the daily operation of residential facilities may arise in which the facility manager will need to rely on delegation, for example, during absences from the facility.
- 15.116 If the facility manager delegates any powers to staff, the manager should retain responsibility for ensuring all powers and duties are exercised in accordance with the new

⁸⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [241].

Act. The scope of powers that can be delegated will be determined by the standard and special conditions imposed on each resident. The chief executive will not be able to delegate the delegation power itself.

RIGHTS OF RESIDENTS

Results of consultation

- 15.117 In the Preferred Approach Paper, we made several proposals to clarify what the rights of people subject to secure preventive detention should be.⁸⁹ Among those proposals, we suggested that the new Act should specify the rights of detainees. The NZLS and the Public Defence Service both submitted that the Act should provide for rights of people subject to residential preventive supervision as well.
- 15.118 We also proposed that people subject to residential preventive supervision should be 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.⁹⁰ All submitters who responded to this proposal agreed with it.⁹¹
- 15.119 Lastly, we proposed that people subject to residential preventive supervision should be entitled to medical treatment and other healthcare appropriate to their conditions and that the standard of healthcare available to them should be reasonably equivalent to the standard of healthcare available to the public.⁹² Again, all submitters who responded to this proposal agreed with it.⁹³ Dr Jordan Anderson added that people on any preventive measure should have this entitlement.

Recommendation

R96

The new Act should state that residents' rights are only limited by standard and special conditions imposed on them in accordance with the new Act. The new Act should provide for a non-exhaustive list of residents' rights as set out in Appendix 2 of this Report.

R97

The new Act should clarify that certain rights of residents (minimum entitlements) set out in Appendix 2 of this Report may not be limited by standard and special conditions imposed on them unless the security of the facility or the health or safety of a person is threatened.

⁸⁹ Preferred Approach Paper, P72–P74.

⁹⁰ Preferred Approach Paper, P54.

⁹¹ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, New Zealand Council for Civil Liberties, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁹² Preferred Approach Paper, P55.

⁹³ Dr Jordan Anderson, Bond Trust, Myra Crawford-Smith, 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 of New Zealand.

Clarifying residents' rights

- 15.120 We recommend that the new Act should clarify that rights of people subject to residential preventive supervision can only be limited by standard and special conditions imposed on them in accordance with the new Act (or by directions issued by the facility manager pursuant to standard or special conditions). Submitters agreed with this proposal in the context of secure preventive detention. In response to submitter feedback, we now also make this recommendation in relation to residential preventive supervision.
- 15.121 In addition to being highly prescriptive about the ways in which rights can be restricted, we consider that the rights of residents should also be set out in the new Act in order to make residents' rights as clear as possible and to give direction to those who are responsible for managing residential preventive supervision.
- 15.122 There is precedent for this approach in the current PPO Act, which contains a list of residents' rights.⁹⁴ We conclude that the rights affirmed under the PPO Act provide useful guidance but are too embedded in the specific context of that Act to be imported into the new Act. Several rights under the PPO Act are subject to coercive powers listed elsewhere in that Act that we do not consider should be imported into the new regime for residential preventive supervision. We therefore recommend a non-exhaustive list of rights that stands on its own.
- 15.123 The recommended list of rights in Appendix 2 of this Report includes rights to send and receive communications, to access information and education and to have regular supervised outings.⁹⁵ It also includes rights to participate in meaningful recreational activities, as these have been shown to help reduce people's reoffending risk.⁹⁶ 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:⁹⁷
- 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.
- 15.124 Our recommendation echoes these expectations.

⁹⁴ Public Safety (Public Protection Orders) Act 2014, ss 27–39.

⁹⁵ The wording of our recommended list in Appendix 2 of this Report goes beyond the current phrasing in s 31 of the Public Safety (Public Protection Orders) Act 2014 (“therapeutic, recreational, educational, cultural and religious activities” as opposed to “recreational, educational, and cultural activities”).

⁹⁶ Yvonne H A 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.

⁹⁷ 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.

Separate list of minimum entitlements

- 15.125 In addition to the list of rights that people under the new Act have unless limited in accordance with the Act, we consider there should also be a separate list of rights that may not be limited unless the security of the facility or the health or safety of any person is threatened. Both the non-exhaustive list of rights and the exhaustive list of minimum entitlements are contained in Appendix 2 of this Report.
- 15.126 The design of the standard conditions, the test for imposing special conditions and the guiding principles for the exercise of powers under these conditions should, on their own, prevent any of these rights being limited in any situation other than the security of the facility or the health or safety of any person being threatened. However, for the sake of clarity and given the sensitive nature of detention as a preventive measure, we consider these minimum entitlements should be expressly stated in the new Act.
- 15.127 The list of minimum entitlements is compiled from minimum entitlements in the Corrections Act, the PPO Act and similar legislation in comparable jurisdictions. It includes minimum entitlements in relation to exercise, nutrition, legal advice, medical treatment and voting. The minimum entitlements are intended to clarify that people subject to preventive measures retain an immutable core of rights that cannot be lawfully limited except in extraordinary circumstances.
- 15.128 Many of the minimum entitlements listed in Appendix 2 of this Report affirm that the new Act will not authorise any limitation on residents' rights that would be contrary to the standards set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Mandela Rules),⁹⁸ which provide for good standards of places of detention in relation to accommodation, personal hygiene, clothing and bedding, food, exercise, healthcare and contact with the outside world, among other aspects.
- 15.129 One of the minimum entitlements listed in Appendix 2 of this Report concerns the provision of healthcare. Our recommendation specifies that the standard of healthcare available to people subject to residential preventive supervision should be reasonably equivalent to the standard of healthcare available to the public.
- 15.130 Although we acknowledge there are practical limitations to the standard of healthcare available — even to the public — residents cannot access healthcare without facilitation by staff. That is why the new Act should impose a duty on facility manager to guarantee healthcare appropriate to residents' conditions.
- 15.131 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.⁹⁹ We consider the provision of rehabilitative treatment and reintegration support in detail in Chapter 13.

⁹⁸ *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA res 70/175 (2015). The Mandela Rules seek to establish standards of "what is generally accepted as being good principles and practice in the treatment of prisoners and prison management" and adopts a broad understanding of "prisoner", including people subject to "security measures" (preliminary observations 1 and 3).

⁹⁹ See for example the study Erkmen G Aslim and others "The Effect of Public Health Insurance on Criminal Recidivism" (2022) 41 *Journal of Policy Analysis and Management* 45, which shows 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.

CHAPTER 16

Secure preventive detention

INTRODUCTION

- 16.1 In Chapter 3, we recommend that the new Act should provide for a new measure called secure preventive detention. This should be the most restrictive of the three new measures we recommend. The court should impose it only when no less restrictive measure would address the risks of a person's reoffending.
- 16.2 In this chapter, we consider how secure preventive detention should operate in practice. We discuss the issues:
- (a) that preventive detention conditions have been found to breach the right to be free from arbitrary detention; and
 - (b) that detention under public protection orders (PPOs) has been found to breach the right not to be subject to second punishment.
- 16.3 To address these issues, we recommend reforming the law that governs how people with the most severe risk profiles are detained for preventive purposes through the introduction of secure preventive detention.
- 16.4 We recommend that people subject to secure preventive detention should be detained in specialised secure facilities separate from prison. Secure facilities should be designed to physically prevent people detained there from leaving. We make further recommendations on how these facilities should be run, including the powers available to facility managers and the rights of the people detained there.

CURRENT LAW

Preventive detention

- 16.5 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).¹

- 16.6 Corrections officers and staff have several coercive powers in relation to prisoners, including the powers to use physical force, non-lethal weapons and restraint in specific situations. They also have powers to conduct searches, carry out drug or alcohol tests and monitor communications.²
- 16.7 A prisoner may be accommodated in an individual cell, a shared cell or a self-care unit (“accommodation of a residential style”).³ 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.⁴

Public protection orders

- 16.8 People subject to PPOs must be detained at a “separate and secure” residence on prison grounds.⁵ Like prisoners under the Corrections Act, residents at a PPO facility are in the legal custody of the chief executive.⁶ The only PPO residence is Matawhāiti Residence.⁷ 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.
- 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.⁸ The residence manager may delegate most of their powers to a suitable person.⁹
- 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.¹⁰ 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.¹¹
- 16.11 A PPO resident has 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).¹² Without limiting the scope of rights, the PPO Act lists several rights of

¹ Corrections Act 2004, s 38(1).

² Corrections Act 2004, pt 2 subpt 4.

³ Corrections Act 2004, ss 3 definition of “self-care unit” and 82A.

⁴ Corrections Act 2004, s 69. More detailed rules appear in ss 70–82B.

⁵ Public Safety (Public Protection Orders) Act 2014, ss 20 and 114.

⁶ Public Safety (Public Protection Orders) Act 2014, s 21(1).

⁷ “Establishment and Revocation of Residences Under the Public Safety (Public Protection Orders) Act 2014” (19 January 2017) *New Zealand Gazette* No 2016-go2684.

⁸ 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”.

⁹ Exceptions are the powers to delegate and to make rules: Public Safety (Public Protection Orders) Act 2014, s 117(1).

¹⁰ Public Safety (Public Protection Orders) Act 2014, s 74(2)(a).

¹¹ Public Safety (Public Protection Orders) Act 2014, s 74(2)(b).

¹² 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).

residents, including in relation to basic health needs, legal advice, voting in elections, participation in activities and access to information.¹³

SECURE PREVENTIVE DETENTION AS A STAND-ALONE PREVENTIVE MEASURE

Issues

- 16.12 Under the current law, preventive detention and PPOs are the preventive measures involving the most severe rights restrictions. These two measures authorise indeterminate detention in a prison and in a secure residence on prison grounds, respectively. Because of the severity of these measures, both raise significant human rights issues.
- 16.13 In other chapters of this Report, particularly Chapter 4, we discuss in greater depth the main human rights concerns posed by preventive detention and PPOs. In this chapter, we briefly repeat the main concerns, because they are particularly relevant to how any reformed preventive measure involving secure detention should be designed.
- 16.14 Secure detention as a preventive measure is needed. There is a group of people whose risk of reoffending is so severe that physical barriers are needed to protect the community. However, detention in prison facilities beyond a punitive prison sentence is not an appropriate way to address the risk of serious reoffending. In Chapter 5, we explain in detail how detention in prison conditions is a severe form of criminal sanction because of the restrictions it places on every aspect of a person's life and because of the physical, psychological and social detriments it imposes.
- 16.15 International human rights jurisprudence requires a clear distinction between the punitive and the preventive periods of detention. During the preventive period, 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".¹⁴ To date, the New Zealand courts have not adopted this requirement. 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 New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).¹⁵ In Chapters 4 and 5, we conclude that it is desirable for New Zealand law to adopt the approach taken by the international human rights jurisprudence.

Results of consultation

- 16.16 In the Preferred Approach Paper, we proposed that secure preventive detention should be a stand-alone preventive measure. We proposed that the new Act should provide for the following core features of secure preventive detention:¹⁶

¹³ Public Safety (Public Protection Orders) Act 2014, ss 28–40.

¹⁴ United Nations 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].

¹⁵ *Miller v Attorney-General* [2022] NZHC 1832 at [82], citing *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [101] per McGrath J. The Kōti Mana Nui | Supreme Court in *Attorney-General v Chisnall* favoured a more generous interpretation of s 22 that recognises that the New Zealand Bill of Rights Act 1990 is intended to affirm Aotearoa New Zealand's commitment to the International Covenant on Civil and Political Rights: *Attorney-General v Chisnall* [2024] NZSC 178 at [161].

¹⁶ Preferred Approach Paper, P68–P71.

- (a) People subject to secure preventive detention should be detained in secure facilities that are separate to prisons.
- (b) Detainees should not leave the facility without permission of the facility manager.
- (c) Detainees should be in the custody of the chief executive.

Secure preventive detention as a preventive measure

- 16.17 Most submitters supported the proposal for the introduction of secure preventive detention as a stand-alone preventive measure.¹⁷ Few submitters gave reasons for their support.
- 16.18 The Royal Australian and New Zealand College of Psychiatrists (RANZCP) stated that indeterminate detention should only be considered when all less restrictive measures for managing that person’s risk have been shown to be inadequate.
- 16.19 In contrast, Dr Jordan Anderson was opposed to requiring a person who has completed a finite prison sentence to reside within a secure facility. She stated this could only be punitive and would therefore amount to second punishment. In her view, the creation of more state-run institutions requiring people to reside there is inappropriate in the wake of the recent release of the report of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions. Dr Tony Ellis expressed general opposition to any form of preventive measure, and another submitter opposed “post-detention restrictions involving detention”.

Separation from prison

- 16.20 Almost all submitters agreed with the proposal that secure preventive detention facilities should be separate to prisons.¹⁸
- 16.21 Dr Jordan Anderson submitted it would be “completely contrary” to human rights to detain a person in prison following the expiration of a finite prison sentence. The Law Association of New Zealand (TLANZ) added that the proposal should go further in its distinction between prisons and secure facilities under the new Act — facilities should not be located on prison grounds or be staffed by prison officers.
- 16.22 The RANZCP supported the proposal in principle. However, it raised concerns regarding the resourcing required to implement it. It noted some problems with the German approach, on which our proposal was modelled. Specifically, it submitted that the German preventive detention facilities were unable to effectively manage individuals with more complex physical or mental health needs, including elderly and disabled persons. It also noted “higher risk individuals” were often considered unsuitable for such facilities. They were detained in prisons instead. The RANZCP suggested that further consideration be given to the practicalities of this proposal.

¹⁷ Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

¹⁸ Bond Trust, Myra Crawford-Smith, Criminal Cases Review 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 of New Zealand.

- 16.23 We further proposed that there should be a procedure under the new Act pursuant to which the responsible Minister may designate a premises as a facility for secure preventive detention.¹⁹ Submitters agreed, but some had reservations.²⁰
- 16.24 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service both submitted that the process should require the responsible Minister to designate a facility only if certain defined minimum standards are met. They said that the location of a facility is particularly important for detainees to be able to maintain connection with their family, whānau or wider support network. They referred to cases where the High Court discussed the problem of the Matawhāiti Residence being far away from the support network of the people concerned.²¹
- 16.25 Lastly, we proposed that detainees' units should provide for privacy and a reasonable level of comfort.²² All submitters who provided feedback on this proposal agreed with it.²³ One submitter added that detainees should be entitled to "a high standard of comfort".

Recommendations

R98 The new Act should require that people subject to secure preventive detention (detainees) are detained in a secure facility and must not leave the facility without the permission of the facility manager.

R99 Detainees should be in the custody of the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R100 The new Act should provide that secure facilities must conform to the following design features:

- a. Secure facilities must be separate from prison.
- b. Secure facilities must have rooms or separate, self-contained units where people subject to secure preventive detention reside. The rooms or units should be materially different from prison cells and provide the detainee with privacy and a reasonable level of comfort.

R101 The new Act should set out a procedure for the responsible Minister to designate a secure facility by New Zealand Gazette notice.

¹⁹ Preferred Approach Paper, P70.

²⁰ Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

²¹ Te Kāhui Ture o Aotearoa | New Zealand Law Society referred to *Chief Executive of the Department of Corrections v Hunia-Rikirangi* [2024] NZHC 2159 at [10]. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service referred to *Chief Executive of the Department of Corrections v McCord* [2018] NZHC 3195 at [14] and [53].

²² Preferred Approach Paper, P71.

²³ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association of New Zealand.

- 16.26 We conclude that the new Act should enable the detention of a person in a secure facility. Detainees should not be able to leave the secure facility without the permission of the facility manager. The secure facility should be designed accordingly.
- 16.27 We recognise that the indeterminate detention of a person after they have completed a prison sentence is exceptionally restrictive.²⁴ It is a most severe intrusion on a person's rights and freedoms. We nevertheless recommend that the law should provide for a measure that enables the secure detention of people posing the highest risk of serious reoffending when no less restrictive preventive measure would adequately protect the community.
- 16.28 There is a group of people whose risk of reoffending is so severe that physical barriers are needed to protect the community from serious reoffending. For example, there have been incidents where people on extended supervision orders (ESOs) committed offences despite being subject to the most restrictive ESO conditions available, including an instance where the person sexually offended against a 16-year-old girl.²⁵ There have also been cases where the courts concluded that ESOs with the most restrictive conditions available were insufficient to protect community safety and so ordered the imposition of a PPO.²⁶
- 16.29 Our recommendation is supported by precedent. The law of Aotearoa New Zealand has long provided for secure detention as a means of protecting the community — through determinate prison sentences, preventive detention and PPOs. The laws of nearly all comparable jurisdictions we have researched provide for secure detention as a preventive measure.²⁷
- 16.30 We recognise the concerns with the law as it currently stands. However, te Kōti Mana Nui | Supreme Court in *Attorney-General v Chisnall* held that a regime authorising the post-sentence detention to keep the community safe can be justified.
- 16.31 For post-sentence detention to be justified, the regime must not intrude on detainees' rights more than necessary, the Court held. To achieve this, the regime must conform to three pillars:²⁸
- (a) Ensuring detention is the least restrictive means possible to achieve its community safety objectives.
 - (b) Minimising the punitive impact of the restrictions on the person detained.
 - (c) Requiring mandatory provision of rehabilitation.

²⁴ Compare *Attorney-General v Chisnall* [2024] NZSC 178 at [254].

²⁵ 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].

²⁶ *Chief Executive of the Department of Corrections v Waiti* [2024] NZHC 1682 at [125]–[126]; and *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305 at [79]–[83].

²⁷ 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.

²⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [235].

- 16.32 In relation to the first pillar, the Court said that the “architecture” of the current PPO regime limited this ability.²⁹ It noted some concern that the conditions relating to detention imposed under PPOs were not set by the court but by the chief executive.³⁰
- 16.33 In relation to the second pillar, the Supreme Court concluded the regime did not minimise the punitive impact of a PPO. The Court was guided by the international human rights jurisprudence in connection with arbitrary detention discussed above.³¹ In particular, the Supreme Court noted that a less rights-intrusive model requires the conditions of post-sentence detention to be distinct from those in prison. The Court observed that the PPO regime contained “no significant statutory recognition of the need to ensure the circumstances and conditions of the detention” pursuant to a PPO are “distinct from the circumstances and conditions of imprisonment”.³²
- 16.34 In relation to the third pillar, the Supreme Court explained that rehabilitation and a therapeutic approach did not “lie at the core” of the regime.³³ The chief executive is only obliged to provide rehabilitation where there is “a reasonable prospect of reducing risk to public safety” posed by the person subject to the PPO.³⁴ Accordingly, the Court found that the limitations that PPOs put on the right not to be subject to second punishment had not been demonstrably justified and were therefore inconsistent with the NZ Bill of Rights.³⁵
- 16.35 Our recommendations are based on these three pillars.

Ensuring secure preventive detention achieves public protection through the least restrictive means

- 16.36 Secure preventive detention will require the full-time detention of a person (subject to supervised outings) in a secure facility designed to prevent people from leaving. All people subject to secure preventive detention will be subject to this same statutory core restriction.
- 16.37 The legislative tests we recommend in Chapter 10 for the imposition of preventive measures will ensure that a court imposes secure preventive detention only when satisfied:
- (a) it is the least restrictive measure adequate to address the high risk a person will reoffend; and
 - (b) the limits it places on the person’s rights and freedoms are justified by the nature and extent of the risk the person will reoffend.
- 16.38 We recognise a possible concern that secure preventive detention would impose uniform conditions that preclude the court, when imposing the measure, from ensuring the conditions of that detention are the least restrictive necessary for that individual. In this

²⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [239].

³⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [240].

³¹ *Attorney-General v Chisnall* [2024] NZSC 178 at [227] and [233].

³² *Attorney-General v Chisnall* [2024] NZSC 178 at [241].

³³ *Attorney-General v Chisnall* [2024] NZSC 178 at [242].

³⁴ Public Safety (Public Protection Orders) Act 2014, s 36.

³⁵ *Attorney-General v Chisnall* [2024] NZSC 178 at [244] and [261]–[262].

regard, secure preventive detention will take a different approach to the operation of community preventive supervision and residential preventive supervision. A person subject to either of those measures will have an individualised set of standard and special conditions imposed on them rather than a uniform setting prescribed directly by statute.

- 16.39 In our view, however, secure preventive detention is not suited as a condition-based measure, because, by its nature, it provides less scope for variation of the restrictions it imposes.
- 16.40 Community preventive supervision and residential preventive supervision are measures aimed at people who can be safely reintegrated into the community when subject to a suitable degree of restrictions, supervision and monitoring. It is, therefore, essential that there are conditions available to control, in a tailored and responsive manner, where a person might go in the community, with whom they might associate, how they can be monitored and in what behaviour they might engage.
- 16.41 In contrast, secure preventive detention should be reserved for those whose risks of reoffending can only be safely managed in a tightly regulated and secure environment.
- 16.42 We recognise the importance of safeguards to ensure that a person's day-to-day life in secure preventive detention is not unduly restricted. In our view, however, the best approach to addressing this concern is not through court-imposed conditions. Rather, it is through ensuring that the facility manager and staff control aspects of detainees' lives in a rights-compliant way. We think the law can ensure this through the following:
- (a) We recommend below that facility managers and staff should be able to exercise coercive powers only to ensure the safety of the community and the orderly functioning and safety of the facility. In addition, in Chapter 13, we recommend a set of guiding principles pursuant to which facility managers and staff must exercise their powers. Particularly relevant is the principle that the facility manager and staff must allow for 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. The facility manager and their staff must also give people opportunities to demonstrate that they have made rehabilitative progress.³⁶
 - (b) As we explain below, the new Act should provide a list of minimum entitlements for detainees that cannot be overridden by any of the powers given to facility managers and staff.
 - (c) We recommend in Chapter 18 that the preventive measure to which a person is subject should be reviewed every three years by the court and annually by a Review Authority. If the review concludes that the measure should continue, the court and Review Authority should review the person's treatment and supervision plan. We expect that this review procedure will be used to scrutinise the person's day-to-day management and whether their rights and freedoms were being unduly restricted in the facility.
 - (d) Lastly, we recommend in Chapter 13 that secure facilities should be inspected periodically by the National Preventive Mechanisms under the Crimes of Torture Act 1989 and by additional inspectors appointed by the chief executive. As we explain in

³⁶ 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.

that chapter, we think these inspections will shed light on any practices that unduly restrict rights.³⁷

16.43 In conclusion, we are confident that the powers the new Act will confer on those administering secure preventive detention will go no further than what is necessary to protect the community from serious reoffending. The legislative tests for imposing secure preventive detention will ensure it is reserved for instances where there are no less restrictive means available of addressing the risks the person poses. The day-to-day management of detainees will be guided by the new Act and subject to oversight and scrutiny.

Secure preventive detention facilities should be distinct from prisons

16.44 The new Act should provide statutory recognition that secure preventive detention must be distinct from the conditions of imprisonment that apply to people serving punitive criminal sentences.

16.45 As set out above, this distinction is critical to ensuring that secure preventive detention does not constitute arbitrary detention or an unjustified second punishment.³⁸

16.46 We recommend that the distinction be achieved in the new Act by:

- (a) requiring that the location of facilities be physically separate from prisons; and
- (b) prescribing certain design features of secure facilities.

16.47 Submitters generally supported making secure preventive detention substantially different from imprisonment.

Secure facilities should be physically separate from prisons

16.48 Facilities that are run independently from prisons will be better suited to minimising restrictions on detainees' quality of living and to focusing on rehabilitation and reintegration. For example, specialised secure facilities could be designed to support and accommodate detainees with mental health conditions better than would be possible in a prison.

16.49 Our recommendation draws on the approach taken in Germany, where reforms in 2012 required preventive detention to be administered in separate, specialised detention centres.³⁹ 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”.⁴⁰ The European Court of Human Rights has welcomed these new German detention centres as improvements.⁴¹

³⁷ See for example 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); and Peter Boshier *Report on an announced follow up inspection of Matawhāiti Residence under the Crimes of Torture Act 1989* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, February 2023).

³⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [241].

³⁹ German Criminal Code (Strafgesetzbuch — StGB), s 66c(1)(2)(b).

⁴⁰ German Criminal Code (Strafgesetzbuch — StGB), s 66c(1)(2)(a).

⁴¹ *Ilseher v Germany* [2018] ECHR 991 (Grand Chamber) at [81] and [167]–[168]; and *Bergmann v Germany* (2016) 63 EHRR 21 at [118]–[128].

- 16.50 In *Attorney-General v Chisnall*, the Supreme Court referred to the German example when considering less rights-intrusive alternatives to the PPO regime (and the detention-authorising parts of the ESO regime).⁴² We acknowledge the RANZCP's feedback that the practical implementation of the law in Germany is not without problems and that sufficient resourcing will be required for secure preventive detention to run successfully. We agree that sufficient resourcing for secure facilities will be required. We suggest exploring the option of repurposing the Matawhāiti Residence as one of the secure facilities needed under the new regime. This will likely ameliorate resourcing concerns in respect of one secure facility.
- 16.51 An alternative option we have considered is to administer secure preventive detention in a separate area or unit of a prison building. Most comparable jurisdictions that we have assessed administer preventive detention in this way.⁴³ Advantages of this approach are that no new facilities would have to be built and that the security infrastructure required would already be in place.
- 16.52 However, situating secure facilities in prison buildings themselves would fundamentally undermine the attempt to differentiate between punitive prison sentences on the one hand and detention for preventive purposes on the other hand.
- 16.53 One submitter suggested that secure facilities should not be located on prison grounds. We acknowledge the submitter's concern that the distinction between secure facilities and prisons should be as clear as possible. We consider this is a matter that should best be considered directly by Ara Poutama. However, we suggest that repurposing the existing Matawhāiti Residence could be a practical way to administer secure preventive detention. Our recommendations for the operation of secure facilities (discussed below) will help distinguish them clearly from prisons.

Conditions of secure facilities

- 16.54 As to the way the new Act should prescribe the features of a secure facility, we recommend 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 recommendation is aimed at providing a more humane environment and thereby reducing the punitive impact on detainees.
- 16.55 The rooms or units at a secure facility should be materially different from prison cells. They should provide detainees with privacy and a reasonable level of comfort. In our view, a reasonable level of comfort entails that each detainee should have a separate room or unit with a separate bathroom and, where reasonably practical, a kitchenette.

⁴² *Attorney-General v Chisnall* [2024] NZSC 178 at [216]–[220] and [234].

⁴³ 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), s 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.

Procedure for designating premises as secure facilities

- 16.56 As is currently the case under the PPO Act, we consider that a secure facility should be declared by the responsible Minister by New Zealand Gazette notice.⁴⁴ This is to ensure that there is a comprehensive record of all secure facilities so that periodic inspections can be carried out.
- 16.57 We agree with submitters that the location of secure facilities may affect the rehabilitation and reintegration success of those detained. We expect this will be considered when designating new facilities.

Provision of rehabilitative treatment and reintegration support

- 16.58 We recommend in Chapter 13 that, for all preventive measures, including secure preventive detention, Ara Poutama should have a duty to provide sufficient rehabilitative treatment and reintegration support. This will address the third pillar the Supreme Court said was needed to ensure that the measure takes the least rights-intrusive approach possible.

COERCIVE POWERS OF SECURE FACILITY MANAGERS

- 16.59 The PPO Act provides a residence manager and staff with a set of coercive powers.⁴⁵ The question arises whether the new Act should provide for similar coercive powers in connection with secure preventive detention.

Results of consultation

- 16.60 In the Preferred Approach Paper, we proposed a new list of coercive powers that facility managers and their staff should have under the new Act in relation to detainees.⁴⁶ Submitters agreed with our proposal.⁴⁷ The NZLS and another submitter emphasised the importance of keeping an accurate record of the use of coercive powers. The NZLS also submitted that the coercive powers should expressly be made subject to the NZ Bill of Rights.
- 16.61 We proposed that facility managers should be able to make rules for the management of the facility.⁴⁸ Most submitters agreed with our proposal.⁴⁹
- 16.62 TLANZ agreed, provided that the rules are consistent with the Corrections Act, regulations and services agreements with Ara Poutama. The NZLS added that detainees' autonomy must be upheld. The Public Defence Service added that facility managers should receive appropriate training. One submitter disagreed with our proposal,

⁴⁴ Compare Public Safety (Public Protection Orders) Act 2014, s 114.

⁴⁵ Public Safety (Public Protection Orders) Act 2014, ss 63–68 and 71–74.

⁴⁶ Preferred Approach Paper, P75.

⁴⁷ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁴⁸ Preferred Approach Paper, P76.

⁴⁹ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association of New Zealand.

submitting that the chief executive should be regularly consulted on rules for facility management and conduct.

16.63 We also proposed facility managers should be able to delegate their powers to their staff.⁵⁰ Again, most submitters agreed.⁵¹ TLANZ noted that rules should be carefully circumscribed by service agreements with Ara Poutama and regulations. One submitter said that delegation should only be permissible in the event of planned absence of the facility manager.

Recommendations

R102

To ensure the safety of the community or the orderly functioning and safety of a secure facility, the manager of the facility should have powers to:

- a. check and withhold certain written communications;⁵²
- b. inspect delivered items;
- c. monitor and restrict mail, phone calls and internet use;
- d. restrict contact with certain people outside a facility;
- e. conduct searches in accordance with Subpart 4 of Part 2 of the Corrections Act 2004 for the purpose of detecting a prohibited item (as currently defined in section 3 of the Public Safety (Public Protection Orders) Act 2014);
- f. inspect and take prohibited items;
- g. carry out drug or alcohol tests;
- h. seclude detainees;
- i. restrain detainees;
- j. take all reasonable steps to return an escaped detainee to custody, including calling for assistance from Ngā Pirihimana Aotearoa | New Zealand Police; and
- k. call on corrections officers to use physical force in a security emergency.

R103

The manager of a secure facility should have the power to make appropriate rules for the management of the facility and for the conduct and safe custody of the detainees if authorised to do so by the chief executive of Ara Poutama Aotearoa | Department of Corrections.

⁵⁰ Preferred Approach Paper, P77.

⁵¹ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁵² Except communications with a member of Parliament, a judge or an officer of the court or a member or an officer of another judicial body, an Ombudsman, the Privacy Commissioner, the Health and Disability Commissioner, a Human Rights Commissioner, an inspector, a lawyer, a health professional or a minister of religion. Compare the affirmed right to send written communication to, and receive written communication from, these people without them being opened, read or withheld (Appendix 2 of this Report).

R104 The manager of a secure facility may delegate any of their powers, except the powers to make rules and to delegate, to suitably qualified staff.

R105 The new Act should provide for a procedure for obtaining a warrant from a judge or, if unavailable, a registrar, and an empowering provision for Ngā Pirihimana Aotearoa | New Zealand Police to arrest an escapee without warrant where it is not reasonably practical to obtain one.

- 16.64 We recommend that, under the new Act, the manager of a facility should have a set of statutory powers to ensure the orderly functioning of the secure facility and the safety of the public. Submitters agreed that coercive powers should be available.
- 16.65 As set out above, we recognise the possibility that facility managers and staff may misuse these powers. We are, however, satisfied that the guidance given by the new Act on how these powers are to be exercised, coupled with the review and inspection procedures, should offer adequate safeguards against the improper use of the powers.
- 16.66 Lastly, as we recommend below, the new Act should provide a set of minimum entitlements that the facility manager cannot limit with their powers.

Delegation and rule-making powers

- 16.67 Facility managers should be able to delegate their powers to suitably qualified staff, as is currently the case under the PPO Act.⁵³ This is necessary for the orderly functioning of a secure facility, including when the facility manager is on site.
- 16.68 Facility managers should also be able to make rules for the management of the facility and for the conduct and safe custody of the detainees, if authorised to do so by the chief executive.⁵⁴ 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.

The list of coercive powers

- 16.69 The recommended list of coercive powers largely reflects those currently available to facility managers under the PPO Act.⁵⁵ The use of force in secure facilities should be restricted along the same lines as the use of force under the PPO Act.
- 16.70 In response to submitter feedback, we have clarified that communications with certain types of people, including a detainee's lawyer, must not be withheld or monitored.
- 16.71 Because we recommend in Chapter 17 that section 120 of the Crimes Act 1961 ("escape from lawful custody") should not apply to preventive measures under the new Act, it is necessary to equip the facility manager with the powers needed to return an escaped detainee to the secure facility, including by requesting the support of Ngā Pirihimana

⁵³ Compare Public Safety (Public Protection Orders) Act 2014, s 117.

⁵⁴ Compare Public Safety (Public Protection Orders) Act 2014, s 119.

⁵⁵ Compare Public Safety (Public Protection Orders) Act 2014, ss 45–74.

Aotearoa | New Zealand Police.⁵⁶ Relatedly, we recommend that Police should have appropriate powers to arrest a person.

- 16.72 The new Act should also provide for a procedure for obtaining a warrant from a judge or, if unavailable, a registrar and an empowering provision for Police to arrest an escapee without warrant where it is not reasonably practical to obtain one.⁵⁷

RIGHTS OF DETAINEES

Results of consultation

- 16.73 In the Preferred Approach Paper, we proposed a clarifying provision in the new Act that detainees retain all rights except where restricted by the new Act.⁵⁸
- 16.74 Most submitters who responded to this proposal supported it.⁵⁹ TLANZ submitted that detainees' rights should only be restricted "by the provisions of their individual preventive order". The NZLS suggested that, if there is a need to prevent a person from contacting specified persons or possessing specified prohibited items, this should be done by imposing special conditions on that specific person rather than by the facility manager exercising general coercive powers provided for in legislation.
- 16.75 We proposed that the new Act should carry over the existing list of rights provided for under the PPO Act, with which submitters again agreed.⁶⁰
- 16.76 The Public Defence Service said that detainees' entitlement to social benefits would need to be adjusted to the detention conditions under the new Act.
- 16.77 Submitters also supported our proposal to add several rights to that list (we proposed that rights to cook their own food, wear their own clothes, use their own linen, have regular supervised outings and access the internet be added).⁶¹ One submitter said that facility managers should support detainees in exercising these rights. The Bond Trust thought that detainees should only be entitled to access pre-approved internet sites.
- 16.78 The NZLS and TLANZ submitted that the new Act should expressly protect detainees' legal correspondence.⁶² The NZLS also submitted that the right to communicate with official agencies and members of Parliament should be included.⁶³

⁵⁶ Compare Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 40; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 110–111; and Mental Health (Compulsory Assessment and Treatment) Act 1992, s 40.

⁵⁷ Examples of similar provisions are Substance Addiction (Compulsory Assessment and Treatment) Act 2017, ss 105–107; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 112–114; and Mental Health (Compulsory Assessment and Treatment) Act 1992, s 41.

⁵⁸ Preferred Approach Paper, P72.

⁵⁹ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁶⁰ Preferred Approach Paper, P73. The submitters who agreed were Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁶¹ Preferred Approach Paper, P74. The submitters who agreed were Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁶² Compare Corrections Act 2004, s 110.

⁶³ Compare Corrections Act 2004, s 109.

Recommendations

R106 The new Act should state that detainees' rights are only limited by provisions of the new Act. The new Act should provide for a non-exhaustive list of rights of detainees as set out in Appendix 2 of this Report.

R107 The new Act should clarify that certain rights of detainees (minimum entitlements) set out in Appendix 2 of this Report may not be limited unless the security of the facility, or the health or safety of a person, is threatened.

- 16.79 We recommend that the new Act should clarify that rights of people subject to secure preventive detention can only be limited by provisions of the new Act (or by directions and rules issued by the facility manager pursuant to provisions of the new Act).
- 16.80 We make corresponding recommendations on residents' rights in Chapter 15. The rights listed in Appendix 2 of this Report apply both to people subject to secure preventive detention and to people subject to residential preventive supervision, because both groups will be detained for the purposes of human rights law.
- 16.81 As we explain in Chapter 15, we consider that the new Act should express the rights of people detained for clarity. The recommended non-exhaustive list of rights in Appendix 2 of this Report includes rights to send and receive communications, to access information and education and to have regular supervised outings. As we explain in Chapter 15, some of these rights are intended to improve the person's overall wellbeing, which has been shown to help reduce reoffending risk.
- 16.82 We consider there should also be a separate list that specifies which rights may only be limited where the security of the facility or the health or safety of any person is threatened. This is to clarify that people subject to preventive measures retain an immutable core of rights that cannot be limited except in extraordinary circumstances.
- 16.83 This recommended list of minimum entitlements in Appendix 2 of this Report is compiled from minimum entitlements in the Corrections Act, the PPO Act and legislation in comparable jurisdictions. It includes minimum entitlements in relation to exercise, nutrition, legal advice, medical treatment and voting.
- 16.84 Many of these minimum entitlements affirm that the new Act will not authorise any limitation on detainees' rights that would be contrary to the standards set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Mandela Rules).⁶⁴

⁶⁴ *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA res 70/175 (2015). The Mandela Rules seek to establish standards of "what is generally accepted as being good principles and practice in the treatment of prisoners and prison management" and adopts a broad understanding of "prisoner", including people subject to "security measures" (preliminary observations 1 and 3).

16.85 One of the minimum entitlements listed in Appendix 2 of this Report concerns the provision of healthcare. Our recommendation specifies that the standard of healthcare available to people subject to secure preventive detention should be reasonably equivalent to the standard of healthcare available to the public.

CHAPTER 17

Non-compliance and escalation

INTRODUCTION

- 17.1 In this chapter, we consider how the law should respond when:
- (a) a person does not comply with the conditions of a preventive measure; or
 - (b) a preventive measure is no longer considered adequate to manage the risk they will commit further serious offences.
- 17.2 We recommend that there should continue to be sanctions for non-compliance with the conditions of a preventive measure. We recommend that, where a preventive measure is inadequate to manage the risk the person will commit further serious offences, the court should be able to escalate someone to a more restrictive measure.
- 17.3 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 a more restrictive type of measure is needed. Non-compliance and escalation overlap. For instance, persistent non-compliance may demonstrate a need for escalation.

CURRENT LAW

Preventive detention

- 17.4 Non-compliance and escalation are most relevant to preventive detention when a person is released from prison on parole.¹ When released on parole, the person is subject to the standard release conditions and any other special release conditions imposed by the New Zealand Parole Board (Parole Board).²

¹ While subject to imprisonment, the provisions of the Corrections Act 2004 govern non-compliance with the conduct required of prisoners: Corrections Act 2004, ss 83–127.

² Standard release conditions apply to every person who is released on parole from a sentence of imprisonment: Parole Act 2002, s 29(1). The New Zealand Parole Board has discretion to impose special release conditions upon a person released on parole: Parole Act 2002, s 29AA(1).

- 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 \$2,000.³
 - (b) Breaching standard or special conditions can result in a person being recalled to prison.⁴ Recall to prison does not require the person to be charged and convicted. It can be ordered by the Parole Board pursuant to a procedure set out in the Parole Act 2002.⁵
- 17.6 Recall to prison is also the main means of escalation for people subject to preventive detention. The grounds for recall are set out in the Parole Act.⁶ Alongside breach of release conditions, they include that the person poses an undue risk to the safety of the community.
- 17.7 When recalled to prison, the person may only be released again if directed by the Parole Board on the basis that they will not pose an undue risk to the community.⁷

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.⁸
- 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.⁹
- 17.10 A person subject to an ESO can be escalated to a restrictive public protection order (PPO) if:¹⁰
- (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; 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.
- 17.11 A person subject to an ESO fitting these eligibility criteria can be escalated to detention pursuant to a PPO if the person satisfies the tests for imposition under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).
- 17.12 It is not possible to recall a person subject to an ESO to prison.

³ Parole Act 2002, s 71(1).

⁴ Parole Act 2002, s 61(b).

⁵ Parole Act 2002, ss 59–66.

⁶ Parole Act 2002, s 61.

⁷ Parole Act 2002, s 28(2).

⁸ Parole Act 2002, s 107J(1).

⁹ Parole Act 2002, s 107T.

¹⁰ Public Safety (Public Protection Orders) Act 2014, s 7(1)(b).

Public protection orders

- 17.13 A person subject to a PPO who escapes from the PPO residence is liable under section 120 of the Crimes Act 1961 to imprisonment for a term not exceeding five years.
- 17.14 There are also criminal consequences for non-compliance when a court cancels a PPO and the person becomes subject to a public supervision order.¹¹ A person subject to a public supervision order must comply with any “requirements” the court includes in the order.¹² 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.¹³
- 17.15 For people subject to a public supervision order, escalation back to a PPO is possible but the court must impose a new PPO.¹⁴ To date, no person has been made subject to a public supervision order.
- 17.16 The court can escalate the restrictions of a PPO by making a prison detention order. A prison detention order requires the person to be detained in prison instead of a PPO residence.¹⁵ The court may make a prison detention order only if it is satisfied that:¹⁶
- (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.¹⁷

CONSEQUENCES FOR NON-COMPLIANCE

Issue

- 17.18 There are concerns about whether the criminal consequences for breaching the conditions of parole or an ESO are appropriate.
- 17.19 Many people are convicted for breaching ESO conditions and sentenced to prison. 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. Between the financial years 2013/14 and 2023/24, 771 people were

¹¹ 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.

¹² Public Safety (Public Protection Orders) Act 2014, s 94.

¹³ Public Safety (Public Protection Orders) Act 2014, ss 103–103A.

¹⁴ Public Safety (Public Protection Orders) Act 2014, s 7(1)(c).

¹⁵ Public Safety (Public Protection Orders) Act 2014, s 85(1).

¹⁶ Public Safety (Public Protection Orders) Act 2014, s 85(2).

¹⁷ *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581.

- convicted for breaching an ESO. Some of these individuals were convicted multiple times. Of those convicted, 585 were imprisoned for breaching their ESO.¹⁸
- 17.20 Research shows that, for high-risk people, the process of desistance (stopping offending) is slow and can take years to become consolidated.¹⁹ 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, possibly resulting in imprisonment, may not only fail to recognise their progress but have a detrimental effect on it.
- 17.21 Several submitters to the Issues Paper considered that the current approach of convicting people for breaches is inappropriate. They said that charges are often laid against people who have breached conditions even if the breach did not indicate a risk of reoffending. Some submitters told us 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. One submitter thought that convictions for breaches often automatically led to imprisonment and that alternative sentences such as community work or supervision were seldom considered.
- 17.22 A recent review by the Solicitor-General of the prosecutorial functions of Ara Poutama has reinforced these concerns.²⁰ The review focused on Ara Poutama prosecutions generally, which includes the prosecution of those subject to preventive measures. The review found that, when laying charges, Ara Poutama commonly “misapplies” or “neglects” both limbs of the test for prosecution set out in *The Solicitor-General’s Prosecution Guidelines (Prosecution Guidelines)*: the need to show a reasonable prospect of conviction and the need for the prosecution to serve the public interest.²¹ The review found that probation officers commonly justify a decision to charge someone by referring to “the need to hold the offender to account” without considering why a criminal charge best reflects the public interest in the particular case.²² They prefer prosecution as a response to breaches and often give inadequate consideration to alternatives like warnings.²³
- 17.23 A heavy-handed approach to prosecuting breaches of conditions has potential to heighten other concerns about preventive measures. In particular:

¹⁸ 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 from year to June 2024 (11 October 2024).

¹⁹ *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 also Jay Gormley, Melissa Hamilton and Ian Belton *The Effectiveness of Sentencing Options on Reoffending* (Sentencing Council, 30 September 2022) at 12–13.

²⁰ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023).

²¹ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [12].

²² David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [13] and [150].

²³ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [8].

- (a) The courts have found ESOs to be a form of second punishment inconsistent with section 26 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights), in part because of the criminal offence for breaching conditions.²⁴ Charges and convictions will therefore amplify the punitive character of ESOs.
- (b) Convictions for breaching conditions may result in an unfairly inflated assessment of risk for people subject to preventive measures. Most risk assessment tools take into account the number of previous convictions a person has. If a person subject to a preventive measure 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 that 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 a preventive measure.
- 17.24 There are, however, good reasons for breaching conditions to remain a criminal offence. 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.²⁵ Breaching a condition imposed for these purposes could indicate unmanaged risk. In some cases, the breach may consist of offence-paralleling behaviour.²⁶ Robust measures are needed for the court to respond to breaches of conditions flexibly and appropriately. Conviction and sentence are a conventional means of censuring non-compliance and deterring future non-compliance.²⁷
- 17.25 Some submitters to the Issues Paper thought that breaching conditions should remain an offence. Te Tari Ture o te Karauna | Crown Law and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted that there is a need for an effective way to enforce compliance. They also agreed, however, that a regime that recognises 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.

Results of consultation

- 17.26 In the Preferred Approach Paper, we proposed 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.²⁸ We recognised concerns that it is inappropriate to prosecute breaches in some circumstances. We suggested that prosecution should only be considered if the breach undermines the purposes of the regime, namely, the

²⁴ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [47]. See also te Kōti Mana Nui | Supreme Court's comments about the punitive character relating to the criminal consequences for breaches under the PPO regime: *Attorney-General v Chisnall* [2024] NZSC 178 at [135].

²⁵ Parole Act 2002, s 15(2).

²⁶ 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.

²⁷ 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.

²⁸ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper), P79 and [17.36]–[17.38].

protection of the community from serious reoffending and the rehabilitation and reintegration of people considered at high risk of serious reoffending.

- 17.27 Few submitters responded directly to this proposal. Those that did supported retaining a criminal offence as a consequence for breaching the conditions of a preventive measure.
- 17.28 Of these, most submitters agreed with our comments that breaches should only be prosecuted when it would be a proportionate response to the risk to community safety posed by the breach.²⁹ Some submitters suggested there could be a sliding scale that identifies greater penalties depending on the nature of the preventive measure and the severity of the breach.³⁰
- 17.29 The NZLS noted the Solicitor-General's recent review of Ara Poutama's prosecutorial function. The NZLS concluded that, while not a matter for legislative reform, it is imperative that other methods of managing breaches should be considered so that an assessment of both limbs of the prosecution test should be undertaken before charges are laid.
- 17.30 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service also noted the Solicitor-General's findings regarding the misapplication of the *Prosecution Guidelines* by Ara Poutama. It suggested that reformed legislation should provide guidance on when to prosecute a breach. It reasoned that, given the risks involved and the purpose of the regime being rehabilitation and reintegration, the threshold for when non-compliance should be prosecuted should be included in the new Act.

Recommendation

R108

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 one year or to a fine not exceeding \$2,000.

Breaching conditions of a preventive measure should remain a criminal offence

- 17.31 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.³¹ Of the three preventive measures we recommend, only community preventive supervision and residential preventive supervision involve conditions as part of their operation. The offence for breaching conditions should not apply to secure preventive detention because that measure will not involve conditions.

²⁹ Bond Trust, 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 of New Zealand.

³⁰ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association of New Zealand.

³¹ For the purposes of this recommendation, 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.

- 17.32 Conviction and sentence are a conventional means of censuring non-compliance and deterring future non-compliance.³² As discussed above, non-compliance with conditions can indicate unmanaged risk and consist of offence-paralleling behaviour. Robust measures are needed to respond to breaches of condition flexibly and appropriately. Submitters who addressed this proposal in the Preferred Approach Paper generally supported the continuation of criminal offences as a means of addressing non-compliance.
- 17.33 By making non-compliance an offence, Police will have power to arrest, without warrant, any person found engaging in conduct in breach of conditions.³³ This is of particular importance for residential preventive supervision. As set out in Chapter 15, we recommend that 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 facility will be for Police to arrest the person.
- 17.34 We recommended that the maximum penalty for the offence be the same as the penalty provided for a breach of parole conditions in the Parole Act.³⁴ It is desirable that the two regimes have consistent sanctions for breach of conditions. Submitters supported this approach.
- 17.35 Consequential amendments may also need to be made to section 120 of the Crimes Act so that the criminal offence of escape from custody does not apply to preventive measures under the new Act. Because we recommend the repeal of PPOs (see Chapter 4), section 120 of the Crimes Act will also need amendment so that escape from the PPO residence ceases to be an offence. Under our recommendations, leaving a residential facility without permission will constitute a breach of standard conditions of residential preventive supervision (see Chapter 15) and therefore already constitute an offence.
- 17.36 Escape from a secure facility should not, in our view, be a criminal offence. Escape will be unlikely because of the security features we recommend for these facilities and the powers of restraint we recommend for facility staff. We are also doubtful that the prospect of conviction and imprisonment will be a meaningful deterrent for people who are already subject to secure preventive detention. As we recommend below, they may in any event face the prospect of a prison detention order if they cannot be safely managed at a secure facility. Consequently, in our view, a criminal conviction under section 120 of the Crimes Act punishable by up to five years imprisonment would unduly heighten the punitive impact of secure preventive detention.
- 17.37 We do, however, recommend in Chapter 16 that the new Act should empower Police to arrest people absconding from secure facilities. Without such a power, there would be no grounds for Police to arrest the person without warrant.

³² 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.

³³ Crimes Act 1961, s 315.

³⁴ Parole Act 2002, s 71.

When to prosecute a breach of condition

- 17.38 We do not think that all breaches of conditions should be prosecuted. A conviction and the prospect of returning to prison are severe consequences for non-compliance. When to prosecute a breach is therefore an important matter.
- 17.39 Decisions to prosecute are governed by the *Prosecution Guidelines*.³⁵ As noted above, prosecuting agencies apply a two-stage test:³⁶
- (a) The evidential test: is there enough evidence to prove the proposed charge beyond reasonable doubt?
 - (b) The public interest test: does the public interest require a prosecution to be brought?
- 17.40 In the context of breaches of statutory or court-ordered conditions (such as sentence or release conditions), the *Prosecution Guidelines* provide that prosecutors should first consider whether alternative approaches would be more appropriate such as educating the person subject to the conditions about their obligations and warning them of the possible consequences of a breach.³⁷ The *Prosecution Guidelines* suggest that prosecution may be in the public interest where it is apparent that the breaches have been repeated and deliberate or where safety is undermined as a result.³⁸ The *Prosecution Guidelines* also require a prosecuting agency to maintain its own policy that sets out the different types of enforcement action that are available. That policy should, at a minimum, include the options of taking no action, taking an educative approach or issuing a warning.³⁹
- 17.41 In its internal policy on prosecutorial decisions, Ara Poutama similarly encourages consideration of alternative responses for non-compliance other than prosecution or recall.⁴⁰ However, as discussed above, the recent Solicitor-General's review has found that Ara Poutama has prosecuted breaches of parole and ESO conditions without properly applying the test for when to prosecute.
- 17.42 The Solicitor-General's review does, however, recognise that there are instances where it is appropriate for Ara Poutama to prosecute breaches. The review states:⁴¹
- ... it may well be in the public interest to bring charges in high-risk cases, especially where there is a risk of serious harm if an escalating risk profile is not disrupted. Provided the

³⁵ *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (Te Tari Ture o te Karauna | Crown Law, December 2024).

³⁶ "Principal Guideline | Aratohu Mātāmua" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (Te Tari Ture o te Karauna | Crown Law, December 2024) at [22].

³⁷ "Decisions to prosecute | Te whakataui ki te aru" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (Te Tari Ture o te Karauna | Crown Law, December 2024) at [35.1].

³⁸ "Decisions to prosecute | Te whakataui ki te aru" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (Te Tari Ture o te Karauna | Crown Law, October 2024) at [35.3].

³⁹ "Prosecution policies | Ngā kaupapa here mō te aru" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* –(Te Tari Ture o te Karauna | Crown Law, October 2024) at [7].

⁴⁰ Ara Poutama Aotearoa | Department of Corrections "Holding offenders to account" (17 November 2024) <www.corrections.govt.nz>.

⁴¹ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [25].

evidence discloses a reasonable likelihood of conviction, the offender's risk profile will continue to be highly relevant to the public interest analysis.

- 17.43 In our view, a prosecution would only be in the public interest if the breach undermined 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. It is unlikely to be in the public interest to prosecute if alternative approaches can address these concerns. A criminal conviction may be a disproportionate response and unjustifiably heighten the punitive character of the regime. It may 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 subject to preventive measures we interviewed during consultation explained, a 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 their probation officer.
- 17.44 Our recommendation does not provide explicit statutory direction on when breaches should be prosecuted. It adopts the current practice of leaving this to guidelines from the Solicitor-General and the internal policies of Ara Poutama. As set out above, submitters differed on this point.
- 17.45 Having considered this matter again, we maintain the view that the new Act should not provide such direction. It is not a common approach for legislation to provide guidance on prosecutorial decisions, and it does not feature in the law of any of the comparable jurisdictions we have examined.⁴² In addition, the recent Solicitor-General's review of the Ara Poutama prosecutorial function recommended that the issues with current practice could be addressed by internal reforms. In particular, it recommended introducing additional layers of assurance to decisions to lay charges by requiring final approval from specialist prosecution staff. It also recommended improving training to probation officers.⁴³ We consider this will assist in ensuring decisions to prosecute breaches of preventive measures are made appropriately.

Breaching conditions and escalation

- 17.46 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 recommendations below).

⁴² In the Preferred Approach Paper, we gave the example of an alternative approach taken in Victoria. The legislation sets out the particular actions the prosecuting authority may take in response to a breach. We explained that introducing this approach in Aotearoa New Zealand would likely add to the administration involved while providing no particular guidance on what action would be most appropriate in any particular case. See Serious Offenders Act 2018 (Vic), s 170(2); and Preferred Approach Paper at [17.43]–[17.44].

⁴³ David Boldt *Review of the Ara Poutama Aotearoa Prosecution Function* (Te Tari Ture o te Karauna | Crown Law, August 2023) at [27]–[32].

ESCALATION TO A MORE RESTRICTIVE PREVENTIVE MEASURE

Issue

- 17.47 There are, and will continue to be, instances where a preventive measure already in place does not offer adequate protection for the community. As set out above, the current law provides avenues to move people to greater restrictions:
- (a) For people subject to preventive detention, the primary means of escalation is to recall a person to prison if, having been released on parole, they are later considered to pose an undue risk to the community.
 - (b) For people subject to ESOs, a person can be considered for a PPO if they have been subject to an intensive monitoring condition or have been in long-term full-time placement with an appropriate agency for the purpose of a programme condition.
 - (c) For people on PPOs who present unacceptable risks meaning they cannot be safely managed at the PPO residence, the court can order that a person be detained in prison pursuant to a prison detention order.
- 17.48 The main issue we have identified with the various means of escalation under the current law concerns recall to prison and that it may occur too readily. In the Issues Paper, we noted that the indefinite possibility of recall to prison was one of the most coercive exercises of state power known to New Zealand law.⁴⁴ As we explain 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. Recall to prison prolongs a person's exposure to prison conditions.
- 17.49 Some people we spoke with during consultation who were subject to indeterminate sentences were particularly concerned about the possibility of recall to prison. They 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.
- 17.50 Some 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 people 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.⁴⁵
- 17.51 Nearly half the people subject to preventive detention who are released from prison on parole are recalled to prison at some stage. Between the years starting 1 July 2013 and ending 30 June 2023, the Parole Board directed the release of 113 people, 48 of whom

⁴⁴ 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) at [3.1], [5.32] and [5.42].

⁴⁵ Preferred Approach Paper at [5.30] and [17.23]–[17.24].

were later recalled to prison.⁴⁶ We do not have information about the circumstances that have resulted in people subject to preventive detention being recalled to prison.

Results of consultation

- 17.52 In the Preferred Approach Paper, we proposed that the new Act should enable te Kōti Matua | High Court to order that a person be escalated to a more restrictive preventive measure if:⁴⁷
- (a) the person poses an 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.
- 17.53 Under our proposals, recall to prison would not be available because preventive measures would be separate post-sentence measures rather than part of an indeterminate sentence. However, for people subject to secure preventive detention, we proposed that the High Court have power to order that the person be detained in prison. Like the test for escalation, we proposed that the court would need to be satisfied that the unacceptably high risk the person poses means they cannot be safely managed in secure preventive detention and all options for managing the behaviour of the person have been considered or tried. We proposed that a person detained in prison be treated in the same way as a prisoner awaiting trial, as is currently provided for in respect of people on PPOs who have been made subject to a prison detention order.
- 17.54 Submitters generally supported our proposal that the High Court have the power to escalate people to a more restrictive preventive measure.⁴⁸ The NZLS and the Public Defence Service stressed that this avenue be used only to respond to increased risks and not as a sanction for breaching conditions. They said it is important that an application be accompanied by updated health assessor reports. This is to ensure that the increase in a person's risk of reoffending justifies a more restrictive measure.⁴⁹
- 17.55 No submitters commented on our proposal that recall to prison should no longer be available, although the New Zealand Council for Civil Liberties observed that too many people are being recalled in the current system.
- 17.56 Submitters had mixed views on our proposal for prison detention orders. The Chief Ombudsman encouraged us to reconsider the proposal. His concern was that prison detention orders appear to blur the punitive, preventive and escalation lines and would therefore be inconsistent with the intent of this review.

⁴⁶ Email correspondence 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 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 New Zealand Parole Board directed 161 releases. Of those releases, 75 resulted in a recall.

⁴⁷ Preferred Approach Paper, P80.

⁴⁸ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, The Law Association of New Zealand.

⁴⁹ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

- 17.57 On the other hand, most submitters who responded to the proposal agreed with the availability of prison detention orders as a measure of last resort and subject to regular reviews when imposed.⁵⁰
- 17.58 Some of these submitters questioned the appropriateness of treating a person subject to a prison detention order as a person awaiting trial.⁵¹ Although submitters saw some benefits of this approach such as people being able to wear their own clothes, they also identified the following concerns:
- (a) It is unclear how a person subject to a prison detention order would practically access rehabilitative treatment and reintegration support, because remand prisoners are generally not given those opportunities.
 - (b) The prison facilities accommodating remand prisoners do not provide for the same quality of life as other prison units, because remand is intended to be short-term.
- 17.59 Lastly, we proposed that prison detention orders should remain in force until terminated by the court and that, while in effect, they should be regularly reviewed by a Review Authority and by the court. Few submitters addressed these proposals, but those that did agreed.⁵²

Recommendations

Escalation to more restrictive preventive measures

R109

For a person subject to community preventive supervision or residential preventive supervision, te Kōti Matua | High Court should have power to order that the preventive measure to which they are subject be terminated and a more restrictive type of preventive measure be imposed if:

- a. the person would, if they were to remain subject to the current 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. less restrictive options for managing the behaviour of the person have been considered to a reasonable extent and any appropriate options have been tried.

R110

The chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the court for an order for a more restrictive type of preventive measure. The chief executive should file two health assessor reports to accompany the application.

⁵⁰ 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 of New Zealand.

⁵¹ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁵² Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

- 17.60 We conclude that the new Act should provide an avenue to escalate a person to a more restrictive type of preventive measure from community preventive supervision or residential preventive supervision. We recommend a separate avenue of escalation for people subject to secure preventive detention below.
- 17.61 Escalation under this recommendation will mean moving a person from one type of measure to another type of measure of greater restrictions, namely:⁵³
- (a) moving a person subject to community preventive supervision to residential preventive supervision or secure preventive detention; or
 - (b) moving a person subject to residential preventive supervision to secure preventive detention.
- 17.62 A move from one type of measure to a more restrictive one may be justified in some cases. There may be some people who cannot be safely managed were they to remain on community preventive supervision or residential preventive supervision. 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.⁵⁴ Submitters on the Preferred Approach Paper mostly agreed with this proposal.
- 17.63 We are mindful too that, if the law does not permit a person to be moved to a more restrictive measure, a cautionary practice of subjecting people to unnecessarily severe measures at the outset may arise, because there would be no later opportunity to respond to elevated risk.⁵⁵
- 17.64 In our view, recall to prison should not be a means of escalation. The preventive measures we recommend under the new Act should operate as an entirely 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. While we recommend below that detention in prison should be a means of escalation limited to those subject to secure preventive detention, we recommend the threshold for its imposition be significantly higher than the current grounds for recall. It should require a fresh application to the court and updated health assessor reports.
- 17.65 Under our recommendation, to escalate a person to a more restrictive measure, the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) should apply to the High Court. We recommend that the chief executive should be able to do so

⁵³ In Chapter 18, we recommend that the Review Authority should have powers to vary the special conditions of the preventive measure. While a variation could make community preventive supervision or residential preventive supervision more restrictive, we do not consider such variation to constitute escalation for the purposes of this recommendation.

⁵⁴ 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.

⁵⁵ 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.

at any point during the period a person is subject to community preventive supervision or residential preventive supervision. This may appear a broader approach than the current law because a more restrictive measure can only be imposed in certain circumstances — for example, a PPO may only be imposed on people subject to an ESO 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,⁵⁶ thereby enabling eligibility for a PPO.⁵⁷ Our preferred approach therefore reflects what can already be achieved in practice but provides a more responsive and efficient procedure.

- 17.66 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 recommend poses a higher threshold than the primary legislative tests we recommend in Chapter 10 for the following reasons:
- (a) The primary tests we recommend 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 residential facilities.
 - (b) Imposing a more restrictive preventive measure would further limit the protection against second punishment under the NZ Bill of Rights beyond the imposition of the initial measure. It is important that the test identify when an escalation is necessary and justified compared to when the original preventive measure remains satisfactory.
- 17.67 The test we recommend 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.⁵⁸ The first limb of the test focuses on whether the person presents an “unacceptable risk”. The assessment of risk should 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.⁵⁹ 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.⁶⁰
- 17.68 As stressed by submitters in response to the Preferred Approach Paper, the chief executive should file fresh health assessor reports to enable the court to determine the risk the person poses.

⁵⁶ 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.

⁵⁷ 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).

⁵⁸ Public Safety (Public Protection Orders) Act 2014, s 85(2); *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [40]; *Chief Executive of the Department of Corrections v Waiti* [2023] NZHC 2310 at [8]–[12]; and *Chief Executive, Department of Corrections v Pori* [2024] NZHC 2767 at [35]–[42] and [48].

⁵⁹ *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [53].

⁶⁰ *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [53].

- 17.69 The second limb of the test should require the chief executive 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 Authority should vary any of the conditions applying to the preventive measure (discussed further in Chapter 18). The second limb of the test, like the first, is modelled on the test for prison detention orders under the current law. That test requires the court to be satisfied that “all less restrictive options” have been considered. We question whether it is possible for the court to be satisfied that *all* options have been considered. Rather, we consider the better framing of this test is to require that available options have been considered to a *reasonable extent*.
- 17.70 The test we recommend does not limit the court to imposing the next most restrictive preventive measure. It should be possible for the court to order that a person subject to community preventive supervision be made subject to secure preventive detention. Because the test for imposing a more restrictive measures requires that the court be satisfied that appropriate options to manage the unacceptable risks the individual poses have been tried, we expect that the court will rarely order that residential preventive supervision be bypassed.

Prison detention orders

R111

Te Kōti Matua | High Court should have power to order that a person subject to secure preventive detention be detained in prison (a prison detention order) 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. less restrictive options for managing the behaviour of the person have been considered to a reasonable extent and any appropriate options have been tried.

R112

The chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the court for a prison detention order. The chief executive should file two health assessor reports to accompany the application.

R113

The new Act should provide that people imprisoned subject to prison detention orders, to the extent possible, have the same rights as they would enjoy if detained in a secure facility.

R114

Prison detention orders should remain in force until terminated by te Kōti Matua | High Court.

R115

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 apply for reviews of the order.
- b. Te Kōti Matua | High Court should review a prison detention order annually upon application by the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive).
- c. A prison detention order should be reviewed by the Review Authority every six months or, if there is an application for a court review pending, within six months after te Kōti Matua | High Court has determined the last application for review.
- d. The chief executive 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.

17.71 We recommend that there should, as a matter of last resort, be the ability to escalate a person from secure preventive detention to prison.

17.72 This matter is finely balanced. Fundamental to our recommendations in Chapter 16 is 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 recognise that return to prison can have a highly detrimental impact on a person. To remove a person from a secure facility to prison would be a significant step. Submitters mostly agreed with the continuation of prison detention orders. However, the Chief Ombudsman, in his submission on the Preferred Approach Paper, stressed that prison detention orders could blur the distinction between the proposed preventive regime and a punitive regime.

17.73 We considered whether to recommend that there be no avenue to detain a person in prison. This approach would rely on the expectation that all behaviour should be managed within secure preventive detention facilities. We do not, however, prefer this approach. The only case where a prison detention order has been imposed on a person subject to a PPO demonstrates the need for an option to detain a person in prison in exceptional cases. The Court found, both at imposition and on its annual review, that the prison detention was justified.⁶¹ The individual had repeatedly demonstrated violent and sexualised behaviour towards the residence manager and other staff. He had made threatening comments towards the other resident. He had inflicted damage on the facility by breaking double-glazed security glass with furniture. The Court was satisfied that, if the individual continued to live at the PPO residence, it would place the manager and other resident at grave risk of serious physical harm.⁶²

⁶¹ *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581; and *Chief Executive, Department of Corrections v Pori* [2024] NZHC 2767 at [79] and [91].

⁶² *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [111]–[113]; and *Chief Executive, Department of Corrections v Pori* [2024] NZHC 2767 at [76]–[79].

- 17.74 In addition, 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 separating some detainees from communal life within the facility — could have considerable impact on the facility and other detainees. The Court considered this point material in its decision to impose the prison detention order.⁶³
- 17.75 It will, however, be highly relevant what efforts have been considered or made to accommodate the individual within the secure facility. To be rights compliant, the court must be satisfied that detention in prison is the only feasible way to manage the unacceptable risk the person poses.
- 17.76 Under the PPO Act, when a person is made subject to a prison detention order, they must be treated in the same way as a person imprisoned while awaiting trial.⁶⁴ In the Preferred Approach Paper, we proposed that this provision be carried forward into the new Act. Most submitters, however, expressed concern because a status as a remand prisoner has potential to restrict a prisoner's quality of life. We agree with those concerns. The reason we had suggested following the current law by treating prison detention order detainees as remand prisoners was to ensure they had the same rights as people who are imprisoned having not been convicted of an offence such as the ability to wear their own clothes. However, as submitters pointed out to us, there may be considerable disadvantages to mid to long-term detention in remand facilities compared to mainstream prison units.
- 17.77 Remand facilities will have a comparatively higher turnover of prisoners, meaning the environment is less settled. We understand that remand facilities are typically high-security environments because the prisoners within them will not have been allocated a security classification. In comparison, mainstream prison units may provide for a better quality of life such as the availability of self-care units, fewer lock-down hours, greater visitation rights and greater access to recreational and rehabilitative opportunities.
- 17.78 We therefore recommend that the legislation assign no particular status to prison detention order detainees. Rather, the new Act should guarantee to the detainee the same rights as they would have had if they had remained detained in a secure facility. Of particular importance is continued access to rehabilitative treatment and reintegrative support. Ara Poutama would, we expect, develop a special status for prisoners in this category.
- 17.79 Given the especially severe nature of prison detention orders, we recommend enhanced review mechanisms, as is currently the position under the PPO Act.⁶⁵ Specifically, we recommend that the High Court review the order annually. The Review Authority (that we recommend in Chapter 18 be established to review preventive measures generally) should review the order in the intervening six-monthly periods. These reviews will ensure the justification for the ongoing detention is regularly tested and that progress to transition the person back to the secure facility is checked. Although there has only been one court

⁶³ *Chief Executive, Department of Corrections v Pori* [2022] NZHC 3581 at [114].

⁶⁴ Public Safety (Public Protections Orders) Act 2014, s 86.

⁶⁵ Public Safety (Public Protections Orders) Act 2014, ss 87–90.

review of the sole prison detention order in existence,⁶⁶ the process appears to be thorough and to offer appropriate accountability.

17.80 Lastly, like preventive measures generally, we recommend that prison detention orders remain in place for as long as they are needed. We recommend they remain in place until terminated by the High Court.

⁶⁶ *Chief Executive, Department of Corrections v Pori* [2024] NZHC 2767.

CHAPTER 18

Duration and review of preventive measures

INTRODUCTION

- 18.1 In this chapter, we consider how long preventive measures should be in place, when they should be reviewed and by whom, and how they can be varied or terminated.
- 18.2 We examine multiple issues with the current law on the duration and review of preventive measures, including the following:
- (a) People subject to preventive detention have limited rights to apply for a court review.
 - (b) The legislative test the New Zealand Parole Board (Parole Board) applies in granting or denying parole to a person subject to preventive detention does not sit comfortably with human rights law.
 - (c) The jurisdictions for cancelling and varying extended supervision orders (ESOs) are split between the courts and the Parole Board.
 - (d) The intervals for periodic reviews of ESOs are sometimes unclear.
- 18.3 To address these issues, we make the following recommendations:
- (a) **Indeterminate duration.** A preventive measure should be in force indeterminate, but the court must terminate it as soon as the court considers it can no longer be justified.
 - (b) **Periodic reviews of a preventive measure.** Te Kōti Matua | High Court should be responsible for reviewing the continued justification of residential preventive supervision and secure preventive detention. Te Kōti-ā-Rohe | District Court should be responsible for reviewing the continued justification of community preventive supervision. The relevant court should review a preventive measure every three years. It should determine whether the primary tests for the imposition of the preventive measure continue to be met. In addition, the new Act should establish a Review Authority to review measures annually in between court reviews.
 - (c) **Termination or variation of preventive measures outside periodic reviews.** The chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) and the person subject to a preventive measure should be able to apply to the court to terminate a preventive measure or to the Review Authority to vary special conditions.

CURRENT LAW

Preventive detention

- 18.4 Preventive detention is an indeterminate sentence.¹ 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 Parole Board.² The Parole Board is an independent statutory body.³ It consists of members who are appointed by the Governor-General on the recommendation of the Attorney-General.⁴ The Parole Board operates in panels of at least three members, one of whom must be a panel convenor or the chairperson.⁵
- 18.6 A person becomes eligible for parole once they have served the minimum period of imprisonment set at sentencing.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.⁷
- 18.7 A Parole Board hearing must be run in the manner of an inquiry and in an atmosphere that encourages persons appearing before the Board to speak for themselves and as freely and frankly as possible. Otherwise, the Board may conduct the hearing as it thinks appropriate.⁸ The Parole Board must consider an offender for parole at least once every two years until it is granted.⁹
- 18.8 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).¹⁰ The person subject to parole or their probation officer may apply to the Parole Board to vary or discharge any parole conditions.¹¹ At any time for the rest of their lives, they can be recalled to prison, for example, if they breach release conditions.¹²

Extended supervision orders

- 18.9 ESOs have a term of no more than 10 years. An ESO expires at the end of its term unless the sentencing court (which is responsible for ESOs following the sentence) cancels it earlier.¹³ Before an ESO expires, the chief executive may apply for a new ESO. This means ESOs can be imposed repeatedly without limit.¹⁴ An ESO is suspended if the person

¹ Sentencing Act 2002, ss 4 definition of “indeterminate sentence of imprisonment”, 87 and 89.

² Parole Act 2002, s 86(3).

³ Parole Act 2002, s 108(1).

⁴ Parole Act 2002, s 111(1).

⁵ Parole Act 2002, s 115(1).

⁶ Parole Act 2002, ss 20(1)(a) and 84(2).

⁷ Parole Act 2002, s 28(2).

⁸ Parole Act 2002, s 49(1)–(2).

⁹ Parole Act 2002, s 21.

¹⁰ Parole Act 2002, s 29(4)(b).

¹¹ Parole Act 2002, s 56(1)–(2).

¹² Parole Act 2002, ss 6(4)(d) and 61.

¹³ Parole Act 2002, s 107I(4).

¹⁴ Parole Act 2002, s 107F(1)(b).

subject to it is taken into custody. It is cancelled if the person receives an indeterminate sentence.¹⁵

- 18.10 If a person has not ceased to be subject to an ESO for 15 years (because the sentencing court has imposed a series of consecutive ESOs), the sentencing court must review the ESO. In that review, the court must assess the person's reoffending risk during the remaining period of the ESO rather than during "the future", which is used in the original legislative test.¹⁶ After the initial review, the court must review the ESO within five years after the imposition of each new ESO.¹⁷ The court must either confirm or cancel the ESO.¹⁸
- 18.11 The person subject to the ESO or the chief executive may apply to the sentencing court to cancel the order at any time.¹⁹ If the court declines to cancel the ESO, it can also order that the offender cannot apply for cancellation again for up to two years.²⁰
- 18.12 In addition to the court review of the ESO itself, the Parole Board must review "high-impact conditions"²¹ every two years after the condition was imposed, confirmed or varied.²² The Parole Board must also review 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.²³ Following a review, the Board may confirm, discharge or vary the relevant conditions.²⁴
- 18.13 The person subject to an ESO or their probation officer may apply to the Parole Board to vary or discharge an ESO condition at any time (except an intensive monitoring condition).²⁵

Public protection orders

- 18.14 Public protection orders (PPOs) do not have an end date. They end only when cancelled by the 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.²⁶ If it does not find that the PPO must be cancelled, it must instead review whether the person's management plan is still appropriate.²⁷

¹⁵ Parole Act 2002, ss 107P–107Q.

¹⁶ Parole Act 2002, s 107RA(1)–(2).

¹⁷ Parole Act 2002, s 107RA(2).

¹⁸ Parole Act 2002, s 107RA(5).

¹⁹ Parole Act 2002, s 107M(1).

²⁰ Parole Act 2002, s 107M(6).

²¹ 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).

²² Parole Act 2002, s 107RB(2).

²³ Parole Act 2002, s 107RC(1)–(2).

²⁴ Parole Act 2002, ss 107RB(5) and 107RC(5).

²⁵ Parole Act 2002, s 107O(1)–(1A).

²⁶ Public Safety (Public Protection Orders) Act 2014, ss 18(4) and 93(1).

²⁷ Public Safety (Public Protection Orders) Act 2014, s 19.

- 18.15 The chief executive must apply to the High Court for a periodic review of a PPO every five years.²⁸ 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.²⁹
- 18.16 PPOs are also subject to annual reviews by a review panel established under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).³⁰ 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.³¹ 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.³²
- 18.17 The review panel consists of six members appointed by the Minister of Justice.³³ Two of the members must be registered and practising psychiatrists or registered psychologists, and four members must have experience in the operation of the Parole Board.³⁴
- 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.³⁵ Additionally, the review panel must interview the person subject to the PPO, unless they do not wish to be interviewed.³⁶

DURATION OF PREVENTIVE MEASURES

Issues

- 18.19 Under the current law, the duration of a preventive measure varies:
- (a) Preventive detention is imposed for life.
 - (b) An ESO is imposed for a determinate period of no more than 10 years and can be renewed.
 - (c) A PPO is imposed for an indeterminate period and remains in force until it is terminated.
- 18.20 In the Issues Paper, we identified instances where the law governing the duration of ESOs is not clear.³⁷ The Parole Act is silent on what happens when the person subject to the

²⁸ Public Safety (Public Protection Orders) Act 2014, s 16(1)(a)–(c). The court can extend this interval to up to 10 years: s 16(2).

²⁹ Public Safety (Public Protection Orders) Act 2014, s 17(1).

³⁰ Public Safety (Public Protection Orders) Act 2014, s 15(1).

³¹ Public Safety (Public Protection Orders) Act 2014, s 15(2).

³² Public Safety (Public Protection Orders) Act 2014, s 15(3).

³³ Public Safety (Public Protection Orders) Act 2014, s 122(2).

³⁴ Public Safety (Public Protection Orders) Act 2014, s 122(5).

³⁵ Public Safety (Public Protection Orders) Act 2014, s 112.

³⁶ Public Safety (Public Protection Orders) Act 2014, s 113.

³⁷ 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 [11.49]–[11.51].

ESO becomes subject to an interim detention order or a PPO. Submitters to the Issues Paper agreed with us that an ESO should be suspended if an interim detention order is made and that an ESO should come to an end if a PPO is ordered.³⁸

Results of consultation

- 18.21 In the Preferred Approach Paper, we proposed that all three preventive measures should be indeterminate. They should remain in force until they are terminated by a court. This approach is similar to the one adopted in the PPO Act.³⁹
- 18.22 Te Kāhui Tātari Ture | Criminal Cases Review Commission supported our approach. However, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, the South Auckland Bar Association and The Law Association of New Zealand (TLANZ) disagreed:
- (a) The Public Defence Service was concerned about preventive measures being “indefinite”, particularly because our proposal did not address whether reviews would be carried out with a hearing, and how a person subject to a preventive measure would obtain legal representation for review proceedings. It warned there is a risk that reviews of indeterminate measures could become a “rubber stamping exercise”. It suggested determinate preventive measures that could be renewed if necessary was preferable. It also emphasised that holding review hearings and ensuring that people have legal representation was important.
 - (b) The South Auckland Bar Association submitted that subjecting people to any indeterminate preventive measure would be “draconian”. It said it was inconsistent with the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and Aotearoa New Zealand’s international human rights obligations, because an indeterminate preventive measure “could amount to torture”. It did not say whether it should be possible to renew fixed-term preventive measures.
 - (c) TLANZ stated that, for community preventive supervision and residential preventive supervision to be “truly aimed at being rehabilitative as well as preventive, [they] must not be indeterminate”.
- 18.23 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) did not express a strong preference but told us imposing a measure for a determinate period with the possibility of renewal was worth further consideration. The NZLS also stated that access to legal representation was important because people subject to preventive measures are often vulnerable and unaware that they can apply to cancel a preventive measure.
- 18.24 The NZLS, the Public Defence Service and TLANZ submitted there were several advantages to an approach of determinate, renewable measures. They said a finite term would give a person an end date to work towards, it would provide an incentive to Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) to provide rehabilitative programmes and it would allow a person to advocate for their rights during proceedings for renewing a measure.⁴⁰ The Public Defence Service stated that there was no reason why preventive measures could not be determinate *and* subject to periodic reviews.

³⁸ Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration* (NZLC IP54, 2024) (Preferred Approach Paper) at [18.49]–[18.50].

³⁹ Preferred Approach Paper, P83.

⁴⁰ The Law Association of New Zealand only expressed this preference in relation to preventive detention.

- 18.25 We further proposed that preventive measures should be automatically suspended if a person is detained in prison for other offending.⁴¹ All preventive measures would be suspended for as long as the person is imprisoned.
- 18.26 Community preventive supervision and residential preventive supervision would remain suspended if the person is released on parole. They could serve part of their intervening prison sentence in the community on parole. We proposed secure preventive detention should reactivate upon release on parole.
- 18.27 Most submitters who responded to this proposal agreed with it.⁴² The NZLS and the Public Defence Service expressed concerns. They said that a person subject to residential preventive supervision could, if detained in prison for other offending, be subject to less restrictive parole conditions than apply to residential preventive supervision.
- 18.28 The NZLS suggested that all preventive measures should resume when the person is released from prison rather than when their sentence expires. This would mean that a person subject to secure preventive detention who is serving an intervening sentence of imprisonment should be eligible for release on parole if served in a secure facility.
- 18.29 We also proposed that a preventive measure should:
- (a) remain in force during a community-based sentence or a sentence of home detention;⁴³
 - (b) be suspended while an interim measure is in force;⁴⁴ and
 - (c) automatically terminate if a sentence of life imprisonment is imposed on the person in question.⁴⁵
- 18.30 The submitters who responded to these proposals agreed with our approach.

Recommendations

Preventive measures to be of indeterminate duration

R116

A preventive measure should be imposed indeterminately and remain in force until terminated by a court.

⁴¹ Preferred Approach Paper, P84.

⁴² Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

⁴³ Preferred Approach Paper, P85 and [18.62]. The submitters who agreed were Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association. The Law Association of New Zealand merely noted that this was also the position under the current law.

⁴⁴ Preferred Approach Paper, P86. The submitters who agreed were Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

⁴⁵ Preferred Approach Paper, P87. The submitters who agreed were Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

- 18.31 We recommend that preventive measures under the new Act should be indeterminate. A system of indeterminate measures has advantages over systems of both renewable and non-renewable fixed-term measures.
- 18.32 As we explain below, indeterminate measures — coupled with appropriate review mechanisms — can achieve the same level of scrutiny as a system of renewable fixed-term measures while having some procedural advantages. A system of indeterminate measures also avoids the risk that preventive measures remain in force longer than necessary because they are left in place until the predetermined term runs out. At the same time, indeterminate preventive measures can be in place for as long as necessary to protect the community, which cannot be guaranteed under a system of non-renewable determinate orders.
- 18.33 To ensure scrutiny, rigorous review obligations must accompany indeterminate preventive measures. We detail our recommendations on reviews later in this chapter. To summarise, we recommend periodic court reviews every three years and periodic reviews by a specialised Review Authority every year in between court reviews. These reviews apply the same degree of scrutiny as the initial decision whether to impose the preventive measure. In addition to periodic reviews, the chief executive and the person subject to a measure can seek the variation or termination of the measure at any time.
- 18.34 Indeterminate preventive measures make the application of the legislative tests for imposing preventive measures more straightforward. The legislative tests we recommend in Chapter 10 will direct the court to impose the least restrictive of these measures that would be adequate to address the reoffending risks a person poses. When considering which preventive measure is appropriate for a person, the court should be able to compare different levels of restrictiveness. Preventive measures with terms of differing duration could distort this assessment.
- 18.35 For example, the court may consider that imposing secure preventive detention for one year may be less restrictive than imposing residential preventive supervision for three years. We think such comparisons would be imprecise and should be avoided. They may lead to the courts imposing measures that are too restrictive.⁴⁶ Our recommendation excludes the duration of a measure from consideration when imposing a preventive measure. This ensures that, at all times, the least restrictive preventive measure that is adequate to address a person's reoffending risk is in place.
- 18.36 There are many comparable jurisdictions that have opted for indeterminate preventive measures —Northern Territory, Queensland, South Australia, Tasmania, Victoria, Canada, England and Wales, Scotland and Ireland. In most of these jurisdictions, detention as a preventive measure is indeterminate, while supervision is imposed through fixed-term orders. These indeterminate measures are always coupled with periodic reviews every one to three years.
- 18.37 We have decided against splitting the duration of preventive measures between detention and supervision. For the reasons given above, we do not favour renewable, fixed-term measures. There may also be a risk that, if the court considered a less

⁴⁶ 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 such as 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].

restrictive measure might not provide sufficient community safety because of its fixed-term, there would be an undue preference for the more restrictive indeterminate measure.

Alternative approaches and why we decided against them

- 18.38 We have considered two alternatives to imposing preventive measures indeterminately because of concerns over measures of indeterminate duration.
- 18.39 The first alternative is fixed-term measures that can be renewed. The difference between our recommendation and this option is subtle. Our recommendation relies on reviews to assess whether the measure should remain in place, whereas this alternative relies on reviews to assess whether the measure should be reimposed. In effect, however, both amount to the availability of indefinite restriction.
- 18.40 Some submitters preferred this alternative over indeterminate preventive measures. However, we consider that some of the submitters' concerns apply to both approaches. Most importantly, the reviews for indeterminate measures and the reviews for determinate but renewable measures are both at risk of becoming tick-box exercises without appropriate procedural safeguards. We are confident that, under our recommendations for periodic reviews, the courts will recognise that their role will be to consider the justification for a preventive measure anew without being swayed by the status quo of an indeterminate measure continuing in force unless terminated.
- 18.41 We acknowledge that indeterminate preventive measures may invoke feelings of hopelessness for the person subject to the measure (discussed in Chapter 4). However, an alternative approach where the term of a preventive measure may be renewed repeatedly may be just as frustrating and disheartening. In our view, it is more transparent to describe preventive measures as indeterminate and communicate that a preventive measure will remain in place for as long as the legislative tests continue to be met.
- 18.42 The second alternative is imposing preventive measures as determinate orders without any possibility of renewal.
- 18.43 We conclude, however, that ongoing safety concerns after the period has expired would undermine the community safety objective of the measure. Removing the ability of the court to continue or renew preventive measures may also lead to the imposition of excessively long terms as a matter of precaution.
- 18.44 The history of how the ESO regime evolved over time illustrates this point. Originally, ESOs could not be renewed beyond a maximum of 10 years.⁴⁷ However, when the end of that period approached for some people subject to ESOs, Parliament found it necessary to amend the regime to allow for their continued restriction.⁴⁸
- 18.45 Our comparative analysis supports our conclusion that ongoing safety concerns after the period has expired would undermine the community safety objective of the measure. None of the comparable jurisdictions we have analysed provide for determinate

⁴⁷ Parole Act 2002, ss 107I(6) and 107N(5) (as enacted by the Parole (Extended Supervision) Amendment Act 2004).

⁴⁸ Sections 107I(6) and 107N(5) of the Parole Act 2002 (as enacted) were repealed by ss 15(3) and 22 of the Parole (Extended Supervision Orders) Amendment Act 2014.

preventive detention that cannot be extended. Only very few provide for fixed-term supervision orders that cannot be renewed upon expiry.⁴⁹

Suspension during determinate sentences of imprisonment and remand

R117 A preventive measure to which a person is subject should be suspended while that person is either subject to a determinate sentence of imprisonment or on remand in custody.

R118 In the case of a prisoner serving a sentence of imprisonment, a preventive measure should reactivate at the person's sentence expiry date or the date when the individual ceases to be subject to any release conditions, whichever is later. In the case of a prisoner on remand, the preventive measure should reactivate when the individual is released from custody.

R119 If the person subject to a suspended preventive measure has been released on parole at the time of reactivation of the preventive measure, the Review Authority (R131–R141) should review the preventive measure as soon as is reasonably practical. The Review Authority should determine whether it should make the measure less restrictive or whether the relevant court should consider terminating the measure (R136).

- 18.46 We conclude that preventive measures should be suspended while a person is detained in prison.
- 18.47 It is possible for a person to be sentenced to imprisonment while they are subject to a preventive measure. This will usually be if the person is convicted and sentenced for a new or historical offence during the time a preventive measure is in effect. Sentences of imprisonment should operate in place of a preventive measure.
- 18.48 It is also possible that a person is remanded in custody while they are subject to a preventive measure. The preventive measure should be suspended while a person is remanded in custody.
- 18.49 We recommend that a preventive measure should continue to be suspended if a person serving an intervening sentence of imprisonment is released on parole.⁵⁰ It is conceivable that a person could be 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 preventive regime. This includes people subject to secure preventive detention who serve an intervening prison sentence. Although such a decrease in reoffending risk may be rare, we consider the new Act should not prevent a

⁴⁹ 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).

⁵⁰ Compare Parole Act 2002, s 107P(1)(b).

person being released on parole if the Parole Board has determined that they pose no undue risk to the community.

- 18.50 We have adjusted our original proposal from the Preferred Approach Paper slightly by departing from our approach concerning the reactivation of secure preventive detention. Our initial approach, and the NZLS's suggestion, was that a measure of secure preventive detention that has been suspended should reactivate if the person is released on parole. However, this approach would create tensions between the parole regime and the preventive measures under the new Act. Resolving these tensions would require extensive reforms of the parole regime that we cannot consider within the confines of this review of preventive detention and post-sentence orders.
- 18.51 In some instances, it may be appropriate that parole conditions of an intervening prison sentence are less restrictive than the conditions of the suspended preventive measure. While a person is on parole, they can be made subject to conditions similar to the conditions that are available under community preventive supervision and residential preventive supervision.
- 18.52 We acknowledge submitters' feedback that this would, in theory, allow a person to be subject to less restrictive conditions than would apply under residential preventive supervision. However, we consider it is appropriate that the Parole Board grants parole to a person whose reoffending risk has decreased and with the conditions that are available under that regime — even if these conditions are less restrictive than the conditions to which the person had previously been subject.
- 18.53 If a person successfully serves the rest of their sentence on parole without being recalled to prison, this may serve as evidence that the suspended preventive measure should be varied or terminated. That is why we consider that, in this case, the Review Authority should carry out a review of the preventive measure upon its reactivation. In its review, the Review Authority should determine whether the conditions of the measure should be made less restrictive or the measure referred to the relevant court to consider termination.

Termination of sentence if life imprisonment is imposed

R120

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

- 18.54 Under a sentence of life imprisonment, a person must remain in prison unless the Parole Board decides that 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.
- 18.55 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.⁵¹

⁵¹ Parole Act 2002, s 107Q(3).

Preventive measures to continue during community-based sentences and home detention

R121

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

- 18.56 We conclude that community-based sentences and sentences of home detention should not affect a preventive measure, because these sentences may not provide the same level of community safety as the preventive measure. The preventive measure should therefore remain in force alongside such sentences.⁵²
- 18.57 Suspending preventive measures for sentences of imprisonment but not for community-based sentences and sentences of home detention is in line with the provisions on the suspension of ESOs under the Parole Act.⁵³

Suspension while interim measures are in force

R122

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 new 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.

- 18.58 In Chapter 17, we recommend that the chief executive should be able to apply to the relevant court for the imposition of a more restrictive preventive measure on a person already subject to a preventive measure.⁵⁴ It should also be possible for the chief executive to seek interim orders pending the application for the more restrictive measure.
- 18.59 We conclude that existing preventive measures should be suspended while an interim measure is in force. If the court ultimately declines the application for a new measure, the former preventive measure should reactivate. If the court grants the application for a new measure, the suspended preventive measure should terminate.

Suspension while orders under mental health and intellectual disability legislation are in force

- 18.60 We discuss suspension while measures under mental health and intellectual disability legislation are in force in Chapter 5.

⁵² We consider it very unlikely, however, that a court would consider a secure facility a “suitable” home detention residence: Sentencing Act 2002, s 80A(2)(a)(i).

⁵³ Parole Act 2002, ss 107P–107Q.

⁵⁴ We explain the process for moving to a *less* restrictive measure later in this chapter.

PERIODIC REVIEWS BY A COURT

Issues

Concerns that people on preventive detention do not have the right to apply to court for review

- 18.61 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) has been interpreted to place two review obligations on state parties in relation to detention for preventive reasons:⁵⁵
- (a) First, article 9(1) requires that periodic reviews are carried out by an independent body to decide whether continued detention is justified.⁵⁶ The United Nations Human Rights Committee (UNHRC) has stated repeatedly that the Parole Board fulfils the criteria for being an “independent body”.⁵⁷
 - (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.⁵⁸
- 18.62 Aotearoa New Zealand’s current law on preventive detention complies with the requirements of article 9(1). However, there has been some confusion about the scope of, and compliance with, article 9(4).
- 18.63 The UNHRC has 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”.⁵⁹ Unlawful detention includes “detention that was lawful at its inception but has become unlawful because ... the circumstances that justify the detention have changed”.⁶⁰
- 18.64 New Zealand courts do not apply the ICCPR’s standards of what constitutes a “lawful” detention when considering the lawfulness of preventive detention in habeas corpus proceedings. They only consider whether the detention has been imposed and reviewed in accordance with the Sentencing Act 2002 and Parole Act when determining habeas corpus applications.⁶¹ In other words, the courts do not review the Parole Board’s

⁵⁵ For example MacKenzie J made this distinction in *Miller v Parole Board of New Zealand* (2008) 24 CRNZ 104 (HC) at [18]–[19]. See also the Issues Paper at [11.32]–[11.36].

⁵⁶ United Nations 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].

⁵⁷ *Rameka v New Zealand* (2004) 7 HRNZ 663 (UNHRC) at [7.3]; United Nations 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].

⁵⁸ *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].

⁵⁹ United Nations 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].

⁶⁰ United Nations 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].

⁶¹ *Miller v New Zealand Parole Board* [2010] NZCA 600 at [70].

substantive assessment of whether a person poses an undue risk to the safety of the community.

18.65 Most submitters to the Issues Paper thought that courts, as opposed to the Parole Board, should have greater responsibilities for reviewing preventive detention.⁶²

The provisions governing release on parole do not express the requirements accurately

18.66 The general provisions on granting parole to people serving sentences of imprisonment also apply to people subject to a sentence of preventive detention. Section 28(2) of the Parole Act provides that the Parole Board may direct an offender’s release on parole only if it is satisfied on reasonable grounds that “the offender ... will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence”.

18.67 The Parole Act states in section 28(1AA) that an offender “has no entitlement to be released on parole”.⁶³ However, in *Vincent v New Zealand Parole Board*, the High Court stated that this provision must be interpreted consistently with the NZ Bill of Rights. It explained that, if a person imprisoned on preventive detention no longer constitutes an undue risk, there is no basis to maintain the detention.⁶⁴

18.68 The courts therefore apply this provision in a way that is consistent with human rights law. However, it would be preferable for the wording to align with the approach the courts apply in practice. We made a similar statement in the Issues Paper.⁶⁵

18.69 Submitters to the Issues Paper who responded to our preliminary view agreed that 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.⁶⁶

Concerns with the “increasing justification” test

18.70 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.

18.71 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”.⁶⁷ 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”.⁶⁸

18.72 In the Issues Paper, we expressed concern that an increasing justification test could result in unintended situations where a person posing a lesser risk is detained while a person

⁶² Preferred Approach Paper at [18.42].

⁶³ Parole Act 2002, s 28(1AA).

⁶⁴ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [87].

⁶⁵ Issues Paper at [11.39].

⁶⁶ Preferred Approach Paper at [18.44].

⁶⁷ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.5]. See also *Attorney-General v Chisnall* [2024] NZSC 178 at [206].

⁶⁸ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.5].

posing a higher 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.⁶⁹ Most submitters to the Issues Paper who remarked on this matter agreed.⁷⁰

Separate jurisdictions for cancelling and for varying extended supervision orders

- 18.73 The court and the 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.
- 18.74 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.
- 18.75 Second, it is unclear whether the Parole Board can vary an intensive monitoring condition. The Parole Board may not impose an intensive monitoring condition unless a court has ordered it. If the court does order an intensive monitoring condition, the Parole Board must impose it.⁷¹ 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 intensive monitoring condition.⁷²
- 18.76 We assume that the purpose of the provision is to avoid the Parole Board circumventing a court order to impose an intensive monitoring condition by imposing and then immediately cancelling it.
- 18.77 However, other scenarios are less clear. For example, a court could order the Parole Board to impose an intensive monitoring condition for six months. It is not clear whether the Parole Board could reduce the term from six to four months soon after imposing the intensive monitoring condition or whether that would amount to varying the condition “in a way that would be contrary” to the order of the court. Most submitters to the Issues Paper who remarked on this point agreed that the law relating to the Parole Board’s ability to vary an intensive monitoring condition needs clarification.⁷³
- 18.78 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

- 18.79 The calculation of the correct review periods for ESOs is unclear if other measures are imposed while an ESO is in force.
- 18.80 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 one. However, it is unclear if and

⁶⁹ Issues Paper at [11.45].

⁷⁰ Preferred Approach Paper at [18.46].

⁷¹ Parole Act 2002, s 107IAC.

⁷² Parole Act 2002, s 107O(1A).

⁷³ Preferred Approach Paper at [18.48].

when an ESO starts or ends if an interim supervision order, an interim detention order or a PPO is imposed while an ESO is in force.

- 18.81 In the Issues Paper, our preliminary views were that:⁷⁴
- (a) any time spent on an interim supervision order should be included in the calculation of the ESO review period;
 - (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 imposes a PPO.

Results of consultation

- 18.82 In the Preferred Approach Paper, we proposed that the chief executive should apply to the relevant court for review of a preventive measure every three years.⁷⁵
- 18.83 Submitters who replied to this proposal supported our approach.⁷⁶ The Criminal Cases Review Commission supported “the supervisory involvement of the courts” in particular. The NZLS added that it should be clarified that the review of a preventive measure includes a review of special conditions where applicable.
- 18.84 TLANZ reiterated its preference for determinate measures and said that, in a review of a determinate measure, the onus would be on Ara Poutama to argue why the measure should continue to be in force. The South Auckland Bar Association said that the appropriate procedure for bringing a review application should depend on the preventive measure in question.
- 18.85 The NZLS and the Public Defence Service submitted that clarification of procedural matters was needed such as the ability to apply for legal aid, to be represented by counsel and to make submissions and whether proceedings would occur on the papers or in open court.
- 18.86 We proposed that the High Court should be responsible for reviewing residential preventive supervision and secure preventive detention and that the District Court should be responsible for reviewing community preventive supervision.⁷⁷
- 18.87 Most submitters who addressed this proposal agreed with it, although the Public Defence Service suggested the High Court would be more suitable to undertake a review if it was the sentencing court in respect of the qualifying offence.⁷⁸
- 18.88 Two submitters disagreed. The Bond Trust submitted that the High Court should generally have sole jurisdiction to review all preventive measures. Another submitter thought that all reviews should be carried out by a Review Authority rather than the courts.
- 18.89 We further proposed in the Preferred Approach Paper that, when applying for a court review, the chief executive should submit the same number of health reports required for

⁷⁴ Issues Paper at [11.53].

⁷⁵ Preferred Approach Paper, P88.

⁷⁶ Bond Trust, Myra Crawford-Smith, Te Kāhui Tātari Ture | Criminal Cases Review Commission, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁷⁷ Preferred Approach Paper, P89.

⁷⁸ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand (subject to its preference for determinate measures).

the original application to impose a measure (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). The chief executive should also submit the decisions of the Review Authority since the last court review.⁷⁹

- 18.90 Submitters who responded to this proposal generally agreed with it.⁸⁰ The NZLS and the Public Defence Service agreed with the proposal in principle but considered that a progress report from the responsible probation officer or facility manager should also be included with the application. The Public Defence Service added that Ara Poutama should also submit the treatment and supervision plan to allow the court to review it. The South Auckland Bar Association agreed but stated it was aware of delays in obtaining health assessor reports.
- 18.91 One submitter disagreed, stating that two health assessor reports should be required for all review applications. Dr Tony Ellis submitted that the person subject to the measure under review should have the right to file at least two health assessor reports of their own.
- 18.92 In our Preferred Approach Paper, we detailed which matters should be addressed in a health assessor report submitted for a review proceeding. We proposed the report should address the reoffending risk during the next three-year period and whether the preventive measure currently in force is still the least restrictive measure adequate to address that risk.⁸¹ Submitters who responded to our proposal agreed with it.⁸²
- 18.93 We further proposed that the courts, when reviewing preventive measures, should apply the same legislative tests that are used for imposing them.⁸³ Most submitters who gave feedback on this proposal agreed with it.⁸⁴ In contrast, TLANZ submitted that there was no need to make the preventive measure indefinite if the legislative tests were the same for imposition and review.
- 18.94 We proposed that there should be four possible outcomes of a review: confirmation of the measure, variation of special conditions to make them less restrictive, imposing a less restrictive measure or terminating the measure.⁸⁵ If the court confirms a preventive measure or orders the imposition of a less restrictive measure, it should review the person's treatment and supervision plan.⁸⁶ Submitters who remarked on this point supported our approach.⁸⁷ The NZLS said it supported these proposals in principle but suggested the court should also be able to recommend to the chief executive that an

⁷⁹ Preferred Approach Paper, P90.

⁸⁰ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

⁸¹ Preferred Approach Paper, P91.

⁸² Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service (subject to its comments in relation to the legislative tests we recommend in Chapter 10), South Auckland Bar Association.

⁸³ Preferred Approach Paper, P92.

⁸⁴ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁸⁵ Preferred Approach Paper, P93.

⁸⁶ Preferred Approach Paper, P94.

⁸⁷ Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

application for a more restrictive measure should be made or impose a more restrictive measure on its own motion.

Recommendations

R123

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 it was imposed. 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 (including any appeals). Any time spent while the preventive measure is suspended should not be included in the calculation of the three-year period.

R124

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

R125

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

- 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;
- b. the person's current treatment and supervision plan and a progress report from the facility manager (in the case of residential preventive supervision or secure preventive detention) or the probation officer (in the case of community preventive supervision); and
- c. the decisions of the Review Authority since the last court review.

R126

The court should have the power to direct, on its own initiative, that additional health assessor reports be provided. The person subject to the preventive measure under review should be able to submit additional health assessor reports prepared by health assessors they have engaged.

R127

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 that risk, the preventive measure is the least restrictive measure adequate to address that risk.

R128 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 (R25).

R129 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 (in the case of community preventive supervision or residential preventive supervision) to make them less restrictive;
- c. terminating the preventive measure and imposing a less restrictive measure; or
- d. terminating the preventive measure without replacement.

R130 If the court confirms the preventive measure, it should review the person's treatment and supervision plan. It should have the power (but not be required) to do so if it orders the imposition of a less restrictive measure. The court should have the power to make recommendations to the person responsible for developing and administering the plan.

The need for court reviews

- 18.95 We conclude that regular and periodic court reviews of the ongoing justification for a preventive measure are essential to make the regime under the new Act compliant with human rights standards.
- 18.96 Periodic court reviews of residential preventive supervision and secure preventive detention are required to ensure that these measures do not amount to arbitrary detention in breach of article 9 of the ICCPR. After we published our Preferred Approach Paper, *te Kōti Mana Nui* | Supreme Court has confirmed that court reviews are important to ensuring that public protection is achieved by the least restrictive means possible, because reviews address concerns that continued detention for preventive purposes can become arbitrary.⁸⁸
- 18.97 Monitoring and scrutinising the continued need for preventive measures helps ensure that measures can be brought to an end as soon as reoffending risks no longer justify the measure. The periodic court reviews we recommend are intended to facilitate progress to fewer restrictions and, where possible, to safe and unrestricted life in the community.
- 18.98 Entrusting the review of the ongoing justification for a preventive measure to the courts ensures a high degree of scrutiny and reflects the severity of preventive measures and the importance of the reviews. It also addresses any concerns that the law does not

⁸⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [240].

comply with article 9(4) of the ICCPR. Almost all submitters agreed that periodic court reviews are needed.

- 18.99 Our comparative analysis of review mechanisms supports court reviews. Most comparable jurisdictions require a court to review periodically the ongoing necessity of detention as a preventive measure.⁸⁹ By comparison, supervision orders in the comparable 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.
- 18.100 We are mindful that periodic reviews for all preventive measures will add to the courts' workload. We recommend that the District Court should review community preventive supervision and the High Court should review residential preventive supervision. This will keep jurisdiction with the court that will have most experience with the relevant measures. It will also allocate this workload across the District Court and High Court. Nevertheless, we acknowledge that implementing this recommendation will have resourcing implications.
- 18.101 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 have decided against this approach for the same reasons we recommend the courts should impose preventive measures, including any special conditions. Only a court has the legitimacy to decide whether a preventive measure should be imposed and whether it should remain in force or be terminated, and only court decisions are subject to appropriate rights of appeal.

Intervals of court reviews

- 18.102 We recommend that the chief executive should have responsibility for initiating reviews. The chief executive should apply for a review of a preventive measure within the first three years of its imposition. If the court determines the application by confirming the preventive measure or imposing an alternative measure, the chief executive should apply for the next review of the measure within a further three years. We have chosen this period because risk of reoffending can be accurately predicted within it, as opposed to longer or indefinite timeframes. It corresponds with the three-year timeframe with which the legislative tests for imposing preventive measures (recommended in Chapter 10) operate.
- 18.103 The PPO Act provides for court reviews every five years and annual reviews by a review panel.⁹⁰ We used the PPO Act's five-year period as a starting point because we recommend a similar combination of court and Review Authority reviews (see below). We found, however, that the comparable jurisdictions we looked at, without exception,

⁸⁹ We have looked at the law in the Australian jurisdictions, Canada, England and Wales, Ireland and Scotland.

⁹⁰ Public Safety (Public Protection Orders) Act 2014, ss 15–16.

provide for court reviews of detention every three years or more frequently.⁹¹ 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.⁹²

18.104 We recommend that time runs on the court review intervals only during the period between:

- (a) the imposition of the preventive measure or the final determination (including any appeals) of the previous court review application; and
- (b) the chief executive’s application for the next court review of the preventive measure.

18.105 In other words, time should not run in the period between the application for review and the court’s final determination. This makes allowance for varying durations of review proceedings, depending on factors like court availability, the evidence to be gathered and appeals.

18.106 The chief executive should apply to the relevant court — the District Court for community preventive supervision or the High Court for residential preventive supervision and secure preventive detention. This continues the current law in respect of PPOs and, in effect, ESOs given the chief executive must apply for a new ESO if the term of the previous ESO expires.⁹³

Determination of court review applications

18.107 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 approach is common in other jurisdictions such as Australia.⁹⁴ For every review, the court should consider the justification for the preventive measure afresh. The court review should apply the same scrutiny as if it was considering whether to renew a preventive measure imposed for a fixed term.

18.108 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 Issues Paper and most submitters agreed with our concern. It would also imply that, at the start of a preventive measure, the threshold for continuing a preventive measure would be less than it being necessary to protect the community from serious reoffending. We consider an approach that consistently requires the same high level of justification to be preferable.

⁹¹ 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.

⁹² Serious Offenders Act 2018 (Vic), ss 100 and 291(1)(e).

⁹³ Parole Act 2002, s 107F(1)(b); and Public Safety (Public Protection Orders) Act 2014, s 16.

⁹⁴ 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.

- 18.109 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.
- 18.110 As we explain in Chapter 10, special conditions form part of the preventive measure and can carry severe restrictions. Therefore, where the preventive measure under review includes special conditions, the court review should include them in the scope of review.
- 18.111 The same type of information should be available to the court when it first imposes a preventive measure and when it determines a subsequent review application. We therefore recommend 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.
- 18.112 As we explain in Chapter 11, we consider that this number of required health assessor reports strikes an appropriate balance between the importance of these reports as the principal evidence of a person's reoffending risk and the constraints posed by the shortage of health assessors. We also recommend that the court should be able to request further health assessor reports and that the person subject to the preventive measure under review should be able to submit additional health assessor reports.
- 18.113 We acknowledge that periodic court reviews will create additional pressure on health assessors, who already have a heavy workload. Nevertheless, the outcome of a court review will usually mean the continuation of the preventive measure until the next review. In our view, the consequences of a court review warrant the same level of assessment as applications for the initial imposition of a measure.
- 18.114 The risk a person poses may decrease because of various factors, including how they have responded to rehabilitative treatment. The court should be able to take these matters into account through fresh health assessments. We also consider that the appropriate response to issues with the availability of health assessors is to develop the health assessor workforce rather than to compromise on the evidential standard required to justify a preventive measure.
- 18.115 In response to submitter feedback, we have clarified our original proposal that the chief executive should submit the person's current treatment and supervision plan and a report on the person's rehabilitative progress to the court. We anticipate that this documentation will usually be included in the Review Authority's report but consider that the Act should expressly provide for it.
- 18.116 We recommend 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, as part of a periodic review, the court should only be able to vary special conditions to make them less restrictive.

Other procedures we explain later in this chapter will be in place to address the need to make measures more restrictive in certain exceptional circumstances.

- (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. 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
 - (iii) from secure preventive detention directly to community preventive supervision.

One submitter noted that periodic reviews do not provide for the outcome of escalation to a more restrictive preventive measure. 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 should be available under a different procedure separate from periodic reviews and based on different tests, which we explain in Chapter 17. As we recommend in that chapter, any escalation to a more restrictive measure should require the chief executive to apply to the court seeking the imposition of that measure.

- (d) **Termination.** If the court finds on review that no preventive measure can be justified, it must terminate the preventive measure.

18.117 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.

18.118 The purpose of reviewing a person's treatment and supervision plan is so that the court can assess whether the plan is appropriate or whether it needs amending to ensure it is helpful in reducing the person's reoffending risk. 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.

18.119 This recommendation 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.⁹⁵ We do not anticipate that separate hearings or even separate judgments are required for a review of a person's treatment and supervision plan.

⁹⁵ Public Safety (Public Protection Orders) Act 2014, s 19.

18.120 In Chapter 12, we recommend that there should be a right to appeal to te Kōti Pīra | Court of Appeal against a court's review decision under the new Act.⁹⁶

PERIODIC REVIEWS BY A REVIEW AUTHORITY

18.121 Preventive measures should be comprehensively reviewed at least once a year because they are highly restrictive. Most comparable jurisdictions provide for some form of periodic review more frequently than every three years. However, a higher frequency of court reviews than every three years is not realistic given the workload demands the courts face. Court procedure may also be too slow to adequately react to a person's behavioural changes and rehabilitative progress.

Results of consultation

18.122 In the Preferred Approach Paper, we proposed that the new Act should provide for a review panel. It should be chaired by a judge or former judge and include lawyers, psychiatrists, clinical psychologists, people with Parole Board experience and people with knowledge of mātauranga Māori as members.⁹⁷

18.123 The Bond Trust, the NZLS, the Public Defence Service and another submitter agreed with our proposal. The Bond Trust submitted that the establishment of an independent review panel was "a significant step forward". The NZLS queried whether one or multiple review panels should be established under the new Act.

18.124 Some submitters suggested that other types of members should be included in the make-up of the review panel. One submitter agreed with the proposed make-up but suggested also including members from victims' groups, prisoner rights groups or other advocacy group representatives. The Bond Trust suggested including members of the public with relevant experience in managing or supporting offenders on release (including representatives of iwi, social or faith-based groups) and representatives of organisations involved in supporting victims and offenders. TLANZ noted that the proposed make-up was similar to that of the Parole Board. It submitted setting up a similar body was duplicative and inefficient and suggested reconsidering the make-up of the review panel.

18.125 The South Auckland Bar Association disagreed with the proposal to establish a review panel. It submitted all reviews should be done by the courts.

18.126 We proposed that the panel should review a preventive measure annually except when a court review is pending.⁹⁸

18.127 The Bond Trust agreed and added that the review panel should also review how the preventive measure is managed. The NZLS supported the proposal in principle but said clarification was needed as to whether the panel's reviews would be done on the papers, in private or in an open forum. It said it was also unclear whether the person subject to the measure under review could appear and make submissions and whether counsel could be appointed to represent the subject person's interests and rights. The Public

⁹⁶ 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.

⁹⁷ Preferred Approach Paper, P95.

⁹⁸ Preferred Approach Paper, P96.

Defence Service agreed with our proposal but suggested that a person subject to a preventive measure should be able to waive their right to a review if their situation is unlikely to change.

- 18.128 The South Auckland Bar Association disagreed without further comment.
- 18.129 We proposed that the review panel should be able to request information relevant to the review and to conduct interviews with the person subject to the preventive measure under review.⁹⁹ Most submitters who responded to this proposal agreed.¹⁰⁰
- 18.130 We proposed the review panel should apply the legislative tests for imposing preventive measures.¹⁰¹ Most submitters who responded to this proposal agreed with it.¹⁰² The Public Defence Service added that it should be made explicit that the justification for any specific special conditions should also be reviewed. The South Auckland Bar Association disagreed with the proposal.
- 18.131 We proposed there should be three possible outcomes of a review undertaken by the review panel: confirming the measure, varying special conditions to make them less restrictive and directing the chief executive to apply to the court for termination of the measure.¹⁰³
- 18.132 Most submitters who responded to this proposal supported it.¹⁰⁴ The Bond Trust added that another possible outcome should be that the review panel makes directions to the chief executive about how the measure should be administered. The NZLS supported the proposal in principle but queried whether it should be possible for the review panel to vary conditions to make them *more* restrictive or, at the very least, to recommend that the chief executive should apply for a more restrictive condition.
- 18.133 Criminal lawyers from Te Tari Ture o te Karauna | Crown Law had some concerns about the review panel's ability to direct the chief executive to apply to the court for a termination of the preventive measure rather than apply for a court review. In any case, they submitted, the decision whether to terminate the measure should rest with the court rather than the chief executive.
- 18.134 The South Auckland Bar Association disagreed without further comment.

⁹⁹ Preferred Approach Paper, P97.

¹⁰⁰ Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

¹⁰¹ Preferred Approach Paper, P98.

¹⁰² Bond Trust, Myra Crawford-Smith, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

¹⁰³ Preferred Approach Paper, P99.

¹⁰⁴ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

Recommendations

R131

To provide additional reviews of preventive measures alongside court reviews, the new Act should provide for the establishment of a Review Authority as an independent statutory entity.

R132

The Review Authority should operate in panels of three to four members, one of whom must be a panel convenor or the chairperson. A decision by a panel acting within its jurisdiction should be a decision of the Review Authority.

R133

The Review Authority should have the following membership. It should:

- a. be chaired by a judge or former judge;
- b. include other judges or former judges or experienced barristers and solicitors 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 expertise in mātauranga Māori (including tikanga Māori).

R134

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

R135

The Review Authority should review the ongoing justification for a preventive measure by applying the same legislative tests that are used for imposing preventive measures (R25).

R136

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

- a. confirming the ongoing justification for the preventive measure and, if applicable, its conditions;
- b. in the case of community preventive supervision or residential preventive supervision, confirming the ongoing justification for the preventive measure but varying the special conditions to make them less restrictive; 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 for a court review of the preventive measure.

R137

If the Review Authority confirms a preventive measure, it should be required to review the person's treatment and supervision plan. The Review Authority should have the power to make recommendations to the person responsible for developing and administering the plan.

R138 The Review Authority should be able to regulate its own procedure. Review Authority hearings should be run in the manner of an inquiry and in an atmosphere that encourages people appearing before it to speak for themselves and as freely and frankly as possible.

R139 The Review Authority should have the power to decide whether a hearing held by the Review Authority should be open or closed to the public.

R140 The Review Authority should have the power to request information relevant to the review from the people responsible for the administration of a preventive measure.

R141 The person subject to a preventive measure under review should be able to appear and make oral submissions to the Review Authority. They should be able to be represented by a lawyer.

The need for reviews by the Review Authority

18.135 We conclude that the new Act should establish an independent, multi-disciplinary Review Authority to complement the three yearly court review with the efficiency of a specialised review body that reviews measures annually.

18.136 There is 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.¹⁰⁵

18.137 The Review Authority will be based on the models of the review panel under the PPO Act and the Parole Board. The Review Authority will hold similar functions to the review panel established under the PPO Act and to the Parole Board. On the one hand, the Review Authority will fulfil primarily a periodic review function alongside the courts, which resembles the current role of the PPO review panel. On the other hand, it will also have the power to vary special conditions (discussed later in this chapter), which is more similar to the role the Parole Board currently exercises.

18.138 We recommend the entity should be referred to as the “Review Authority” rather than “review panel”, which was the term we originally used in the Preferred Approach Paper. This is because the recommended structure comprises multiple convened panels, each acting as the Review Authority in relation to a particular case. It is likely that multiple panels will need to operate in parallel to work through annual reviews of all preventive measures in force. Although we used the term “review panel” in our proposals in the Preferred Approach Paper, we now consider the term “Review Authority” better describes its nature.

18.139 We anticipate the Review Authority will come to hold considerable experience and expertise on preventive measures because of the profile of its membership and its annual

¹⁰⁵ Serious Offenders Act 2018 (Vic), ss 99–100 and 291(1)(e) and (i).

review functions. This will make the exercise of its review responsibilities efficient. It will also serve as a useful source of information for the courts.

18.140 We disagree with the submission that a person subject to a preventive measure should be able to waive their right to a periodic review by the Review Authority under any circumstance. Even if no changes to a person's situation under preventive measures are likely to be made, the annual reviews by the Review Authority still provide important oversight and generate information that will be relevant in subsequent court reviews. The person subject to the preventive measure will not be required to participate in Review Authority hearings if they do not wish to.

Constitution of the Review Authority

18.141 The constitution of the Review Authority should be modelled on the Parole Board, because its scope will be broader than that of the PPO review panel and its workload more extensive. Accordingly, we recommend that the Review Authority, like the Parole Board, should be established as an independent statutory entity.

18.142 We consider the Review Authority should, similar to the Parole Board, have a pool of members sufficient in number to enable the Review Authority to carry out its functions. Members with expertise in mātauranga Māori (including tikanga Māori) should only be appointed after appropriate consultation with Māori has been undertaken.

18.143 Some of the Review Authority members with a legal background (judges, former judges or experienced solicitors or barristers) should be appointed as panel convenors. As such, they should be able to convene a panel comprising three to four members (including the panel convenor) to consider individual cases. The convenor of a panel should ensure that the panel comprises adequate expertise in law, psychiatry, clinical psychology and mātauranga Māori.

18.144 We acknowledge the submissions that suggested including further types of members on the Review Authority such as people from the general public or representatives from interest groups. We consider, however, that the areas of expertise that are most relevant to assessing a person's reoffending risk — legal, psychiatric, psychological and mātauranga Māori expertise — are covered by the membership we recommend.

18.145 As for the suggestions to include members with experience in managing offenders on release, we consider that this area of expertise will be covered by members with Parole Board experience. The Review Authority should also be able to receive relevant information from the people responsible for the administration of a preventive measure.

Reviews by the Review Authority

18.146 We recommend that each review carried out by the Review Authority should result in a formal decision to:

- (a) confirm the ongoing justification for the preventive measure and, if applicable, its conditions;
- (b) in the case of community preventive supervision or residential preventive supervision, confirm the ongoing justification for the preventive measure but vary the special conditions to make them less restrictive; or
- (c) if it considers the preventive measure may no longer be justified, direct the chief executive to apply to the relevant court for a court review.

- 18.147 As with court reviews, a review of a preventive measure by the Review Authority includes reviewing special conditions where applicable.
- 18.148 Preventive measure should be as responsive as possible to changes in a person's risk levels. Therefore, the Review Authority should have powers to vary special conditions to make them less restrictive.
- 18.149 One submitter stated that the Review Authority should be able to make special conditions more restrictive as well. We disagree. The review process should focus on the ongoing justification for the preventive measure and whether a less restrictive measure would be more appropriate. This is consistent with the review panel's powers to modify requirements of protective supervision orders to render them less restrictive under the PPO Act.¹⁰⁶
- 18.150 Whether *more restrictive* conditions are required is a fundamentally different inquiry and warrants a different procedure. That procedure should enable the person to respond to, and challenge the reasons for, the greater restrictions sought. We address this point further below.
- 18.151 One submitter suggested that it should be possible for the Review Authority to review how a preventive measure is managed in practice. In response, we have recommended that the Review Authority must review the person's treatment and supervision plan if it confirms the preventive measure. It may make recommendations to the person responsible for developing the treatment and supervision plan on possible changes to it. This approach reflects the current law in the PPO Act.¹⁰⁷
- 18.152 If the Review Authority finds that a preventive measure may no longer be justified based on the legislative tests and may have to be terminated, it must direct the chief executive to apply to the relevant court for a review of the measure.
- 18.153 Although the resulting application should be brought by the chief executive, we expect that it will bring to the court's attention the Review Authority's reasoning as to why the measure may no longer be justified. We have slightly amended our original proposal in response to the submission that the chief executive should apply for a review with an unspecified outcome rather than for the termination of the preventive measure specifically. This is to avoid requiring the chief executive to apply for a specific outcome that the chief executive disagrees with. The chief executive should be entitled to make opposing submissions if they do not agree with the Review Authority's view.
- 18.154 We recommend that the Review Authority should review the ongoing justification for the measure by applying the same legislative tests that are used for imposing preventive measures. However, the test is slightly different when the Review Authority directs the chief executive to apply for a court review of the preventive measure. In that case, the Review Authority under the new Act should not need to be certain that the legislative tests are no longer met.
- 18.155 Rather, its determination that this *may* be the case should be sufficient to trigger a court review. This is in line with the relevant provision of the PPO Act.¹⁰⁸ The threshold is

¹⁰⁶ Public Safety (Public Protection Orders) Act 2014, s 97.

¹⁰⁷ Public Safety (Public Protection Orders) Act 2014, s 15(3).

¹⁰⁸ Public Safety (Public Protection Orders) Act 2014, s 15(2).

reached if there is “a real possibility on the evidence”.¹⁰⁹ If the Review Authority considers that the legislative test may no longer be met, it must direct the chief executive to apply for a court review — the decision to trigger a court review should not be discretionary.

Review Authority procedure

- 18.156 We recommend that the Review Authority should have the power to conduct hearings. This aligns with the current law. The Parole Board conducts hearings in relation to parole for sentences of imprisonment (including preventive detention) and in relation to reviewing certain ESO conditions.¹¹⁰ The PPO review panel conducts hearings for reviews of PPOs or prison detention orders.
- 18.157 The Review Authority’s hearings should be conducted in a similar manner to that of Parole Board hearings currently. They should encourage people appearing before the Review Authority to speak for themselves and as freely and frankly as possible.¹¹¹ The person subject to the preventive measure under review should be able to make oral submissions and be represented by a lawyer. Within these constraints, the Review Authority should be able to regulate its own procedure.¹¹²
- 18.158 Like the Parole Board, we consider that the Review Authority should have the power to determine whether any hearing it holds is open to the public or not. This is also consistent with the PPO Act’s current provision on court hearings.¹¹³ We expect that, usually, a closed hearing will be more conducive to people who are appearing before the panel speaking freely and frankly. However, there may be cases where the Review Authority considers that the public interest in open proceedings outweighs that objective.
- 18.159 Lastly, the Review Authority should have broad powers to request relevant information from the chief executive, the relevant probation officer or the manager of the relevant facility.¹¹⁴
- 18.160 We do not recommend that new health assessor reports should be prepared for each annual review. We think that new health assessor reports for each review by the Review Authority are not strictly necessary and would put further significant pressure on health assessors. The Review Authority will, however, be able to scrutinise previous health assessor reports and documentation prepared by probation officers (for community preventive supervision) or facility managers and their staff (for residential preventive supervision and secure preventive detention).
- 18.161 The inquisitorial nature of Review Authority hearings will assist the authority in this task. The Review Authority will also be able to draw on the expertise of its members who are psychologists or psychiatrists. The chief executive should submit the Review Authority’s most recent decision to the court when applying for the next court review.

¹⁰⁹ *Douglas v Chief Executive of Department of Corrections* [2020] NZHC 1107 at [18].

¹¹⁰ See Parole Act 2002, ss 21–22, 107RB(4)(b) and 107RC(4)(b).

¹¹¹ Compare Parole Act 2002, s 49.

¹¹² Compare Parole Act 2002, s 117A; and Public Safety (Public Protection Orders) Act 2014, s 123(4).

¹¹³ Public Safety (Public Protection Orders) Act 2014, s 109.

¹¹⁴ Compare Public Safety (Public Protection Orders) Act 2014, s 112.

APPLICATIONS TO TERMINATE OR VARY A PREVENTIVE MEASURE

- 18.162 It may sometimes be necessary to immediately terminate or vary a preventive measure between periodic reviews. People must not be subject to measures any longer than is justified. It would, for example, not be lawful to maintain a preventive measure until the next periodic review if it is no longer justified in the intervening period.
- 18.163 Our comparative analysis has shown that most comparable jurisdictions provide for avenues to apply to either a court or a parole board or other review body to terminate or vary preventive measures between periodic reviews.
- 18.164 We consider the new Act could complement periodic reviews with separate avenues to terminate or vary a preventive measure.

Results of consultation

- 18.165 In the Preferred Approach Paper, we proposed that the chief executive and, with the leave of the court, the person subject to a preventive measure should be able to apply to the relevant court to terminate the preventive measure.¹¹⁵ Submitters agreed with our proposal in principle.¹¹⁶
- 18.166 However, most submitters who responded to this proposal were opposed to the leave requirement for a person subject to a measure.¹¹⁷ The NZLS stated that, given the significant restriction on liberty and the proposed indeterminate nature of all orders, a leave requirement may unnecessarily restrict oversight and impede a person's rights. It suggested that, if there is a concern about burdening the system with applications to terminate, it may be best to consider whether "a material change in circumstances" should be required. The Public Defence Service added that, under the current law, leave is not required to apply to terminate an ESO and that the court is not inundated with applications.
- 18.167 Some submitters, in line with their general views on the proposed review mechanism, disagreed about the allocation of jurisdiction. The Bond Trust submitted that all termination applications should be considered by the High Court. Another submitter thought all termination applications should be considered by the review panel.
- 18.168 The NZLS voiced concern that some people subject to preventive measures may, because of a disability, not be able to apply for termination.
- 18.169 We further proposed that the chief executive and the person subject to a preventive measure should be able to apply to the review panel to vary the special conditions (if applicable).¹¹⁸ Submitters who responded to our proposal agreed with it.¹¹⁹
- 18.170 We also proposed that the chief executive and the person subject to a preventive measure should be able to appeal the review panel's decision to vary any special

¹¹⁵ Preferred Approach Paper, P100.

¹¹⁶ Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society, South Auckland Bar Association.

¹¹⁷ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

¹¹⁸ Preferred Approach Paper, P101.

¹¹⁹ Bond Trust, Myra Crawford-Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society (subject to its concerns voiced in the context of an application to terminate a measure), Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association.

conditions of a measure.¹²⁰ Again, most submitters who responded to our proposal agreed with it.¹²¹

18.171 The NZLS supported the proposal in principle but stated it should be clarified that a person does not need to apply for leave to appeal. It suggested that requiring the Solicitor-General's consent for the chief executive to appeal against a review panel decision would provide the benefit of independent oversight about whether an appeal is appropriate.

18.172 The Bond Trust and another submitter stated that all appeals of review panel decisions should be submitted to the High Court.

Recommendations

R142 The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to a preventive measure should be able to apply to the court to terminate the measure without replacement or to terminate the measure and replace it with a less restrictive measure. An application concerning community preventive supervision should be submitted to te Kōti-ā-Rohe | District Court. An application concerning residential preventive supervision or secure preventive detention should be submitted to te Kōti Matua | High Court.

R143 When determining an application to terminate 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 (R25).

R144 If, following an application to terminate a measure without replacement, te Kōti Matua | High Court is not satisfied the measure should be terminated without replacement but is satisfied the measure should be terminated and replaced with a less restrictive measure instead, it should have the power to do so in the same proceedings.

R145 If the court declines to order the termination of a measure following an application to terminate by the person subject to the measure, the court should be able at the same time, and on its own initiative or on application by the chief executive of Ara Poutama Aotearoa | Department of Corrections, to order that the person subject to the measure not be permitted to apply for termination of the measure for a specified period of not more than two years.

¹²⁰ Preferred Approach Paper, P102.

¹²¹ Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, South Auckland Bar Association, The Law Association of New Zealand.

R146 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 Authority to vary the special conditions of community preventive supervision or residential preventive supervision.

R147 The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to residential preventive supervision should be able to apply to the Review Authority to change the specific residential facility where the person subject to residential preventive supervision must stay.

R148 The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to a preventive measure should have a right to appeal to the relevant court (te Kōti-ā-Rohe | District Court for community preventive supervision or te Kōti Matua | High Court for residential preventive supervision) against a decision by the Review Authority to vary special conditions.

Applications for termination by the court

- 18.173 We conclude that the chief executive and the person subject to a preventive measure should be able to apply to the relevant court for termination of the measure in force. This is to ensure that the court can respond to changes in a person's risk profile between periodic reviews.
- 18.174 Unlike an application for a periodic court review where the chief executive seeks a review without specifying the desired outcome, we recommend that the applicant should specifically seek to terminate the measure.
- 18.175 This will allow the court to determine more efficiently whether a preventive measure should be terminated or not. If, following an application to terminate residential preventive supervision or secure preventive detention, the High Court is not satisfied the measure should be terminated without replacement but is satisfied the measure should be replaced with a less restrictive measure instead, it should have the power to do so in the same proceedings. This recommendation only addresses the High Court, because the District Court's jurisdiction is restricted to community preventive supervision, which cannot be replaced with a less restrictive measure.
- 18.176 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.
- 18.177 Several submitters were sceptical of the requirement that a person subject to a preventive measure must be granted leave by the court to apply for termination. In response to this feedback, we have removed the requirement.
- 18.178 According to the Public Defence Service, the courts have not been overwhelmed with applications to cancel ESOs despite the absence of a leave requirement. The Parole Act instead provides for the possibility that, if the sentencing court declines to terminate the

order, it may order that the offender is not permitted to apply again for up to two years.¹²² We understand that this power is seldom used. On the contrary, there are some cases where the court acknowledges the possibility of barring a person from reapplying but decides against making use of that power.¹²³ We think the courts will be as circumspect and measured in applying a similar provision under the new Act.

- 18.179 We also acknowledge the NZLS's concern that a disabled person may not be able to apply for termination of a measure without assistance. We consider that the people responsible for managing people subject to preventive measures and the lawyers of people subject to preventive measures should ensure they are aware of their rights and can exercise them.
- 18.180 We do not consider this is an issue with the right to apply for termination specifically. That is why we recommend in Chapters 14 to 16 that people subject to preventive measures should be informed about conditions, instructions, entitlements, obligations and decisions that affect them. They should be given information in a way that ensures that they understand the nature and effect of conditions, instructions, entitlements, obligations and decisions.
- 18.181 In Chapter 12, we recommend that there should be a right to appeal against court decisions under the new Act. This includes appeals against decisions determining applications to terminate a preventive measure.

Applications to the Review Authority for variation of conditions

- 18.182 We conclude that it should be possible for the chief executive or the person subject to a preventive measure to apply to the Review Authority for a variation of special conditions. This recommendation will allow the Review Authority to vary special conditions in any way, including to make them less or more restrictive. (Its powers within periodic reviews should be limited to making conditions less restrictive.)
- 18.183 The purpose of this recommendation 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 Authority did not 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 would take longer, and it would be an unnecessary use of court resources.
- 18.184 The Review Authority's ability to vary special conditions will be analogous to the Parole Board's power to vary ESO conditions under the current law. However, the new Act will avoid the current issues of split jurisdictions between the courts and the Parole Board by allowing *both* the courts and the Review Authority 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.
- 18.185 We recommend that the Review Authority should be able to vary the relevant standard condition that specifies at which residential facility a person must stay. In Chapter 15, we explain that there could be instances where a person needs to be transferred from one

¹²² Parole Act 2002, s 107M(6).

¹²³ *Kerr v Chief Executive of Department of Corrections* [2021] NZHC 2347 at [111]; and *Miller v Department of Corrections* [2021] NZHC 983 at [66].

residential facility to another. There are several reasons why a change of facility may be required, for example, because of family needs, employment opportunities, new rehabilitation opportunities or hostile dynamics between residents.

- 18.186 The person subject to a preventive measure and the chief executive should be able to appeal the decision of the Review Authority to the relevant court. We make this recommendation because, by varying special conditions, the Review Authority will have the power to significantly change the character of community preventive supervision or residential preventive supervision.
- 18.187 We do not consider appealing a decision of the Review Authority should require the leave of the responsible court.¹²⁴ However, consistent with current practice, the Solicitor-General should be required to authorise appeals on behalf of Ara Poutama against decisions by the Review Authority.¹²⁵
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¹²⁴ There are other examples of appeal against non-judicial authorities where no leave of the court is required. See for example ss 120–121 of the Resource Management Act 1991 on the right to appeal to the Environment Court against a decision of the consent authority without requiring the leave of the court; or s 123 of the Human Rights Act 1993 on the right to appeal to te Kōti Matua | High Court against a decision of the Human Rights Review Tribunal.

¹²⁵ Criminal Procedure Act 2011, s 246(2). See also Cabinet Office Circular “Cabinet Directions for the Conduct of Crown Legal Business 2016” (30 March 2016) CO 16(2) at [29]; and “Appeals | Ngā Pira” in *The Solicitor-General’s Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (Te Tari Ture o te Karauna | Crown Law, December 2024) at [19].

CHAPTER 19

Transitional provisions

INTRODUCTION

- 19.1 In this Report, we recommend the repeal of the current law governing preventive detention, extended supervision orders (ESOs) and public protection orders (PPOs) and the introduction of a reformed preventive regime under a new Act.
- 19.2 In this chapter, we discuss the need for transitional arrangements to implement these reforms. We recommend that Ara Poutama Aotearoa | Department of Corrections (Ara Poutama) should consider how the new Act should come into effect. The proposed regime under the new Act will require work and time to implement. Ara Poutama, as the government agency responsible, is best placed to assess when and how the new regime can be brought into effect.
- 19.3 Alongside the logistical challenges of implementation, Ara Poutama will need to consider the compatibility of any retrospective provisions in the new Act with human rights law. Without making recommendations on these matters, we share some advice on the human rights implications of possible transitional provisions.

RECOMMENDATION

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

- 19.4 We recommend that Ara Poutama should consider when the new Act should commence when work for the preparation of the Bill is under way.
- 19.5 We conclude that Ara Poutama, as the agency responsible for implementing and administering the new regime, will be best placed to consider the appropriate time the new Act should come into effect. Feedback we received in consultation from the Bond Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society and another submitter supported this approach.
- 19.6 Implementing our recommendations for a new Act will take time, and it will be necessary to invest additional resources to establish facilities for residential preventive supervision and secure preventive detention. It will also be necessary to allow time, for example, for the appointment of facility managers and inspectors (Chapter 13) and for the establishment of the Review Authority (Chapter 18). 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.¹

HUMAN RIGHTS IMPLICATIONS OF TRANSITIONAL PROVISIONS

- 19.7 In addition to the logistical challenge of implementing the new regime, the way it is introduced is likely to engage a range of considerations under human rights law. These relate principally to the possibility of provisions in the new Act having retrospective application (applying to people who committed a qualifying offence before the new Act comes into force). We see no legal issues concerning the prospective application of the new Act.
- 19.8 It is a long-standing principle at common law and of domestic and international human rights law that it is unfair to impose consequences on people for their behaviour when those consequences are harsher than those that applied at the time of the relevant conduct.² This principle manifests as a presumption of prospectivity in statutory interpretation. It has also been affirmed in the Crimes Act 1961, the Sentencing Act 2002, the Legislation Act 2019 and the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).³
- 19.9 In order to overcome the presumption of prospective application, any transitional provisions of the new Act will need to state plainly under what circumstances, and to what extent, the new Act is intended to apply retrospectively.⁴
- 19.10 In some circumstances, retrospective application of the Act might result in an unjustified infringement of the NZ Bill of Rights. However, we do not consider that all retrospective application will result in an unjustified infringement. We set out below the relevant provisions in the NZ Bill of Rights and then comment on what bearing they have on the implementation of the new Act.

Relevant human rights protections

Section 26(2) of the New Zealand Bill of Rights Act 1990

- 19.11 Section 26(2) of the NZ Bill of Rights provides that no one who has been finally acquitted or convicted of an offence shall be tried or punished for it again.
- 19.12 Although section 26(2) of the NZ Bill of Rights does not expressly target retrospective laws, New Zealand courts have said that whether or not a second punishment is retrospective will be highly relevant to whether it can be justified.⁵

¹ BvR 2365/09 Federal Constitutional Court, Second Senate, 4 May 2011 at [170].

² See for example *R v Poumako* [2000] 2 NZLR 695, (2000) 5 HRNZ 652 (CA) at [2]–[6] per Richardson P, Gault and Keith JJ and [70]–[75] per Thomas J.

³ Crimes Act 1961, s 10A; Sentencing Act 2002, s 6; Legislation Act 2019, s 12; and New Zealand Bill of Rights Act 1990, ss 25(g) and 26.

⁴ See for example the wording of s 107C(2) of the Parole Act 2002.

⁵ *Attorney-General v Chisnall* [2024] NZSC 178; and *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

- 19.13 In *Attorney-General v Chisnall*, te Kōti Mana Nui | Supreme Court held that the ESO and PPO regimes are a limit on the section 26(2) right.⁶ The Court considered whether this limitation could be justified for the purposes of section 5 of the NZ Bill of Rights. It considered the question of justification by distinguishing:
- (a) between the aspects of the regimes that enabled a person to live in the community and the aspects that authorised detention; and
 - (b) between prospectively and retrospectively imposed measures.
- 19.14 For the aspects of the regimes that enable the retrospective imposition of ESOs that do not authorise detention, the Supreme Court held that the limitation on the section 26(2) right was justified.⁷ The Court said that “a purely prospectively applied regime would not be as effective at securing the legislative objective” because it would leave some high-risk offenders unmanaged.⁸ It also observed that ESOs under which people live in the community, rather than detained, are “not amongst the most severe category of penalty”.⁹
- 19.15 On the other hand, the Supreme Court held that the aspects of the ESO and PPO regimes that authorise the retrospective imposition of detention are limitations on section 26(2) of the NZ Bill of Rights that can never be justified:¹⁰
- [T]here is one limitation upon the s 26(2) right which it is clear is not capable of justification – that is, a second penalty amounting to detention and which is applied retrospectively (in the sense that the second penalty subjects the person to detention in connection with offending that occurred prior to the regimes’ enactment as it applies to them). This is because ... the rule of law and fairness imperatives of the principle against retrospective application of criminal liability and sanction are particularly powerful where the sanction entails detention.
- 19.16 The Supreme Court’s judgment in *Attorney-General v Chisnall* is consistent with previous court decisions and reports prepared by the Attorney-General under section 7 of the NZ Bill of Rights on the retrospective application of the ESO regime.¹¹

⁶ *Attorney-General v Chisnall* [2024] NZSC 178 at [138].

⁷ *Attorney-General v Chisnall* [2024] NZSC 178 at [260].

⁸ *Attorney-General v Chisnall* [2024] NZSC 178 at [231] and [259].

⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [260].

¹⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [146].

¹¹ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA); and 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]. See also in the context of retrospectively applied registration and reporting requirements for sex offenders: Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill* (6 May 2015) at [25]–[40]; Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill* (7 March 2017) at [16]–[42]; David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill* (March 2021) at [41]–[52]; David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill* (8 November 2021) at [34]–[37]; and Judith Collins *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill* (17 September 2024) at [28]–[42].

- 19.17 The Supreme Court also considered it was “arguable” that a retrospectively imposed second penalty amounting to detention was an arbitrary detention for the purposes of section 22 of the NZ Bill of Rights.¹²
- 19.18 Section 26(1) of the NZ Bill of Rights protects people from being convicted for an act or omission that did not constitute an offence at the time it occurred. The Supreme Court in *Attorney-General v Chisnall* concluded that this right was not engaged by ESOs or PPOs. This was because ESOs and PPOs do not criminalise any conduct that has not previously been criminal.¹³ We therefore do not consider section 26(1) is relevant to the retrospective application of the new Act.

Section 25(g) of the New Zealand Bill of Rights Act 1990

- 19.19 If the penalty for an offence has been changed between the commission of the offence and sentencing, section 25(g) of the NZ Bill of Rights protects the right of a person convicted of the offence to have the benefit of the lesser penalty.
- 19.20 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 section 4 of the NZ Bill of Rights), section 6 of the Sentencing Act applies despite any other enactments.¹⁴
- 19.21 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.
- 19.22 Section 25(g) of the NZ Bill of Rights has, however, been applied on some occasions in the context of post-sentence orders.¹⁵ Te Kōti Pira | Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* accepted that ESOs engage section 25(g).¹⁶

How the new Act will compare to the current law

- 19.23 To assess the implications of these human rights protections for possible transitional provisions under the new Act, it is necessary to be clear about the extent to which the preventive measures under the new Act are more or less punitive than the measures under the current law.

¹² *Attorney-General v Chisnall* [2024] NZSC 178 at [162].

¹³ *Attorney-General v Chisnall* [2024] NZSC 178 at [155]. See also David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole Amendment Bill* (22 August 2023) at [16]–[17].

¹⁴ 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.

¹⁵ *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.

¹⁶ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [49]. Te Kōti Mana Nui | Supreme Court in *Attorney-General v Chisnall* [2024] NZSC 178 did not rule on whether s 25(g) applied to the ESO and PPO regimes.

- 19.24 As we have expressed throughout this Report, there are multiple issues with the current law on preventive detention, ESOs and PPOs. We have explained why we think the reformed preventive measures we recommend under a new Act will be less punitive than the current preventive measures. In summary, the most important factors are that the new Act will 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) (Chapter 4);
 - (c) a strengthened focus on rehabilitation and reintegration (Chapter 5);
 - (d) a legislative test that ensures that the preventive measure imposed (including any special conditions) is the least restrictive measure adequate to address the person's reoffending risk (Chapter 10);
 - (e) more extensive appeal rights (Chapter 12);
 - (f) more extensive mechanisms for inspection of residential facilities and secure facilities as well as procedures to investigate complaints (Chapter 13);
 - (g) an entitlement to appropriate rehabilitative treatment and reintegration support (Chapter 13);
 - (h) guiding principles to ensure that those responsible for administering preventive measures exercise their powers in accordance with the rights of the people subject to the measures (Chapter 13);
 - (i) secure facilities that are separate from prison (Chapter 16); and
 - (j) more extensive review mechanisms for all preventive measures (Chapter 18).
- 19.25 Based on how the new Act will compare to the current law, we set out our advice below on the assumption that:
- (a) community preventive supervision is a lesser penalty than the standard conditions of an ESO and the standard release conditions for people on preventive detention;
 - (b) residential preventive supervision is a lesser penalty than an ESO or parole from preventive detention with special conditions that authorise detention; and
 - (c) secure preventive detention is a lesser penalty than a PPO or imprisonment under a sentence of preventive detention.
- 19.26 The changes we recommend to eligibility criteria in Part 3 of this Report are also relevant. The eligibility criteria we recommend are similar to those under the current law but narrower in two respects. Under the new Act:
- (a) the minimum age of eligibility will be 18, whereas under the current law, people under 18 can be made subject to an ESO (Chapter 7); and
 - (b) overseas offenders will 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).

- 19.27 The position in respect of qualifying offences is more complicated. In Chapter 8, we recommend that incest, bestiality and accessory after the fact to murder (sections 130, 143 and 176 of the Crimes Act) should be removed from the list of qualifying offences. However, we also recommend some expansion to the list of qualifying offences:
- (a) Strangulation or suffocation (section 189A of the Crimes Act) should be added as a new qualifying offence.
 - (b) The imprisonable offences under the Films, Videos, and Publications Classification Act 1993 (FVPC Act) that are currently qualifying offences only for ESOs should be qualifying offences that make a person eligible for all preventive measures under the new Act.
 - (c) Qualifying offences under the Prostitution Reform Act 2003, which are currently only qualifying offences if committed overseas, should be qualifying offences whether committed overseas or in Aotearoa New Zealand.
- 19.28 As we explain further below, these new or extended qualifying offences have implications for the retrospective application of the new regime.

Human rights implications of retrospective application

- 19.29 Whether transitional provisions in the new Act might result in incompatibility with sections 25(g) or 26(2) of the NZ Bill of Rights depends on multiple factors. These include the type of qualifying offending, when it occurred, to which preventive measure (if any) the person is currently subject and when that measure was imposed on them. For this reason, we divide our advice below into multiple categories. Under each category, we explain whether we think the retrospective application of the new regimes would be compatible with the NZ Bill of Rights or not.
- 19.30 Some considerations apply to every category. For example, the Supreme Court in *Attorney-General v Chisnall* held that the retrospective imposition of ESOs that do not authorise detention is a justified limit on the NZ Bill of Rights protection against second punishment. Retrospective eligibility for community preventive supervision, which is similar to a community-based ESO, would therefore most likely be compatible with the NZ Bill of Rights under every category that we discuss.
- 19.31 In contrast, whether retrospective eligibility for residential preventive supervision or secure preventive detention is compatible with the NZ Bill of Rights varies from category to category.
- 19.32 Our advice set out below comes with some qualifications:
- (a) First, our advice does not cover every possible scenario in which a preventive measure is imposed or modified. It is intended to serve as a starting point to assist officials in their more detailed considerations in preparation of a Bill.
 - (b) Second, we only consider here the implications of the NZ Bill of Rights for the *eligibility* of particular categories of people. Whether the retrospective imposition of a new preventive measure is consistent with the NZ Bill of Rights depends on the individual circumstances and can therefore only be accurately assessed by the courts on a case-by-case basis. In each individual case, the court would need to ascertain that the individual preventive measure imposed really is a lesser penalty than the measure that would have been imposed on the person under the current law.
 - (c) Lastly, our advice assumes that measure under the new Act may be held by the New Zealand courts to amount to a penalty for the purposes of the NZ Bill of Rights. It is

possible that the courts may find the new regime does not engage sections 25(g) and 26(2), but, based on past cases, we think this is unlikely.

Overview

19.33 In the following table, we summarise the NZ Bill of Rights implications of applying the new Act retrospectively to particular categories of people. By retrospective application, we mean application to people who committed their qualifying offence before the commencement of the new Act. We provide accompanying explanations in the sections below.

CATEGORY	ELIGIBILITY FOR PREVENTIVE MEASURES UNDER THE NEW ACT		
	COMMUNITY PREVENTIVE SUPERVISION	RESIDENTIAL PREVENTIVE SUPERVISION	SECURE PREVENTIVE DETENTION
People awaiting sentencing	required	required	required
People serving a determinate prison sentence	compatible	compatible	compatible
People convicted of certain offences under the FVPC Act	compatible	compatible	incompatible
People convicted of strangulation or suffocation	compatible	incompatible	incompatible
People convicted of domestic Prostitution Reform Act offences	compatible	incompatible	incompatible
People subject to preventive detention	compatible	compatible	compatible
People subject to prospective ESOs who are eligible for PPOs	compatible	compatible	compatible
People subject to prospective PPOs	compatible	compatible	compatible
People subject to prospective ESOs who are <i>not</i> eligible for PPOs	compatible	compatible	incompatible
People subject to retrospective ESOs	compatible	incompatible	incompatible
People subject to retrospective PPOs	compatible	incompatible	incompatible

People who committed a pre-existing qualifying offence before the commencement of the new Act and are awaiting sentencing

- 19.34 This category comprises people who have committed a pre-existing qualifying offence (an offence that is already a qualifying offence under the current regimes) before the commencement of the new Act and are still awaiting sentencing at the time of the commencement of the new Act.
- 19.35 Section 25(g) of the NZ Bill of Rights affirms a person’s right to have the benefit of the lesser penalty if the penalty has been changed between the commission of the offence and sentencing.
- 19.36 For this small group of people, section 25(g) may actively *require* the retrospective application of the new Act once it has entered into force. For reasons set out above, we consider the new measures we recommend amount to lesser penalties when compared to preventive measures under existing law. People in this category are entitled to the benefit of these lesser penalties under section 25(g).

People convicted of a pre-existing qualifying offence before the commencement of the new Act who are serving a determinate prison sentence

- 19.37 This category comprises people who have been convicted of a pre-existing qualifying offence, whose conviction has occurred before the commencement of the new Act and who are serving a determinate prison sentence at the time of commencement of the new Act.
- 19.38 On the plain meaning of the words, section 25(g) of the NZ Bill of Rights is only engaged if a new regime that amounts to a penalty commences after someone has committed an offence but before they are sentenced.
- 19.39 It is possible to interpret the word “sentencing” in section 25(g) broadly and purposively to encompass any court process at which a penalty is imposed, including the imposition of a preventive measure towards the end of a prison sentence. In that case, section 25(g) would still be engaged while a person is serving their determinate prison sentence. We think, however, that there is insufficient authority to support this broad interpretation of section 25(g).¹⁷
- 19.40 In our view, human rights law is neutral as to the eligibility of people in this category for new preventive measures. It would likely not infringe the NZ Bill of Rights to make people in this category eligible for preventive measures under the new Act.

People convicted of certain offences under the Films, Videos, and Publications Classification Act 1993 before the commencement of the new Act

- 19.41 This category deals with people who have, before the commencement of the new Act, been convicted of offences under the FVPC Act that are qualifying offences for the purposes of the ESO regime.

¹⁷ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis NZ, 2015) at 23.9.2–23.9.3. But see *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA) at [35]; and *Chief Executive, Department of Corrections v Chisnall* [2019] NZHC 3126 at [100].

- 19.42 In Chapter 8, we recommend 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. A person who is subject to an ESO because they committed an imprisonable offence under the FVPC Act is not eligible for a PPO.¹⁸
- 19.43 We think it would likely be incompatible with section 26(2) of the NZ Bill of Rights to make people in this category eligible for secure preventive detention. As discussed, the retrospective imposition of an increased second penalty that authorises detention is a limitation on section 26(2) of the NZ Bill of Rights that can never be justified.¹⁹
- 19.44 We think it would likely not infringe section 26(2) to make people in this category eligible for community preventive supervision and residential preventive supervision. Neither of these two measures amount to a harsher penalty than what is currently available under the ESO regime.

People convicted of strangulation or suffocation before the commencement of the new Act

- 19.45 This category comprises people who, before the commencement of the new Act, were convicted of an offence that is not a qualifying offence under the current law but would be under the new Act.
- 19.46 In Chapter 8, we recommend that strangulation or suffocation should be a qualifying offence under the new Act. The introduction of this new qualifying offence would bring some people within the scope of the new regime that are outside the scope of application of the current law.
- 19.47 We think it would likely be incompatible with section 26(2) of the NZ Bill of Rights to make people in this category eligible for residential preventive supervision or secure preventive detention. As above, the retrospective imposition of an increased second penalty involving detention is a limitation on section 26(2) of the NZ Bill of Rights that can never be justified.²⁰ The retrospective imposition of community preventive supervision, on the other hand, could be justified.

People convicted of certain domestic Prostitution Reform Act 2003 offences before the commencement of the new Act

- 19.48 Like the previous category, this category deals with people who, before the commencement of the new Act, were convicted of an offence that is not a qualifying offence under the current law but would be under the new Act.
- 19.49 In Chapter 8, we conclude that qualifying offences under the Prostitution Reform Act, which are currently only qualifying offences if committed overseas, should be qualifying offences regardless of whether committed overseas or in Aotearoa New Zealand.
- 19.50 Broadening this new qualifying offence to include domestic offences would bring some people within the scope of the new regime that are outside the scope of application of the current law. Again, it would likely be compatible with section 26(2) of the NZ Bill of Rights to make people in this category eligible for community preventive supervision but

¹⁸ Public Safety (Public Protection Orders) Act 2014, s 7(3).

¹⁹ *Attorney-General v Chisnall* [2024] NZSC 178 at [146].

²⁰ *Attorney-General v Chisnall* [2024] NZSC 178 at [146].

incompatible to make them eligible for residential preventive supervision or secure preventive detention.

People subject to sentences of preventive detention

- 19.51 This category comprises people who, at the time of commencement of the new Act, are serving sentences of preventive detention.
- 19.52 The transfer of people from preventive detention to a post-sentence order under the new Act would likely amount to the imposition of a second penalty. Section 26(2) of the NZ Bill of Rights would therefore be engaged. However, we consider the limit on the right would likely be justified.
- 19.53 Preventive detention is the most punitive preventive measure available under the current law. As we state above, we provide this advice under the assumption that:
- (a) secure preventive detention is a lesser penalty than imprisonment during a sentence of preventive detention;
 - (b) residential preventive supervision is a lesser penalty than being on parole during a sentence of preventive detention subject to special conditions that amount to detention; and
 - (c) community preventive supervision is a lesser penalty than being on parole during a sentence of preventive detention subject to release conditions that do not involve detention.
- 19.54 We consider it would likely be compatible with section 26(2) of the NZ Bill of Rights to transfer people serving sentences of preventive detention across to one of the three preventive measures under the new Act because, in effect, their sentence of preventive detention would be replaced with a less punitive measure.

People subject to prospective extended supervision orders who are eligible for public protection orders

- 19.55 This category includes people who committed a qualifying offence before the commencement of the new Act who are already subject to ESOs and who are eligible for PPOs. A person subject to an ESO is eligible for a PPO if:²¹
- (a) the person has committed an offence that is a qualifying offence for both ESOs and PPOs; and
 - (b) the person is, or has been, subject to “a condition of full-time accompaniment and monitoring” or is subject to “a condition of long-term full-time placement in the care” of a programme provider.
- 19.56 For this category of people, we think eligibility for all three new preventive measures would likely be compatible with the NZ Bill of Rights. The reasons are complex and vary between preventive measures:
- (a) **Community preventive supervision.** As explained above, the Supreme Court’s decision in *Chisnall* suggests that the retrospective imposition of community preventive supervision would most likely be compatible with the NZ Bill of Rights.

²¹ Public Safety (Public Protection Orders) Act 2014, s 7(1)(b) and (3).

- (b) **Residential preventive supervision.** Eligibility for residential preventive supervision would likely be compatible with section 26(2) of the NZ Bill of Rights, because people subject to ESO conditions are eligible for special conditions amounting to detention. For reasons explained above, residential preventive supervision would be a less harsh penalty than detention under an ESO.
- (c) **Secure preventive detention.** Eligibility for secure preventive detention would likely be compatible with section 26(2) of the NZ Bill of Rights for a person who is subject to an ESO and eligible for a PPO. This is because eligibility for secure preventive detention would be a less harsh penalty than eligibility for a PPO.

People subject to prospective public protection orders

- 19.57 This category comprises people who were convicted of a qualifying offence before the commencement of the new Act but after commencement of the Public Safety (Public Protection Orders) Act 2014 and who are subject to PPOs.
- 19.58 In our view, eligibility for any new preventive measure, including secure preventive detention, would likely be compatible with section 26(2) of the NZ Bill of Rights. This is because they would all be less harsh penalties than the continued detention of people through the PPO regime.

People subject to prospective extended supervision orders who are not eligible for public protection orders

- 19.59 This category comprises people who committed a qualifying offence before the commencement of the new Act who are already subject to ESOs but who are not eligible for PPOs.
- 19.60 There are some offences that are qualifying offences for the purposes of the ESO regime but not the PPO regime (for example, imprisonable offences under the FVPC Act). People who have committed one of these offences and are subject to an ESO are not eligible for a PPO.²² People who are on ESOs but not subject to “a condition of full-time accompaniment and monitoring” or “a condition of long-term full-time placement in the care” of a programme provider are not eligible for a PPO either.
- 19.61 Eligibility for community preventive supervision and residential preventive supervision for this category of people would likely be compatible with the NZ Bill of Rights. As we explain above, the eligibility for these two measures is a less harsh penalty than the eligibility for ESOs under the current law.
- 19.62 Because this category of people would, under the current law, not be eligible for a PPO, making them eligible for secure preventive detention would likely infringe the NZ Bill of Rights.

People subject to retrospective extended supervision orders

- 19.63 This category includes people subject to ESOs who had committed a qualifying offence before the ESO regime was put in place in 2004. It also includes people who committed offences before they became qualifying offences when the ESO regime was extended in 2014.

²² Public Safety (Public Protection Orders) Act 2014, s 7(3).

- 19.64 As discussed, the Supreme Court has found that the retrospective imposition of a preventive measure that authorises detention can never be justified.²³ Retrospectively imposed ESOs can be a justified limit on section 26(2) of the NZ Bill of Rights so long as no special conditions authorising detention are imposed.
- 19.65 It would therefore be inconsistent with the NZ Bill of Rights to make people in this category subject to residential preventive supervision or secure preventive detention.

People subject to retrospectively imposed PPOs

- 19.66 This category comprises people who were convicted of a qualifying offence before the PPO regime was put in place in 2014, and who are subject to PPOs.
- 19.67 The Supreme Court has found that the retrospective imposition of detention as a preventive measure can never be justified.²⁴ Transferring people in this category onto residential preventive supervision or secure preventive detention would not cure this breach. Although a transfer of people in this category to the new regime might be preferable to continuing their PPOs, it would nevertheless remain incompatible with the NZ Bill of Rights.
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²³ *Attorney-General v Chisnall* [2024] NZSC 178 at [146]–[147].

²⁴ *Attorney-General v Chisnall* [2024] NZSC 178 at [146]–[147].

List of recommendations

PART 2: FOUNDATIONAL MATTERS

Preventive measures, community safety and human rights (Chapter 3)

R1 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.

R2 The preventive measures the law should provide for are:

- community preventive supervision;
- residential preventive supervision; and
- secure preventive detention

A single, post-sentence regime (Chapter 4)

R3 A new statute should be enacted to govern all preventive measures (the new Act).

R4 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.

R5 All preventive measures should be imposed as post-sentence orders. For preventive measures sought against an eligible person subject to a prison sentence in Aotearoa New Zealand for a qualifying offence, the new Act should require applications 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.

R6

A court sentencing an eligible person to imprisonment following conviction for a qualifying offence should give written notice to the person to inform them of their eligibility to have a preventive measure sought against them.

Reorienting preventive measures (Chapter 5)

R7

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.

R8

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.

R9

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.

R10

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 regarded as being detained in a prison under an order of committal.

R11

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. The Review Authority (see R131–R141) should annually review any reactivated conditions.

Te ao Māori and the preventive regimes (Chapter 6)

R12

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.

PART 3: ELIGIBILITY

Age of eligibility (Chapter 7)

R13

To be eligible for a preventive measure, the new Act should require that a person is aged 18 years or older at the time of an application.

Qualifying offences (Chapter 8)

R14

To be eligible for a preventive measure, the new Act should require that a person has been subject to a sentence of imprisonment for a conviction of a qualifying offence.

R15

Qualifying offences should be the same for all preventive measures.

R16

Qualifying offences should continue to focus on sexual and violent offending.

R17

Qualifying offences should be those offences set out in Appendix 1 of this Report.

R18 Imprisonable offences under the Films, Videos, and Publications Classification Act 1993 that are currently qualifying offences for an extended supervision order should be qualifying offences for all preventive measures.

R19 The offence of strangulation or suffocation (section 189A of the Crimes Act 1961) should be a qualifying offence.

R20 The following offences should not be qualifying offences:

- a. Incest (section 130 of the Crimes Act 1961).
- b. Bestiality (section 143 of the Crimes Act 1961).
- c. Accessory after the fact to murder (section 176 of the Crimes Act 1961).

R21 All qualifying offences should be further qualifying offences for the purpose of the application of the legislative tests in R25 except:

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

Overseas offending (Chapter 9)

R22 A person convicted of an offence overseas should be 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.

PART 4: IMPOSING PREVENTIVE MEASURES

Legislative tests for imposing preventive measures (Chapter 10)

R23

All proceedings for the imposition of a preventive measure should commence by application to the court from the chief executive of Ara Poutama Aotearoa | Department of Corrections for an order for a specific preventive measure.

R24

Jurisdiction to hear and determine applications for preventive measures should be as follows:

- a. Te Kōti-ā-Rōhe | District Court should have first instance jurisdiction to determine applications for community preventive supervision.
- b. Te Kōti Matua | High Court should have first instance jurisdiction to determine applications for residential preventive supervision and secure preventive detention.
- c. Where the chief executive of Ara Poutama Aotearoa | Department of Corrections applies for preventive measures in the alternative, they should apply to te Kōti Matua | High Court.

R25

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.

R26

In deciding whether the tests in R25 are met, the court should take into account:

- a. any health assessor reports before the court;
- b. whether the person has, or has had, a pattern of serious offending;
- c. any efforts made by the person to address the cause or causes of all or any of those offences;
- d. whether and, if so, how a preventive measure imposed can be administered by Ara Poutama Aotearoa | Department of Corrections (or on its behalf);
- e. any other possible preventive measure that the court could impose that would comply with those tests; and
- f. any other information relevant to whether the tests in R25 are met.

R27

Special conditions of community preventive supervision or residential preventive supervision should be set in the following way:

- a. An application for either measure should include any special condition sought.
- b. The court determining the application should apply the tests in R25 to the whole application, including the special conditions sought.
- c. An order imposing community preventive supervision or residential preventive supervision should include any special conditions of the measure.

R28

If the court is not satisfied the tests in R25 are met in respect of the measure sought in the application, the new Act should confer on the court the power in the same proceedings to impose a less restrictive preventive measure if satisfied the tests are met in respect of that measure.

R29

Before an application for a preventive measure is finally determined, the court should have power to impose any preventive measure on an interim basis in the following circumstances:

- a. An eligible person is, or is about to be, released from detention.
- b. An eligible person who is a returning offender arrives, or is about to arrive, in Aotearoa New Zealand.
- c. The court directs the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive) to consider an application in respect of a 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 makes an application to escalate a person to a more restrictive measure.

R30

To impose an interim preventive measure, the court should be satisfied the primary legislative tests in R25 are made out on the available evidence in support of the application for the interim measure.

R31

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

Evidence of reoffending risk (Chapter 11)

R32

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

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

R33

The health assessor reports should address 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 that risk, the preventive measure is the least restrictive measure adequate to address that risk.

R34

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.

R35

The court should be able to direct, on its own initiative, that a report or reports prepared by health assessors be provided.

R36

A person against whom an application for a preventive measure is made should be able to file a report or reports prepared by health assessors they have engaged.

R37

A person against whom a preventive measure is sought should have public funding available to them to obtain:

- a. two health assessor reports if the application against them is to impose residential preventive supervision or secure preventive detention; and
- b. one health assessor report if the application against them is to impose community preventive supervision.

R38

The new Act should provide that the court may receive and consider any evidence or information it thinks fit in proceedings under the new Act, 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.

Proceedings under the new Act (Chapter 12)

R39 Te Kōti Matua | High Court and te Kōti-ā-Rohe | District Court should hear and determine applications for preventive measures under their criminal jurisdiction.

R40 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-ā-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; or
- e. escalate a person to a more restrictive measure (including to a prison detention order).

R41 Part 6 of the Criminal Procedure Act 2011 should, with the necessary modifications, apply to the appeal as if it were an appeal against sentence.

R42 The lodging of an appeal should not prevent the decision appealed against taking effect according to its terms.

R43 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.

R44 The government should continue to develop and support ways to facilitate the court to hear views from family, whānau, hapū, marae, iwi and other people holding a shared sense of whānau identity.

R45

The chief executive of Ara Poutama Aotearoa | Department of Corrections should, as soon as practicable, notify 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 abandoned;
- 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 or termination 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; or
- h. that the person subject to community preventive supervision or residential preventive supervision has been convicted of a breach of their conditions.

R46

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.

R47

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.

R48

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.

R49

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, give directions or impose conditions on the disclosure or distribution of a victim's submission if, in its opinion, it is necessary to protect the physical safety or security, emotional welfare or privacy of the victim concerned; and
- c. making it an offence for any person to publish information provided to the court for the purpose of making a victim submission that identifies, or enables the identification of, a victim of a person subject to an application or a preventive measure.

R50

Court proceedings concerning preventive measures should generally be open to the public.

R51

The court should have the power 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;
- 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.

R52

The court should have the power to make an order forbidding publication of a matter listed under R51 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 (the person);
- b. unduly impede the person's ability to engage in rehabilitation and reintegration;
- c. create a real risk of prejudice to a fair trial;
- d. cause undue hardship to any victim of the person's previous offending;
- e. endanger the safety of any person;
- f. lead to the identification of another person whose name is suppressed by order of law; or
- g. prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

- R53** The court should have the power to make an order to clear the court if satisfied that:
- a. the order is necessary to avoid:
 - i. undue disruption to the conduct of proceedings;
 - ii. a real risk of prejudice to a fair hearing;
 - iii. endangering the safety of any person;
 - iv. undue hardship to the person who is the subject of an application for, or subject to, a preventive measure; or
 - v. prejudicing the maintenance of the law, including the prevention, investigation and detection of offences; and
 - b. a suppression order is not sufficient to avoid that risk.

PART 5: ADMINISTRATION OF PREVENTIVE MEASURES

Overarching operational matters (Chapter 13)

- R54** Ara Poutama Aotearoa | Department of Corrections should be responsible for the operation of preventive measures under the new Act.
- R55** The chief executive of Ara Poutama Aotearoa | Department of Corrections should appoint facility managers.
- R56** For facilities operated under a facility management contract, the contractor should appoint facility managers, subject to approval by the chief executive of Ara Poutama Aotearoa | Department of Corrections.
- R57** The chief executive of Ara Poutama Aotearoa | Department of Corrections should have the power to issue guidelines and instructions with which all facility managers should be required to comply.
- R58** The chief executive of Ara Poutama Aotearoa | Department of Corrections should have the power to 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).

R59

Every facility management contract should:

- a. provide for objectives and performance standards no lower than those that apply to Ara Poutama Aotearoa | Department of Corrections;
- b. provide for the appointment of a suitable person as facility manager; 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.

R60

The chief executive of Ara Poutama Aotearoa | Department of Corrections should have the power to take control of externally administered facilities in emergencies (as defined in section 134 of the Public Safety (Public Protection Orders) Act 2014).

R61

The chief executive of Ara Poutama Aotearoa | Department of Corrections should appoint suitably qualified people to be independent inspectors. The chief executive should ensure that the number of inspectors appointed is sufficient for the operation of the new Act.

R62

Anyone should be able to complain to an inspector about a breach of the rights of a person subject to a preventive measure.

R63

An inspector may, on their own initiative or on receipt of a complaint against a probation officer, facility manager or facility staff, commence an investigation into an alleged breach of the new Act or any conditions imposed, or guidelines or directions issued under it. An inspector may decide not to investigate a complaint if satisfied that the complaint is frivolous or vexatious.

R64

If, after investigating a complaint, the inspector is satisfied that the complaint has substance, the inspector should, as soon as is reasonable in the circumstances, either:

- a. conduct an inquiry (in accordance with the Inquiries Act 2013); or
- b. report the matter, together with any recommendations, to the relevant probation officer or facility manager.

R65

An inspector should have the power to commence an inquiry into an alleged breach of the new Act or any conditions imposed, or guidelines or directions issued under it, on their own initiative. An inspector should commence an inquiry if directed to do so by the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R66

An inquiry should result in an inquiry report being prepared, which the inspector should send to:

- a. the relevant probation officer or facility manager;
- b. the chief executive of Ara Poutama Aotearoa | Department of Corrections;
- c. the person subject to the preventive measure concerned; and
- d. if applicable, any person who complained on behalf of the person subject to the preventive measure concerned.

R67

Residential facilities and secure facilities should be subject to:

- a. examination by a National Preventive Mechanism under the Crimes of Torture Act 1989; and
- b. inspections every six months by inspectors appointed under the new Act to address the facilities' compliance with all requirements under the new Act.

R68

An inspection by an inspector appointed under the new Act should result in an inspection report being prepared, which the inspector should send to the relevant facility manager and the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R69

Probation officers, as well as facility managers and their staff, should have regard to the following guiding principles when exercising their powers:

- a. People subject to community preventive supervision must not be subject 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 must 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 must, to the extent compatible with the safety of the community, be given appropriate opportunities to demonstrate rehabilitative progress and prepared for moving to a less restrictive preventive measure or unrestricted life in the community.

R70

The new Act should provide that people subject to a preventive measure are entitled to receive rehabilitative treatment and reintegration support.

R71

Ara Poutama Aotearoa | Department of Corrections should ensure sufficient rehabilitative treatment and reintegration support is available to people subject to a preventive measure so that the duration of the preventive measure is limited to the shortest period necessary to protect the community from the high risk the person will commit a further qualifying offence.

R72

The new Act should provide 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. needs related to education;
- e. needs related to therapeutic, recreational, cultural and religious activities;
- f. needs related to building relationships with the person's family, whānau, hapū, 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.

R73

The new Act should provide that each person subject to a preventive measure must have a treatment and supervision plan developed with them as soon as practicable after the completion of the initial needs assessment. 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. opportunities to participate in life in the community for people subject to residential preventive supervision or secure preventive detention;
- 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.

R74

The person responsible for assessing the person's needs and developing and administering the treatment and supervision plan should be:

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

R75

When undertaking a needs assessment or developing a treatment and supervision plan, the responsible person should be required to make reasonable efforts to consult with the person subject to the preventive measure.

Community preventive supervision (Chapter 14)

R76

Community preventive supervision should comprise standard conditions and any additional special conditions imposed by te Kōti-ā-Rohe | District Court.

R77

When te Kōti-ā-Rohe | District Court imposes community preventive supervision, the following standard conditions should automatically apply. The person subject to community preventive supervision (the person) 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 community preventive supervision measure;
- 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 the person is moving to a new probation area;
- e. not reside at any address at which a probation officer has, in writing, 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 in writing, 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, in writing, directed the person not to engage or continue to engage;
- j. not associate with, or contact, a victim of their offending without the prior written approval of a probation officer; and
- k. not associate with, or contact, any specified person, or with people of any specified class, whom the probation officer has, in writing, directed the person not to associate with or contact unless the probation officer has defined conditions under which association or contact is permissible.

R78

The new Act should provide that the kinds of special conditions that te Kōti-ā-Rohe | District Court may impose under R76 include, without limitation, conditions:

- a. to reside at a particular place;
- b. to be at the place of residence for up to eight hours in a 24-hour period;
- c. not to use a controlled drug or a psychoactive substance and/or consume alcohol;
- d. not to associate with any person, persons or class of persons;
- e. to take prescription medication;
- f. not to enter, or remain in, specified places or areas at specified times or at all times;
- g. not to associate with, or contact, a person under the age of 16 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;
- h. to submit to the electronic monitoring of compliance with any conditions that relate to the whereabouts of the person; and
- i. not to use any electronic device capable of accessing the internet without supervision.

R79

The new Act should provide that a person subject to community preventive supervision must not be made subject to a special condition that requires them to take prescription medication unless the person:

- a. has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
- b. consents to taking the prescription medication.

R80

The new Act should provide that a person subject to community preventive supervision does not breach their conditions if they withdraw consent to taking prescription medication.

R81

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

- a. Any kind of detention.
- b. An intensive monitoring condition (in-person, line-of-sight monitoring).

R82

Special conditions should, by default, be imposed for as long as the preventive measure is in place. Te Kōti-ā-Rohe | District Court, should, however, have the power to specify a shorter period for individual special conditions where it would otherwise not be the least restrictive measure.

R83 Probation officers should be responsible for monitoring people's compliance with conditions of community preventive supervision.

R84 The new Act should state that the rights of people subject to community preventive supervision are only limited by standard and special conditions imposed on them in accordance with the new Act.

R85 The new Act should clarify that the following rights (minimum entitlements) of a person subject to community preventive supervision may not be limited by a probation officer:

- a. Every person subject to community preventive supervision is entitled to be informed about conditions, instructions, entitlements, obligations and decisions that affect them. The information must be provided in a way that ensures that the person understands its nature and effect.
- b. Every person subject to community preventive supervision is entitled to be dealt with in a respectful manner, having regard to the person's cultural and ethnic identity, language, and religious or ethical beliefs.
- c. Every person subject to community preventive supervision is entitled to make complaints about the probation officer responsible for managing their conditions to an inspector appointed in accordance with the new Act.

Residential preventive supervision (Chapter 15)

R86 Residential preventive supervision should comprise standard conditions and any additional special conditions imposed by te Kōti Matua | High Court.

R87 When te Kōti Matua | High Court imposes residential preventive supervision, the following standard conditions should automatically apply. The person subject to residential preventive supervision (the resident) 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 in writing;
- d. be subject to in-person, line-of-sight monitoring during outings unless the facility manager directs otherwise in writing;
- e. not have in their possession any prohibited items (as currently defined in section 3 of the Public Safety (Public Protection Orders) Act 2014);
- f. submit to rub-down searches or searches of their room (in accordance with sections 89 and 93–96 of the Corrections Act 2004) for the purpose of

detecting a prohibited item 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, whom the facility manager has, in writing, directed the resident not to associate with or contact unless the facility manager has defined conditions under which association or contact is permissible.

R88

The new Act should provide that the kinds of special conditions that te Kōti Matua | High Court may impose under R86 include, without limitation, conditions:

- a. not to use a controlled drug or a psychoactive substance and/or consume alcohol;
- b. not to associate with any person, persons or class of persons;
- c. to take prescription medication;
- d. not to enter, or remain in, specified places or areas at specified times or at all times;
- e. not to associate with, or contact, a person under the age of 16 except with the prior written approval of a facility manager 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 facility manager as suitable to undertake the role of supervision; and
- f. not to use any electronic device capable of accessing the internet without supervision.

R89

The new Act should provide that the resident may not be made subject to a special condition that requires them to take prescription medication unless the resident:

- a. has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
- b. consents to taking the prescription medication.

R90

The new Act should provide that the resident does not breach their conditions if they withdraw consent to taking prescription medication.

R91

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

R92

The new Act should provide that rooms or units at a residential facility should be materially different from prison cells and provide each resident with privacy and a reasonable level of comfort.

R93 The chief executive of Ara Poutama Aotearoa | Department of Corrections should have legal custody of the residents.

R94 The facility manager should be entrusted with the residents' care and be responsible for the day-to-day operation of the facility.

R95 The manager of a residential facility should be able to delegate any of their powers under standard or special conditions to suitably qualified staff.

R96 The new Act should state that residents' rights are only limited by standard and special conditions imposed on them in accordance with the new Act. The new Act should provide for a non-exhaustive list of residents' rights as set out in Appendix 2 of this Report.

R97 The new Act should clarify that certain rights of residents (minimum entitlements) set out in Appendix 2 of this Report may not be limited by standard and special conditions imposed on them unless the security of the facility or the health or safety of a person is threatened.

Secure preventive detention (Chapter 16)

R98 The new Act should require that people subject to secure preventive detention (detainees) are detained in a secure facility and must not leave the facility without the permission of the facility manager.

R99 Detainees should be in the custody of the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R100 The new Act should provide that secure facilities must conform to the following design features:

- a. Secure facilities must be separate from prison.
- b. Secure facilities must have rooms or separate, self-contained units where people subject to secure preventive detention reside. The rooms or units should be materially different from prison cells and provide the detainee with privacy and a reasonable level of comfort.

R101 The new Act should set out a procedure for the responsible Minister to designate a secure facility by New Zealand Gazette notice.

R102

To ensure the safety of the community or the orderly functioning and safety of a secure facility, the manager of the facility should have powers to:

- a. check and withhold certain written communications;
- b. inspect delivered items;
- c. monitor and restrict mail, phone calls and internet use;
- d. restrict contact with certain people outside a facility;
- e. conduct searches in accordance with Subpart 4 of Part 2 of the Corrections Act 2004 for the purpose of detecting a prohibited item (as currently defined in section 3 of the Public Safety (Public Protection Orders) Act 2014);
- f. inspect and take prohibited items;
- g. carry out drug or alcohol tests;
- h. seclude detainees;
- i. restrain detainees;
- j. take all reasonable steps to return an escaped detainee to custody, including calling for assistance from Ngā Pirihimana Aotearoa | New Zealand Police; and
- k. call on corrections officers to use physical force in a security emergency.

R103

The manager of a secure facility should have the power to make appropriate rules for the management of the facility and for the conduct and safe custody of the detainees if authorised to do so by the chief executive of Ara Poutama Aotearoa | Department of Corrections.

R104

The manager of a secure facility may delegate any of their powers, except the powers to make rules and to delegate, to suitably qualified staff.

R105

The new Act should provide for a procedure for obtaining a warrant from a judge or, if unavailable, a registrar, and an empowering provision for Ngā Pirihimana Aotearoa | New Zealand Police to arrest an escapee without warrant where it is not reasonably practical to obtain one.

R106

The new Act should state that detainees' rights are only limited by provisions of the new Act. The new Act should provide for a non-exhaustive list of rights of detainees as set out in Appendix 2 of this Report.

R107

The new Act should clarify that certain rights of detainees (minimum entitlements) set out in Appendix 2 of this Report may not be limited unless the security of the facility, or the health or safety of a person, is threatened.

Non-compliance and escalation (Chapter 17)

R108

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 one year or to a fine not exceeding \$2,000.

R109

For a person subject to community preventive supervision or residential preventive supervision, te Kōti Matua | High Court should have power to order that the preventive measure to which they are subject be terminated and a more restrictive type of preventive measure be imposed if:

- a. the person would, if they were to remain subject to the current 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. less restrictive options for managing the behaviour of the person have been considered to a reasonable extent and any appropriate options have been tried.

R110

The chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the court for an order for a more restrictive type of preventive measure. The chief executive should file two health assessor reports to accompany the application.

R111

Te Kōti Matua | High Court should have power to order that a person subject to secure preventive detention be detained in prison (a prison detention order) 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. less restrictive options for managing the behaviour of the person have been considered to a reasonable extent and any appropriate options have been tried.

R112

The chief executive of Ara Poutama Aotearoa | Department of Corrections should be responsible for applying to the Court for a prison detention order. The chief executive should file two health assessor reports to accompany the application.

R113

The new Act should provide that people imprisoned subject to prison detention orders, to the extent possible, have the same rights as they would enjoy if detained in a secure facility.

R114 Prison detention orders should remain in force until terminated by te Kōti Matua | High Court.

R115 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 apply for reviews of the order.
- b. Te Kōti Matua | High Court should review a prison detention order annually upon application by the chief executive of Ara Poutama Aotearoa | Department of Corrections (chief executive).
- c. A prison detention order should be reviewed by the Review Authority every six months or, if there is an application for a court review pending, within six months after te Kōti Matua | High Court has determined the last application for review.
- d. The chief executive 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.

Duration and review of preventive measures (Chapter 18)

R116 A preventive measure should be imposed indeterminately and remain in force until terminated by a court.

R117 A preventive measure to which a person is subject should be suspended while that person is either subject to a determinate sentence of imprisonment or on remand in custody.

R118 In the case of a prisoner serving a sentence of imprisonment, a preventive measure should reactivate at the person's sentence expiry date or the date when the individual ceases to be subject to any release conditions, whichever is later. In the case of a prisoner on remand, the preventive measure should reactivate when the individual is released from custody.

R119 If the person subject to a suspended preventive measure has been released on parole at the time of reactivation of the preventive measure, the Review Authority (R131–R141) should review the preventive measure as soon as is reasonably practical. The Review Authority should determine whether it should make the measure less restrictive or whether the relevant court should consider terminating the measure (R136).

R120 A preventive measure to which a person is subject should terminate if a sentence of life imprisonment is imposed on that person.

R121 A preventive measure to which a person is subject should continue in force while that person is serving a community-based sentence or a sentence of home detention.

R122 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 new 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.

R123 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 it was imposed. 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 (including any appeals). Any time spent while the preventive measure is suspended should not be included in the calculation of the three-year period.

R124 Applications for a review of community preventive supervision should be made to te Kōti-ā-Rohe | District Court. Applications for the review of residential preventive supervision or secure preventive detention should be made to te Kōti Matua | High Court.

R125 To accompany an application, the chief executive of Ara Poutama Aotearoa | Department of Corrections should submit at least:

- 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;
- b. the person's current treatment and supervision plan and a progress report from the facility manager (in the case of residential preventive supervision or secure preventive detention) or the probation officer (in the case of community preventive supervision); and
- c. the decisions of the Review Authority since the last court review.

R126 The court should have the power to direct, on its own initiative, that additional health assessor reports be provided. The person subject to the preventive measure under review should be able to submit additional health assessor reports prepared by health assessors they have engaged.

R127

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 that risk, the preventive measure is the least restrictive measure adequate to address that risk.

R128

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 (R25).

R129

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 (in the case of community preventive supervision or residential preventive supervision) to make them less restrictive;
- c. terminating the preventive measure and imposing a less restrictive measure; or
- d. terminating the preventive measure without replacement.

R130

If the court confirms the preventive measure, it should review the person's treatment and supervision plan. It should have the power (but not be required) to do so if it orders the imposition of a less restrictive measure. The court should have the power to make recommendations to the person responsible for developing and administering the plan.

R131

To provide additional reviews of preventive measures alongside court reviews, the new Act should provide for the establishment of a Review Authority as an independent statutory entity.

R132

The Review Authority should operate in panels of three to four members, one of whom must be a panel convenor or the chairperson. A decision by a panel acting within its jurisdiction should be a decision of the Review Authority.

R133

The Review Authority should have the following membership. It should:

- a. be chaired by a judge or former judge;
- b. include other judges or former judges or experienced barristers and solicitors 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 expertise in mātauranga Māori (including tikanga Māori).

R134

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

R135

The Review Authority should review the ongoing justification for a preventive measure by applying the same legislative tests that are used for imposing preventive measures (R25).

R136

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

- a. confirming the ongoing justification for the preventive measure and, if applicable, its conditions;
- b. in the case of community preventive supervision or residential preventive supervision, confirming the ongoing justification for the preventive measure but varying the special conditions to make them less restrictive; 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 for a court review of the preventive measure.

R137

If the Review Authority confirms a preventive measure, it should be required to review the person's treatment and supervision plan. The Review Authority should have the power to make recommendations to the person responsible for developing and administering the plan.

R138

The Review Authority should be able to regulate its own procedure. Review Authority hearings should be run in the manner of an inquiry and in an atmosphere that encourages people appearing before it to speak for themselves and as freely and frankly as possible.

R139

The Review Authority should have the power to decide whether a hearing held by the Review Authority should be open or closed to the public.

R140 The Review Authority should have the power to request information relevant to the review from the people responsible for the administration of a preventive measure.

R141 The person subject to a preventive measure under review should be able to appear and make oral submissions to the Review Authority. They should be able to be represented by a lawyer.

R142 The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to a preventive measure should be able to apply to the court to terminate the measure without replacement or to terminate the measure and replace it with a less restrictive measure. An application concerning community preventive supervision should be submitted to te Kōti-ā-Rohe | District Court. An application concerning residential preventive supervision or secure preventive detention should be submitted to te Kōti Matua | High Court.

R143 When determining an application to terminate 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 (R25).

R144 If, following an application to terminate a measure without replacement, te Kōti Matua | High Court is not satisfied the measure should be terminated without replacement but is satisfied the measure should be terminated and replaced with a less restrictive measure instead, it should have the power to do so in the same proceedings.

R145 If the court declines to order the termination of a measure following an application to terminate by the person subject to the measure, the court should be able at the same time, and on its own initiative or on application by the chief executive of Ara Poutama Aotearoa | Department of Corrections, to order that the person subject to the measure not be permitted to apply for termination of the measure for a specified period of not more than two years.

R146 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 Authority to vary the special conditions of community preventive supervision or residential preventive supervision.

R147 The chief executive of Ara Poutama Aotearoa | Department of Corrections and the person subject to residential preventive supervision should be able to apply to the Review Authority to change the specific residential facility where the person subject to residential preventive supervision must stay.

R148

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

Transitional provisions (Chapter 19)

R149

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

APPENDIX 1

Qualifying offences for preventive measures

QUALIFYING OFFENCES				
Qualifying offence	Preventive detention	Extended supervision orders	Public protection orders	Recommended qualifying offences under the new Act
Sexual offences – Crimes Act 1961				
128B: sexual violation by rape or unlawful sexual connection	✓	✓	✓	✓
129(1) and (2): attempted sexual violation and assault with intent to commit sexual violation	✓	✓	✓	✓
129A(1): sexual connection with consent induced by threats	✓	✓	✓	✓
129A(2): indecent act with consent induced by threats, but only if the victim is under 16	✗	✓	✗	✓
130: incest	✓	✓	✓	✗

131(1) and (2): sexual connection or attempted sexual connection with a dependent family member under 18	✓	✓	✓	✓
131(3): indecent act on a dependent family member, but only if the victim is under 16	✗	✓	✗	✓
131B: meeting young person following sexual grooming	✓	✓	✓	✓
132(1), (2) and (3): sexual connection, attempted sexual connection or indecent act on a child under 12	✓	✓	✓	✓
134(1), (2) and (3): sexual connection, attempted sexual connection or indecent act on a young person under 16	✓	✓	✓	✓
135: indecent assault	✓	✓	✓	✓
138(1) and (2): exploitative sexual connection or attempted exploitative sexual connection with a person with a significant impairment	✓	✓	✓	✓
138(4): exploitative indecent act on a person with a significant impairment	✗	✓	✗	✓
142A: compelling an indecent act with an animal	✓	✓	✓	✓
143: bestiality	✓	✓	✓	✗
144A(1): sexual conduct with children and young people outside New Zealand	✓	✓	✓	✓

144C: organising or promoting child sex tours	✓	✓	✓	✓
208: abduction for purposes of marriage or civil union or sexual connection	✓	✓	✓	✓
Sexual offences – Prostitution Reform Act 2003				
23(1): offences relating to use in prostitution of persons under 18 years	Only if committed overseas	Only if committed overseas	Only if committed overseas	✓
Sexual offences – relating to Films, Videos, and Publications Classification Act 1993				
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; or (c) exploits the nudity of children and/or young persons.	x	✓	x	✓
Violent offences – Crimes Act 1961				
171 or 177: manslaughter	✓	✓	✓	✓
172: murder	x	✓	✓	✓
173: attempt to murder	✓	✓	✓	✓
174: counselling or attempting to procure murder	✓	✓	✓	✓
175: conspiracy to murder	✓	✓	✓	✓

176: accessory after the fact to murder	✓	✓	✓	✗
188(1) and (2): causing grievous bodily harm with intent or reckless disregard for safety	✓	✓	✓	✓
189(1): injuring with intent to cause grievous bodily harm	✓	✓	✓	✓
189A: strangulation or suffocation	✗	✗	✗	✓
191(1) and (2): aggravated wounding or injury	✓	✓	✓	✓
198(1) and (2): discharging a firearm or doing a dangerous act with intent or reckless disregard for safety	✓	✓	✓	✓
198A(1) and (2): using a firearm against a law enforcement officer or to resist arrest	✓	✓	✓	✓
198B: commission of crime with a firearm	✓	✓	✓	✓
199: acid throwing	✓	✓	✓	✓
209: kidnapping	✓	✓	✓	✓
210: abduction of a young person under 16	✓	✗	✓	✓
234: robbery	✓	✓	✓	✓
235: aggravated robbery	✓	✓	✓	✓
236: assault with intent to rob	✓	✓	✓	✓

Attempts and conspiracies				
Attempt to commit a qualifying offence (but only if the offence is not itself specified as an attempt and the provision does not itself provide that the offence may be completed on an attempt)	x	✓	x	✓
Conspiracy to commit a qualifying offence	x	✓	x	✓

APPENDIX 2

Rights of residents and detainees

LIST OF RIGHTS (R96 AND R97)

1. The rights of residents (people subject to residential preventive supervision) and detainees (people subject to secure preventive detention) include, but are not limited to, the rights to:
 - (a) send and receive mail, make telephone calls, and have other forms of electronic communication with people outside the facility;
 - (b) access information and education, including the right to access internet sites approved by the facility manager;
 - (c) have private visitors;
 - (d) retain money earned from work;
 - (e) cook their own food;
 - (f) wear their own clothes;
 - (g) use their own linen;
 - (h) participate in therapeutic, recreational, educational, cultural and religious activities; and
 - (i) have regular supervised outings.

LIST OF MINIMUM ENTITLEMENTS (R106 AND R107)

2. The following rights of residents and detainees (minimum entitlements) may not be limited unless the security of the facility or the health or safety of a person is threatened.
3. Every resident or detainee (other than a resident or detainee who is engaged in outdoor work) may, on a daily basis, take at least one hour of physical exercise. They may do so in the open air if weather permits.
4. Every resident or detainee must be provided with a separate bed (including a mattress) and sufficient bedding for warmth, health and reasonable comfort. The bedding must be laundered as often as is necessary to maintain cleanliness.

5. Every resident or detainee must be provided with a sufficient quantity of wholesome food and drink based on the food and nutritional guidelines for the time being issued by the Ministry of Health, and drinking water must be made available to every resident or detainee whenever they need it.
6. Every resident or detainee must be provided with special dietary food where the facility manager is satisfied that such food is necessary for medical reasons or on account of the person's religious beliefs or because the person is a vegetarian or vegan.
7. Every resident or detainee must have access to the following visitors:
 - (a) A member of Parliament.
 - (b) A judge or an officer of the court or a member or an officer of another judicial body.
 - (c) An Ombudsman.
 - (d) The Privacy Commissioner.
 - (e) The Health and Disability Commissioner.
 - (f) A Human Rights Commissioner.
 - (g) An inspector.
 - (h) A lawyer.
 - (i) A health professional.
 - (j) A minister of religion.
8. Every resident or detainee is 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.
9. Every resident or detainee is entitled to send written communication to, and receive written communication from, a person listed under point 7. These communications must not be opened, read or withheld by the facility manager or staff.
10. Every resident or detainee is entitled to make outgoing phone calls to their legal adviser or an official agency as listed under point 7.
11. Every resident or detainee is entitled to be registered as an elector in accordance with the Electoral Act 1993 and may vote, within the residence, at elections in accordance with that Act, the Local Electoral Act 2001 or any enactment under which a referendum is held.
12. Every resident or detainee is entitled to be informed about rules, conditions, guidelines or instructions, entitlements, obligations and decisions that affect the resident or detainee. The information must be provided in a way that ensures that the resident or detainee understands its nature and effect.
13. Every resident or detainee is entitled to be dealt with in a respectful manner, having regard to the resident's or detainee's cultural and ethnic identity, language, and religious or ethical beliefs.

14. A resident or detainee is not disentitled from obtaining a benefit (as defined in Schedule 2 of the Social Security Act 2018).¹
 15. Every resident or detainee is entitled to make complaints concerning the management of the facility to an inspector appointed in accordance with the new Act.
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¹ For the purpose of calculating the benefit, the resident or detainee is taken to be a patient in a hospital for more than 13 weeks. Compare Public Safety (Public Protection Orders) Act 2014, s 39(2).

APPENDIX 3

List of submitters

Te Aka Matua o Te Ture | Law Commission received submissions from the following organisations and individuals during this review:

IN RESPONSE TO THE ISSUES PAPER

Organisations

- Auckland District Law Society (now The Law Association of New Zealand)
- Bond Trust
- Chief Ombudsman
- Criminal Bar Association
- Te Tari Ture o te Karauna | Crown Law
- Te Kāhui Tika Tangata | Human Rights Commission
- Members of Te Hunga Rōia Māori o Aotearoa | Māori Law Society
- New Zealand Council for Civil Liberties
- Te Kāhui Ture o Aotearoa | New Zealand Law Society
- New Zealand Law Students' Association
- Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service
- South Auckland Bar Association
- Manaaki Tāngata | Victim Support

Individuals

- Dr Jordan Anderson
- Lara Caris
- Dr Tony Ellis
- Douglas Ewen
- 22 individuals who are or were subject to preventive detention, an extended supervision order or a public protection order

IN RESPONSE TO THE PREFERRED APPROACH PAPER

Organisations

- Bond Trust
- Chief Ombudsman
- Te Kāhui Tātari Ture | Criminal Cases Review Commission
- Criminal lawyers from Te Tari Ture o te Karauna | Crown Law
- The Law Association of New Zealand
- Criminal Law Reform Committee of Te Hunga Rōia Māori o Aotearoa | Māori Law Society
- New Zealand Council for Civil Liberties
- Te Kāhui Ture o Aotearoa | New Zealand Law Society
- Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service
- Royal Australian and New Zealand College of Psychiatrists
- South Auckland Bar Association
- Manaaki Tāngata | Victim Support

Individuals

- Dr Jordan Anderson
 - Myra Crawford-Smith
 - Dr Tony Ellis
 - Daniel Jackson
 - Robert Simmonds
 - Christine Staples
 - An individual currently serving a sentence of preventive detention
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APPENDIX 4

Terms of reference

Te Aka Matua o te Ture | Law Commission will undertake a review of the laws in Aotearoa New Zealand providing for preventive detention and post-sentence supervision or detention. These laws apply to individuals who are convicted of sexual or violent crimes. A court can order detention or supervision of an individual if satisfied the individual would continue to present risks to public safety after completing a determinate prison sentence.

The review will consider:

- preventive detention under the Sentencing Act 2002;
- extended supervision orders (ESOs) under the Parole Act 2002; and
- public protection orders (PPOs) under the Public Safety (Public Protection Orders) Act 2014.

The review will include (but not be limited to) consideration of:

- whether the laws reflect current understandings of reoffending risks and provide an appropriate level of public protection;
- te Tiriti o Waitangi | the Treaty of Waitangi, ao Māori perspectives and any matters of particular concern to Māori;
- consistency with domestic and international human rights law; and
- the relationship between sentences of preventive detention, ESOs and PPOs.

Public consultation will be part of the review.



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