

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

SUMMARY OF ISSUES PAPER

THE REVIEW PROCESS

Te Aka Matua o te Ture | Law Commission is reviewing the laws that aim to protect the community from reoffending risks posed by some people convicted of serious crimes. Those laws achieve this aim by providing for the detention or supervision of some people beyond a determinate prison sentence.

The focus of this review is the law relating to:

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

The terms of reference for the review require us to give particular consideration to:

- (a) whether the laws reflect current understandings of reoffending risks and provide an appropriate level of public protection;
- (b) te Tiriti o Waitangi | Treaty of Waitangi, ao Māori perspectives and any matters of particular concern to Māori;
- (c) consistency with domestic and international human rights law; and
- (d) the relationship between sentences of preventive detention, ESOs and PPOs.

This document is an executive summary of the Commission's Issues Paper. It lists the potential issues we have identified with the law, indicates where these issues are discussed in the Issues Paper and sets out the consultation questions we ask in the Issues Paper. The Issues Paper is available on [our website](#). We encourage you to read the more detailed discussion in the Issues Paper on any of the topics that interest you.

HAVE YOUR SAY

We want to know what you think about the issues and proposals set out in the Issues Paper. We welcome feedback on the questions included and on any other matters not addressed by them. The feedback we receive will help us as we develop options for reform. We will present those options in a Preferred Approach Paper, which we will publish in mid-2024 for further consultation.

After consultation on the Preferred Approach Paper, we will develop final recommendations for reform. We will deliver those recommendations in our final report to the Minister responsible for the Law Commission by the end of 2024.

You can make a submission by emailing us at pdr@lawcom.govt.nz or writing to us at Review of Preventive Detention and Post-Sentence Orders, Law Commission, PO Box 2590, Wellington 6140.

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

WHAT HAPPENS TO YOUR SUBMISSION?

Information given to the Law Commission is subject to the Official Information Act 1982 and the Privacy Act 2020. For more information about the Official Information Act, please see the Ombudsman's website. For more information about the Privacy Act, please see the Privacy Commissioner's website.

If you send us a submission, we will:

- consider the submission in our review; and
- keep the submission as part of our official records.

We may also:

- publish the submission on our website;
- refer to the submission in our publications; and
- use the submission to inform our work in other reviews.

Your submission may contain personal information. You have the right to access and correct your personal information at any time.

If we publish submissions we receive on our website, your submission will be publicly available. We will not publish your name or contact details if you are submitting as an individual and not on behalf of an organisation.

You can request that we do not publish other information in your submission. If you request this, we will not publish that information on our website or in our publications.

If we receive a request under the Official Information Act that includes your submission, we must consider releasing it. If the request includes your personal information, we will consult with you.

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

Executive summary

INTRODUCTION

1. The introduction to the Issues Paper provides an overview of the review and our process so far, including our preliminary engagement. It also sets out the terminology used in the Issues Paper.

PART ONE: INTRODUCTORY MATTERS

Chapter 1: Origins and overview of the law

Preventive detention

2. Preventive detention has long been part of Aotearoa New Zealand's sentencing law. The statutory purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.
3. A person can be sentenced to preventive detention if:¹
 - (a) they are convicted of certain serious sexual or violent offences; and
 - (b) the court is satisfied, having considered expert reports, that the person is likely to commit another qualifying sexual or violent offence if the person was released at the expiry date of any other sentence the court could impose.
4. Preventive detention is the most restrictive of the preventive regimes we are reviewing. It is an indeterminate sentence, which means there is no fixed expiry date and the New Zealand Parole Board (Parole Board) is responsible for deciding if and when the person can be released from prison. People subject to preventive detention typically serve many years in prison before being released on parole.
5. Once released on parole, a person sentenced to preventive detention is subject to parole conditions for life. They are also subject to recall to prison at any time.

Extended supervision orders

6. Extended supervision orders (ESOs) are orders that were introduced in 2004 and allow a person who has not been sentenced to preventive detention to be managed and monitored in the community. The statutory purpose of an ESO is to protect members of the community from those who pose a real and ongoing risk of committing serious sexual and violent offences.
7. The court can impose an ESO on a person if:
 - (a) the person has been sentenced to imprisonment for certain serious sexual or violent offences;
 - (b) the court is satisfied, having considered expert reports, that the person:

¹ The criteria for imposing preventive detention, an ESO or a PPO are simplified in this executive summary. We discuss the full eligibility criteria and statutory tests in Chapters 1, 5, 6, 7 and 8 of the Issues Paper.

- (i) has a pervasive pattern of serious sexual or violent offending; and
 - (ii) poses a high risk of committing a serious sexual offence and/or a very high risk of committing a serious violent offence in the future.
8. An ESO may be imposed for up to 10 years at a time. People on ESOs are subject to conditions similar to parole. These may include conditions relating to where they can live and work and who they can associate with as well as requirements to attend treatment programmes. Some people on ESOs are subject to restrictions on where they can go and may be electronically monitored. The most restrictive conditions include curfews and intensive person-to-person monitoring.

Public protection orders

9. Public protection orders (PPOs) are the most recent of the preventive regimes, introduced in 2014. A PPO is an order that allows a person who is not subject to preventive detention to be detained in a secure facility. The legislation states that 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.
10. The court can impose a PPO on a person if:
- (a) the person has been sentenced to imprisonment for certain serious sexual or violent offences;
 - (b) the court is satisfied, after considering expert evidence, that there is a very high risk of imminent serious sexual or violent offending by the person if:
 - (i) where the person is detained in a prison, the person is released from prison into the community; or
 - (ii) in any other case, the person is left unsupervised.
11. A person subject to a PPO (called a resident) cannot leave the residence except with approval. If granted approval, they may only leave under escort and supervision. In some circumstances, a resident may be detained in a prison instead of a residence.
12. A PPO is indefinite. If a PPO is made, the justification of the order must be reviewed by a review panel yearly and by a court at five-year intervals.

PART TWO: OVERARCHING ISSUES

Chapter 2: Te ao Māori and the preventive regimes

Tikanga Māori

13. Tikanga Māori is the first law of Aotearoa New Zealand and includes a system of values and principles that guide and direct rights and obligations in a Māori way of living. Our focus in this review is on tikanga Māori related to community safety and the risks of serious reoffending.
14. It has been suggested that, for Māori, public safety is achieved “when the functioning of communities and whānau reflects a collective sense of wellbeing”.²

² Kim Workman *Whānau Ora and Imprisonment* (Ngā Pae o te Māramatanga, Te Arotahi Series Paper, 3 September 2019) at 12.

15. According to Moana Jackson, when a person committed a hara (offence), this reflected “an imbalance in the spiritual, emotional, physical or social well-being of an individual or whanau”.³ When a hara occurred, the core issue was to understand and respond to what was out of balance for the person who committed the hara, their whānau and the broader community.
16. We discuss the relevant tikanga Māori in more detail in this chapter of the Issues Paper.
17. In our preliminary view, the current laws governing the preventive regimes are inconsistent with tikanga Māori. Responses grounded in tikanga to a person who is at risk of offending should work to restore a person’s mana (authority and responsibility), protect their tapu (sacred life force) and achieve ea (balance) by restoring the person back to their community as a fully functioning human being. Conversely, isolating a person from their community may undermine and disrupt whakapapa and whanaungatanga.

Te Tiriti o Waitangi | Treaty of Waitangi

18. Te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) is recognised as a foundation of government in Aotearoa New Zealand.
19. We consider that the need to keep communities safe from serious offending falls within the Crown’s authority to make laws for the good order and security of the country. Maintaining public safety extends to the safety and wellbeing of Māori communities.
20. The Treaty guarantee of tino rangatiratanga is relevant to this review because of the impacts on Māori lives and collective decision-making and community responsibilities arising from the need to address the significant risks of reoffending posed by some people. Māori individuals and their communities are affected as people subject to preventive orders and as potential victims of reoffending.
21. The Treaty principles have become important tools in understanding the Treaty and have an extensive history in the Tribunal and the courts. We consider this review engages the principles of partnership, active protection, equity and options, noting that these may overlap to some extent.
22. Tino rangatiratanga requires that Māori are substantively involved in maintaining the safety of their communities through successful rehabilitation and reintegration. This includes a rangatiratanga right of Māori to ensure that tikanga is followed appropriately and under the correct authority. The overrepresentation of Māori subject to preventive detention and ESOs also engages the principle of equity and underscores the responsibility of the Crown to enable and support tino rangatiratanga.
23. The Crown and Māori have a mutual interest in ensuring community safety. We suggest that the terms and principles of the Treaty indicate that achieving the social goal of protecting the community from serious reoffending requires the active support and participation of both the Crown and Māori.
24. In our preliminary engagement, we have discerned a clear desire from Māori to manage people at risk of reoffending in different ways to the current preventive regimes. The law

³ Moana Jackson *The Māori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 39.

should enable Māori to live in accordance with tikanga and facilitate tino rangatiratanga through Māori-designed and Māori-led initiatives for managing a person who is at risk of serious reoffending.

QUESTIONS

- Q1** Have we appropriately identified the relevant tikanga Māori?
- Q2** Do you agree with our preliminary views about how the Treaty may apply in the context of this review?
- Q3** Do you think the law relating to preventive detention, ESOs and PPOs is failing to enable Māori to live in accordance with tikanga?
- Q4** Do you think the law relating to preventive detention, ESOs and PPOs fails to give effect to the Crown's obligations under the Treaty?
- Q5** Do you agree with our preliminary views about how the law can better enable Māori to live in accordance with tikanga and better facilitate the exercise of tino rangatiratanga?

Chapter 3: Key human rights issues

25. Preventive detention, ESOs and PPOs authorise some of the most coercive exercises of state power known to New Zealand law, engaging a host of human rights issues. The courts and international human rights bodies have found New Zealand law governing the preventive regimes to be inconsistent with human rights law, notably:
- (a) In *Miller v New Zealand*, the United Nations Human Rights Committee (UNHRC) found that preventive detention under New Zealand law breaches the protection against arbitrary detention under the International Covenant on Civil and Political Rights (ICCPR).⁴
 - (b) In *Chisnall v Attorney-General*, the Kōti Pira | Court of Appeal declared that the ESO and PPO regimes were inconsistent with the protection against second punishment under section 26(2) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and that those inconsistencies had not been justified.⁵
26. In *Miller*, two people complained to the UNHRC that their preventive detention constituted arbitrary detention. Human rights jurisprudence on preventive detention has established that, even though preventive detention is imposed as a single sentence, it comprises two periods. The first period has been referred to as the “tariff element”, “punitive period” or

⁴ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC).

⁵ *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.

what might be regarded as the “just deserts” in respect of the qualifying offending. The second and subsequent period is the time when the person remains detained solely for preventive reasons. In *Miller*, the UNHRC explained that the conditions of preventive detention during the second period 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. The UNHRC found that the preventive period of imprisonment for the two people in this case had not been sufficiently distinct from the punitive period of their sentence. Neither had it been aimed predominantly at their rehabilitation and reintegration into society. The UNHRC concluded the preventive detention was in violation of article 9 of the ICCPR.

27. In *Chisnall*, the Court of Appeal concluded that the severe restrictions imposed by ESOs and PPOs were punitive. The Court noted that people on PPOs have a statutory entitlement to rehabilitative treatment but that entitlement is qualified by a requirement that the treatment have a reasonable prospect of reducing the risk to public safety posed by the person. The Court considered this approach could be compared to a preventive regime centred on the provision of medical and therapeutic treatment.
28. Having found that ESOs and PPOs were punishment that engaged section 26(2) of the NZ Bill of Rights, the Court considered whether the regimes were a justified limitation in terms of section 5 of the NZ Bill of Rights. The Court declared that the ESO and PPO regimes’ inconsistency with section 26(2) had not been justified because it considered the Attorney-General had not provided sufficient evidence.
29. Given the severe restrictions on people’s freedoms and the findings in *Miller* and *Chisnall*, we examine the important question of whether the preventive regimes can be justified for the purposes of human rights law. There is, however, limited evidence available to establish whether the preventive regimes are a proportionate response to meet their community safety purposes. Little consideration appears to have been given to whether the preventive regimes impair people’s human rights no more than is necessary. We are therefore unable to conclude that the preventive regimes in their current form impose justified limitations on people’s human rights. For the purposes of the Issues Paper, we proceed on the basis that the law should provide some form of preventive measures, but we are interested in feedback on what measures would be justified under human rights law.

QUESTION

Q6

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

30. While we think any reformed preventive measures require justification for the purposes of human rights, we share some preliminary views on possible reforms to ensure greater compliance with human rights law. These include that:
 - (a) the law governing preventive detention should clearly demarcate the punitive period and community protection period of preventive detention.
 - (b) people detained beyond a punitive prison sentence for community safety reasons should be managed in different conditions to prisoners serving punitive prison sentences; and

- (c) the law should have a greater focus on rehabilitation.

QUESTIONS

Q7

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

Q8

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

Q9

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

Chapter 4: Fragmentation of the law

31. While preventive detention, ESOs and PPOs share the same community safety objective, they are governed by independent but interrelated statutory regimes in the Sentencing Act 2002, Parole Act 2002 and Public Safety (Public Protection Orders) Act 2014.
32. The courts have attempted to apply the three regimes cohesively, but the fragmentation of the law across the three regimes can hinder the courts' ability to impose a less restrictive preventive measure. Preventive detention, ESOs and PPOs are available at different points of the criminal justice process. This means that, when considering whether to impose preventive detention, a court can consider the availability of an ESO but it cannot be sure an ESO will be imposed as an alternative and least restrictive measure. In some instances, there are express legislative prohibitions preventing the court from imposing the least restrictive measure. For example, a person subject to preventive detention is not eligible for an ESO even if the availability of an ESO would mean they could be released from prison earlier. Lastly, the legislation does not on its own terms contemplate that the court will impose the least restrictive order. Rather, it is a point developed by judges in case law.
33. The fragmentation of the law may also create procedural inefficiencies. In particular, the Parole Act provides that, when a PPO is sought at the same time as applying for an ESO in the alternative, the court "must not hear" the ESO application until the PPO application has been determined or withdrawn. This may result in double handling because, to consider the PPO application, the court must hear evidence and argument on whether the ESO should be granted.
34. In addition, the PPO regime sits in the civil jurisdiction of te Kōti Matua | High Court. Lawyers who work in this area may not be approved legal aid providers for civil services and may be unfamiliar with civil court process. This may mean they are unable to act for a client they have represented in other aspects of the criminal process. For Māori, being represented by counsel with whom they have a relationship or being represented by a Māori lawyer may be particularly important.

QUESTION**Q10**

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

PART THREE: ELIGIBILITY**Chapter 5: Preventive detention and young adults**

35. While preventive detention is rarely imposed on young adults (aged 18 to 25), a person can be sentenced to preventive detention if they were 18 years of age or over at the time of committing a qualifying offence. Our preliminary view is that preventive detention is unlikely to be demonstrably justified as a necessary and proportionate response when imposed on young adults.
36. The human brain continues to develop significantly into a person's mid-20s. In particular, the regions related to prosocial behaviour, controlling emotions, resisting temptations and considering consequences are some of the last to fully mature — reaching biological maturity at around 25 years or older. There is also evidence that young adults are more amenable to rehabilitation than older adults. International human rights laws and Aotearoa New Zealand initiatives are increasingly recognising that young adults should be afforded special protections in the criminal justice system.
37. Preventive detention requires the sentencing court to consider the risk a person will pose if released from prison in the future. However, as young adulthood is a time of developmental change, risk assessment may be less accurate during this time and assessment of long-term risk is problematic. The Court of Appeal has also recently recognised that life sentences may have a disproportionately severe effect on young adults.⁶
38. We suggest that, if preventive measures are needed to address the risk of reoffending posed by a young adult, post-sentence orders are more appropriate than preventive detention because:
- (a) the person has had an opportunity to neurologically mature and to engage in rehabilitation;
 - (b) the risk assessment is more accurate as it addresses current risk rather than risk at the end of a hypothetical sentence of imprisonment; and
 - (c) the particular adverse impacts of indeterminate imprisonment are avoided.

QUESTION**Q11**

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

⁶ *R v Dickey* [2023] NZCA 2.

Chapter 6: Qualifying offences

39. To be eligible for preventive detention, an ESO or a PPO, a person must have been convicted of a serious sexual or violent offence listed in the legislation. We call these “qualifying offences”.
40. In our preliminary engagement, we heard that certain offences — such as indecent assault — are not serious enough to justify making a person eligible for a preventive regime because the consequences of preventive detention, an ESO or a PPO are out of proportion to the offending. Like many offences, indecent assault can be committed in a variety of ways, which can vary significantly in terms of seriousness. We are interested in views on whether indecent assault or other qualifying offences are serious enough to justify making a person eligible for a preventive regime.

QUESTION

Q12

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

41. Mostly, the same offences are qualifying offences for all three regimes. However, there are some inconsistencies. For example, abduction of a young person under 16 is a qualifying offence for preventive detention and a PPO but not for an ESO. We suggest that there are advantages if the preventive regimes fit together coherently, and it is therefore preferable that the same offences are qualifying offences for all three regimes.

QUESTION

Q13

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

42. There are several serious sexual and violent offences that are not qualifying offences for any of the regimes. We seek feedback on whether these should be included. In particular, we suggest that the offence of strangulation or suffocation should be a qualifying offence. This offence was enacted in 2018. Prior to 2018, an act of strangulation or suffocation could be charged as a qualifying offence such as injuring with intent to cause grievous bodily harm. Now, if charged using the strangulation provision, the same behaviour would not be qualifying.

QUESTIONS

Q14

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

Q15

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

43. There are two offences that we suggest could be removed as qualifying offences as they may not be necessary to keep the community safe from serious reoffending. The charge of incest is designed for consensual sexual offending between family members. Other (qualifying) offences are available where sexual offending against a family member is non-consensual or involves a particularly vulnerable victim or a victim too young to consent. Bestiality involves a person engaging in penetrative sexual activity with an animal. In our preliminary research, there is not an established link between bestiality and a risk of sexual or violent offending against humans. Other (qualifying) offences are available if a person forces or compels a person to engage in sexual or indecent activity with an animal.

QUESTIONS

Q16

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

Q17

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

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

QUESTION

Q18

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

Chapter 7: Overseas offending

45. A person may be eligible for an ESO or a PPO on the basis of offending committed overseas.
46. There is very limited case law or commentary on this area, and we have only identified two issues. First, in some situations, a person may be eligible for an ESO on the basis of overseas offending that would not come within the description of a qualifying offence if it had been committed in Aotearoa New Zealand. We have been unable to find any policy or legislative materials that explain the reason for this provision. We seek feedback on this point as it appears to be anomalous and a departure from the other eligibility criteria.

QUESTION**Q19**

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

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

47. Second, an application for an ESO for a returning offender must be made within six months of the person's arrival in Aotearoa New Zealand. In our preliminary engagement, we heard that it can be difficult to access the information needed from overseas jurisdictions to assess whether an ESO application should be made, particularly within this timeframe. Our initial view is that this issue should be addressed through arrangements such as information-sharing agreements rather than through law reform.

QUESTIONS**Q20**

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

Q21

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

PART FOUR: IMPOSING PREVENTIVE DETENTION, EXTENDED SUPERVISION ORDERS AND PUBLIC PROTECTION ORDERS**Chapter 8: The legislative tests for imposing preventive detention, extended supervision orders and public protection orders**

48. The legislation governing the preventive regimes provides different tests for determining whether a person's risk requires the imposition of preventive detention, an ESO or a PPO. There are several issues with these tests.

The legislative tests may not target the appropriate level of risk

49. The legislative tests require that there is a risk the person will reoffend, but the degree of that likelihood may not be set at the right level. The tests for ESOs and PPO require the

risk that the person will reoffend to be “high” or “very high”. For preventive detention, the test differs — the person must simply be “likely” to commit a further qualifying offence. There is also a question as to why, to impose an ESO, the court must be satisfied there is a “high risk” the person will in future commit a relevant sexual offence, whereas for violent offending, the risk must be “very high”.

QUESTION

Q22

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

Scope of qualifying offences too broad

50. The legislative tests require the person to pose a risk of committing a further qualifying offence. In our preliminary engagement, we have heard that some currently qualifying offences may not be serious enough to justify imposing preventive detention, an ESO or a PPO. In particular:
- (a) **Indecent assault** can be committed in a variety of ways that are often at the less serious end of the scale of sexual offending but can include serious offending that causes harm to the community.
 - (b) **Incest and bestiality** may not be rationally connected to the purpose of protecting the public from serious offending that causes harm to the community. Where there is a risk of incestuous sexual offending that is non-consensual or involves a vulnerable victim or where there is a risk of compelling another person to engage in sexual activity with an animal, other qualifying offences would cover this behaviour.
 - (c) **Attempts or conspiracies to commit qualifying offences** do not themselves entail the same level of harm to the community — the main harm results if the offence is in fact committed. Preventive detention, ESOs and PPOs are designed to prevent the substantive offending.

QUESTION

Q23

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

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

51. When the courts apply human rights law to the preventive regimes, they often weigh considerations that are not expressed in the legislative tests themselves. For example, following the Court of Appeal’s declaration in *Chisnall v Attorney-General* that ESOs and PPOs breach the NZ Bill of Rights’ protection against second punishment, the court will balance the right not to be subject to second punishment against the statutory purpose to protect the community from reoffending. This additional justification is not referred to in the Parole Act.

52. Although it is clear that human rights law applies to how the preventive regimes are interpreted and applied, this is not apparent from the primary legislation governing the preventive regimes. It may be preferable that the legislation states more comprehensively how human rights law applies.

QUESTION**Q24**

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

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

53. The tests for ESOs and PPOs provide that a court may determine that a person meets the requisite level of risk only if they display certain traits and behavioural characteristics. The focus appears to be an attempt to identify the people who are at highest risk of reoffending. However, we have found no authoritative material in the policy and legislative history as to why the characteristics were thought to identify the highest-risk people. Regardless, we have other reservations about the focus on the traits and behavioural characteristics:
- (a) Undue focus on these traits fails to recognise the complex interaction between psychological and situational factors that result in offending.
 - (b) Risk assessment and psychological practice is regularly updated in light of new research. What may have been considered important factors at the time the legislative tests were enacted may become outdated. It is unwise for a set of characteristics to be cemented in legislation when regular revision may be required.
 - (c) Concerns have emerged that particular characteristics may fail to describe people who ought to be subject to an ESO or a PPO. There have been cases in which the courts have been satisfied the person poses a high or very high risk of reoffending but an order cannot be made because they do not display the relevant characteristics.
 - (d) The language used in the legislative tests to describe the traits and behavioural characteristics is difficult to understand.
 - (e) The traits and behavioural characteristics may be more likely to describe people who have a disability. This may raise issues of differential treatment and discrimination under human rights law.

QUESTION**Q25**

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

Issues relating to the temporal elements of the legislative tests

54. To impose preventive detention, the court must be satisfied that the person is likely to reoffend if they are released at the sentence expiry date. For PPOs, the court must be satisfied that there is a very high risk of “imminent” serious sexual or violent offending if the person is released from prison or otherwise left unsupervised. The Parole Act expresses no temporal element for ESOs, although the fact that an ESO may be made for up to 10 years contemplates the risk may relate to offending within that timeframe.
55. Risk assessment practice is based on literature that considers a follow-up period of five to seven years is most appropriate for sexual offending and two to five years for violent offending. In our preliminary view, legislative tests that call for an assessment of whether someone poses risks of reoffending well into the future and beyond the follow-up time of risk assessment tools are problematic. So too is the test for PPOs because the triggers for reoffending involve complex interactions between psychological and situational factors and risk may not be capable of being expressed as “imminent”.

QUESTIONS

- Q26** Do you agree with the issues we have identified with the legislative tests a court will apply to decide whether to impose preventive detention, an ESO or a PPO?
- Q27** Are there other issues relating to the legislative tests that we should consider?

Chapter 9: Evidence of reoffending risk

56. A court’s decision to impose preventive detention, an ESO or a PPO is based on the likelihood the person will commit further serious sexual or violent offences. The primary evidence is reports produced by “health assessors” who must be psychiatrists or psychologists. The legislation requires the health assessor reports to address the risk that the person will commit a further qualifying offence and, in the case of ESOs and PPOs, whether the person exhibits the traits and behavioural characteristics described in the legislation.
57. In practice, health assessors use a mixture of actuarial risk assessment tools and clinical judgement to provide an individualised formulation of risk for health assessment reports. Actuarial risk assessment tools are developed by analysing samples of people to identify risk factors that are associated with reoffending. Clinical judgement is when a health assessor forms an opinion about a person’s risk, drawing from a wide range of information about the person and applying clinical experience.
58. Criticism of risk assessment features strongly in the commentary on the preventive regimes. In particular, there are objections that risk assessment is inaccurate because of the limitations of actuarial risk assessment tools. The objections include the following:
- (a) Risk assessment tools cannot assess individualised risk. They identify whether a person shares characteristics with a group, and the resulting probability statement is based on reoffending rates for that group.
 - (b) Risk assessment tools do not predict the severity or imminence of future offending.

- (c) Risk assessment tools may be developed from sample data that is poor quality or not representative of the New Zealand population. Serious violent or sexual offending is rare. The scores may be less accurate because the sample population datasets are smaller than for other types of offending.
 - (d) Risk assessment tools developed from sample data affected by racial bias affecting Māori may perpetuate racially disparate risk profiling.
 - (e) Because of the technical nature of the psychological evidence presented through risk assessment tools, there are concerns that the court does not adequately scrutinise the evidence.
59. Our preliminary view is that, while risk assessment tools have clear limitations and can be misused, law reform is not needed to address the issues. Rather, we consider the limitations can be appropriately addressed as matters of practice within the current legal framework. In particular, the relevant bodies should ensure tools are used responsibly, regularly updated and validated. Risk assessment should rely on all relevant information, not just the results of risk assessment tools. The limitations of tools should be communicated in reports, and those limitations should be properly weighed when decisions are made about a person's risk.
60. We are concerned, however, at the possibility that risk assessment tools could be inappropriate for use on Māori and may perpetuate racial bias. There is, however, limited evidence on the extent of the issue. We are mindful of the increasing awareness of racial bias within the criminal justice and corrections system and the steps being taken to address unintended bias and validate risk assessment tools specifically for Māori. We are interested in feedback on this issue.

QUESTION**Q28**

Do you agree with the issues we have identified regarding evidential matters and our preliminary conclusion that legislative reform is not generally needed to address these issues?

QUESTION**Q29**

Do you think the possibility that risk assessment tools may be inappropriately used on Māori is an issue requiring reform? If so, why, and what reforms should be implemented?

61. In our preliminary engagement, we heard that, when the court considers whether to impose preventive detention, an ESO or a PPO on a person, the person's whānau, marae, hapū or iwi should have an opportunity to make submissions or provide information to the court. This could provide valuable assistance to the court, such as:
- (a) providing relevant information about the person's background and cultural context;
 - (b) providing insight, including in terms of the relevant tikanga, on the risks posed by the person, whether preventive detention, an ESO or a PPO is appropriate and, if so, on what terms; and

(c) if the law was to better enable Māori to take responsibility for the management of people subject to preventive measures, providing views on what possible management options are available and appropriate.

62. While the law already provides options for the court to receive information or submissions on these matters, our preliminary view is that these provisions could be strengthened by placing greater emphasis on enabling relevant groups or individuals to submit or provide information to the court.

QUESTION

Q30

Do you think that the legislation should promote opportunities to address the court or provide information to the court for the person's whānau, hapū or iwi or any person who has a shared sense of whānau identity around a particular kaupapa with the person?

PART FIVE: MANAGEMENT OF PEOPLE ON PREVENTIVE DETENTION, EXTENDED SUPERVISION ORDERS AND PUBLIC PROTECTION ORDERS

Chapter 10: Conditions and management in the community

63. The law allows restrictive conditions to be imposed on people who are released on parole from a sentence of preventive detention or who are subject to an ESO. These conditions may relate to where they can live and work or who they can associate with or require a person to attend treatment programmes. Some people 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.

64. We have identified several issues with these conditions.

Insufficient priority on enabling Māori-designed and Māori-led initiatives

65. Our preliminary engagement with Māori emphasised the desire for Māori participation in the design and delivery of responses to the risk of reoffending by people convicted of serious crimes.

66. While Ara Poutama | Department of Corrections is making operational changes, we have heard that there are currently limited opportunities for Māori groups to exercise responsibility for managing people in the community on parole (from sentences of preventive detention) or ESOs.

67. In our preliminary view, the current law relating to parole conditions and extended supervision conditions could better provide for Māori-designed and Māori-led initiatives by:

- (a) requiring the Government to instigate, support and resource the development of Māori-designed and Māori-led initiatives; and
- (b) requiring the Parole Board or court, when imposing conditions, to consider whether and how a person can access Māori-designed and Māori-led initiatives.

Insufficient priority on providing for the operation of tikanga Māori

68. In our preliminary view, the current law could be strengthened to better recognise and provide for tikanga Māori in the management of people in the community.
69. First, when setting special conditions, the legislation states that the paramount consideration is the safety of the community. The legislation could make clear that the safety of the community is broader than just safety from an undue risk of reoffending and encompasses an ao Māori view of public safety.
70. Second, a person's whānau, marae, hapū or iwi or a relevant non-kin group could have an opportunity to provide information to the court or Parole Board making decisions about conditions. This could include information relevant to setting conditions such as information about the person's background and cultural context, providing insight (including in terms of relevant tikanga Māori) on the risks posed by the person and providing views on what possible conditions or management options would be available and appropriate.

QUESTION

Q31

Do you think that the law relating to the conditions and management of people subject to release on parole from preventive detention and ESOs appropriately allow for Māori-designed and Māori-led initiatives?

The law could better ensure consistency with the New Zealand Bill of Rights Act 1990

71. Decisions by the Parole Board imposing conditions on people subject to preventive orders, as well as decisions by probation officers implementing conditions, must comply with the NZ Bill of Rights. This requirement is not explicitly stated in legislation governing the preventive regimes – rather, it reflects the general requirements under the NZ Bill of Rights.
72. We seek feedback on whether the legislation should build in tests or guidance to ensure that decisions about conditions that may restrict people's rights are made in accordance with the NZ Bill of Rights

QUESTION

Q32

Should the legislation build in tests or guidance to ensure that decisions about conditions are made in accordance with the NZ Bill of Rights?

“Residential restrictions” not defined in legislation

73. The Parole Act allows “residential restrictions” to be imposed as a special condition of parole or an ESO. The term is not defined in the Parole Act, though there are procedural and eligibility requirements for imposing residential restrictions. In one case, *te Kōti Mana Nui | Supreme Court* has commented that there should be greater legislative clarity.⁷

⁷ *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [29].

QUESTION**Q33**

Do you think the term “residential restrictions” should be defined in the legislation?

Requirement for person to agree to residential restrictions may result in parole being denied

74. Residential restrictions may only be imposed on a person released on parole from preventive detention if the Parole Board is satisfied that the person subject to the restrictions agrees to comply with them. The Parole Board can impose residential restrictions on a person subject to an ESO without being satisfied that the person agrees to comply with them.
75. In our preliminary engagement, we heard that, if the Parole Board considers that a person’s risk will only be effectively managed by residential restrictions but the person does not agree to comply with the condition, the person may be denied parole. Our preliminary view is that the human rights imperative to impose the least restrictive order may mean the law should allow residential restrictions to be imposed as a special release condition on a person subject to preventive detention, whether or not they agree to comply with the condition, where this would allow the person to be managed within the community rather than within prison.

QUESTION**Q34**

Do you think that the Parole Board should be able to impose residential restrictions as a special release condition on a person subject to preventive detention, whether or not they agree to comply with the condition, where this would allow the person to be managed within the community rather than within prison?

Extended supervision order special conditions and the principle that conditions must not be more onerous, or last longer, than necessary

76. When the Parole Board imposes special conditions on a person released on parole from preventive detention, it must be guided by the principle that a person “must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community”.⁸ It is arguable that, as drafted, this principle does not apply when the Parole Board imposes special conditions on an ESO. We seek feedback on whether this principle should be amended to expressly apply to ESO conditions.

QUESTION**Q35**

Do you think the guiding principles of the Parole Act should be amended to state that people subject to ESOs must not be subject to conditions that are more onerous, or last longer, than is consistent with the safety of the community?

⁸ Parole Act 2002, s 7(2)(a).

Inefficiency of dividing order-making and condition-setting jurisdictions for Extended supervision orders

77. The court has responsibility for making an ESO and setting its duration while the Parole Board has responsibility for setting conditions.
78. In our preliminary engagement, we heard that this may result in inefficiencies because multiple hearings may be required in respect of a similar issue and because there are different mechanisms for reviewing decisions of the court and of the Parole Board.

QUESTION

Q36

Do you think there are any issues arising from the division between the order-making and condition-setting jurisdictions for ESOs that require legislative reform?

Issues relating to intensive monitoring

79. An intensive monitoring (IM) condition requires a person subject to an ESO to submit to being accompanied and monitored for up to 24 hours a day by a person approved to undertake person-to-person monitoring. When the court imposes an ESO, it can at the same time make an order requiring the Parole Board to impose an IM condition. An IM condition may be imposed for a maximum period of 12 months.
80. There is no test or statutory guidance on the criteria to be considered when imposing an IM condition, though the courts have applied a high threshold. We seek views on whether the legislation should prescribe a test or guidance.

QUESTION

Q37

Do you think the legislation should include a test or guidance on when an IM condition may be imposed?

81. An IM condition can only be ordered at the same time the court orders an ESO. Currently, where Ara Poutama wishes to add an IM condition to a person subject to an ESO, it makes an application for a new ESO with an IM condition. In our preliminary view, it would be more efficient if a separate application could be made to impose an IM condition on an existing ESO.

QUESTION

Q38

Do you think the legislation should allow an IM condition to be imposed after an ESO has been ordered?

82. The 12-month maximum term of an IM condition may mean that a person whose risk is effectively managed by an IM condition is instead made subject to a more restrictive PPO. Our preliminary view is that the human rights imperative to impose the least restrictive order may mean the law should facilitate longer periods of monitoring where this allows a

person to be managed within the community rather than under a more restrictive detention order.

QUESTION

Q39

Do you think that the court should be able to impose an IM condition for longer than 12 months if it would allow a person to be managed in the community rather than be detained?

Prohibition on requiring a person to reside with a programme provider

83. An ESO condition that requires a person to participate in a programme must not require the person to reside with, or result in the person residing with, the programme provider.
84. It appears that the purpose of this provision is to prevent a person from being subject to the supervision and direction of a single agency for 24 hours per day, as would be the case in a custodial environment. However, in practice, it may prevent attendance at residential rehabilitative programmes. Our preliminary view is that this is undesirable because the regimes should provide for effective rehabilitation, and residential programmes have advantages over non-residential programmes.

QUESTION

Q40

Do you think the prohibition on requiring a person to reside with a programme provider should be removed?

Standard extended supervision order condition not to associate with persons under 16 may not be justified in every case

85. It is a standard condition of every ESO that a person must not associate with or contact a person under 16 years except with the prior written approval of a probation officer and in the presence and under the supervision of an adult who has been informed about their offending and who has been approved in writing by a probation officer as suitable.
86. This condition is capable of seriously impairing a person's rights — for example, if it results in a person not being able to associate with their own children or whānau. Some people who are subject to ESOs will pose no risk of offending against people under 16.
87. In our preliminary view, this condition should not be a standard condition of an ESO. It could be imposed as a special condition where appropriate.

QUESTION

Q41

Do you think that the requirement not to associate with persons under 16 should be removed from the standard ESO conditions?

QUESTION**Q42**

Are there any other issues relating to the conditions imposed on people who are released on parole from a sentence of preventive detention or who are subject to ESOs?

Chapter 11: Variation and termination of preventive detention, extended supervision orders and public protection orders***Concerns that people on preventive detention do not have the right to apply to court for review***

88. Article 9(4) of the ICCPR provides that anyone detained should be entitled to take proceedings “before a court” to determine the lawfulness of the detention and order release if the detention is unlawful. In *Miller v New Zealand* (discussed above), the UNHRC concluded that the Parole Board’s task of assessing risk and determining parole did not satisfy the requirements of article 9(4). We are interested in feedback on the UNHRC’s views and whether the courts should have greater responsibilities for reviewing preventive detention.

QUESTION**Q43**

Should the courts have greater responsibilities for reviewing preventive detention instead of leaving the task of determining release on parole to the Parole Board?

The provisions for release on parole do not sit comfortably with human rights law

89. The Parole Act states that there is no entitlement to be released on parole. However, human rights bodies and the courts have considered that, where a person sentenced to preventive detention has served the punitive period of imprisonment, they have an interest in liberty and their ongoing detention for community protection purposes can only be justified by compelling reasons. In *Vincent v New Zealand Parole Board*, the High Court held that, if a person imprisoned on preventive detention no longer constitutes an undue risk, there is no basis to maintain the detention. The state, having no basis to restrain the person’s liberty any longer, has an obligation to release that person within as short a period of time as is reasonably possible.⁹
90. In our preliminary view, the wording of the test for release on parole should reflect the rights-consistent approach that the courts apply in practice. It may be preferable that the tests:
- (a) are expressly worded to recognise that a person detained beyond the punitive period of the preventive detention sentence should only be denied parole when there are compelling reasons relating to community safety; and

⁹ *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [86].

- (b) omit the wording that a person on preventive detention has “no entitlement to be released on parole”.

QUESTION

Q44

Do you think the test for release from detention for people sentenced to preventive detention should expressly recognise their right to liberty except when justified by compelling reasons relating to community safety?

Difficulties with the suggestion that the test for release on parole changes over time

91. When examining the right to liberty and protection against arbitrary detention in the context of preventive detention, the courts and human rights bodies have considered that, as the period of preventive detention increases, the state has an increasingly heavy burden to justify the continued detention. In *Miller*, the UNHRC suggested that a level of risk that might reasonably justify a short period of preventive detention may not necessarily justify a longer period of preventive detention.¹⁰
92. Our preliminary view is that requiring an increasing justification for detention over time would be problematic because it implies that the justification may be lower at the time the court imposes preventive detention. We consider the initial justification should be high. It also suggests that, if the risk a person poses remains static, there may be a point in time where the increased justification is not met and the person would be released notwithstanding the likelihood that they will commit serious offences.

QUESTION

Q45

Do you think the test for release from detention for people sentenced to preventive detention should require “increasing justification” over time?

The test for cancelling an extended supervision orders differs from the test to impose an extended supervision order

93. To impose an ESO, the court must be satisfied that “either or both” of the following apply:
- (a) there is a high risk that the person will in future commit a relevant sexual offence;
 - (b) there is a very high risk that the person will in future commit a relevant violent offence.
94. In contrast, section 107M of the Parole Act provides that the court may cancel an ESO only if satisfied that the person poses “neither a high risk of committing a relevant sexual offence, nor a very high risk of committing a relevant violent offence”.

¹⁰ *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.5].

95. The section seems to require the person to satisfy the court that neither ground applies, even if the ESO was imposed in respect of only one of the grounds. We suggest that the test for cancelling an ESO should mirror the test for imposing an ESO.

QUESTION

Q46

Do you think that the test for cancelling an ESO should mirror the test for imposing an ESO?

No provision for what happens when a person subject to an extended supervision order becomes subject to an interim detention order or a public protection order

96. The Parole Act is silent on what happens to an ESO when the person subject to the ESO becomes subject to an interim detention order (IDO) or a PPO. This seems to be a legislative oversight.
97. In our preliminary view, during the course of an IDO, an ESO should be suspended. It should then resume if the court refuses to grant a PPO. In our preliminary view, an ESO should come to an end and not resume once a final PPO is granted. That is because a PPO provides for a form of indeterminate detention and, following release, the person is then subject to a protective supervision order (PSO). It would therefore be unnecessary for the ESO to resume.

QUESTIONS

Q47

Do you agree that an ESO should be suspended if an interim detention order is made?

Q48

Do you agree that an ESO should come to an end if a PPO is ordered?

Issues relating to the timing of extended supervision order reviews

98. The Parole Act provides that the court must review an ESO 15 years after the date on which a person first became subject to an ESO if they have “not ceased” to be subject to an ESO since first becoming subject to an ESO.
99. In our preliminary view, there are unavoidable problems with tying the review obligations to circumstances in which a person has “not ceased” to be subject to an ESO. For example, it is not clear if an ESO has “ceased” when a person is placed on an ESO after being subject to an interim supervision order, an IDO or a PPO. The better approach, in our preliminary view, is to tie review obligations to each individual ESO rather than a period of unceasing ESOs.

It is unclear whether the Parole Board can vary an interim monitoring condition

100. When making an ESO, the court may at the same time make an order requiring the Parole Board to impose an IM condition. The court must specify the maximum duration of the condition, but the Parole Board sets the actual duration of the condition and its details.
101. The Parole Board may vary or discharge ESO conditions, except it may not vary any condition in a way “that would be contrary to any order ... requiring the imposition of an intensive monitoring condition”.
102. We assume the purpose of the provision is to avoid the Parole Board circumventing a court order to impose an IM condition. However, in our preliminary view, it is unclear whether or to what extent the Parole Board may vary an IM condition.

QUESTION

Q49

Do you think that the law relating to whether the Parole Board can vary an IM condition needs clarification?

Concern that breaching an extended supervision order condition is an offence

103. Breaching an ESO condition is an offence punishable by up to two years’ imprisonment. There are concerns about whether conviction and sentence is an appropriate measure for ensuring compliance with ESO conditions because:
- (a) it amounts to punishing a person for breaching the restrictions of a second punishment;
 - (b) research shows that, for high-risk people, the process of desistance is slow and a person may slip up while making considerable progress overall, and breaching conditions does not necessarily indicate increased risk or failure to make progress; and
 - (c) convictions for breaching ESO conditions may result in an unfairly inflated assessment of risk.
104. There are alternative measures to ensure compliance with conditions and to respond to risk that do not involve conviction and sentence.

QUESTION

Q50

Do you think that breaching an ESO condition should be an offence or that another mechanism should be used for ensuring compliance with ESO conditions?

Issues concerning public protection orders

105. There is a lack of critical commentary on the way PPOs cease. This is likely because so few people have been subject to a PPO and to date, as far as we are aware, no person has yet been placed on a PSO.

106. We would value feedback on whether there are any other issues relating to how PPOs cease.

QUESTION

Q51

Are there any issues relating to the variation or termination of PPOs?

PART SIX: PROPOSALS FOR REFORM

Chapter 12: Proposals for reform

107. We present proposals that seek to address the main issues raised across the Issues Paper. Our aim in presenting these proposals is to receive initial feedback on the advantages and disadvantages of each proposal.

108. The proposals address the following topics:

- (a) facilitating tino rangatiratanga and enabling Māori to live according to tikanga;
- (b) the nature and conditions of detention when a person is detained for preventive reasons after completing a determinate sentence;
- (c) when a court should impose preventive measures;
- (d) the fragmentation of the preventive regimes;
- (e) reform of preventive detention if it is to continue as a sentence;
- (f) the age of eligibility for preventive detention;
- (g) qualifying offences;
- (h) the legislative tests for imposing preventive measures;
- (i) conditions and management in the community.

QUESTION

Q52

What do you think about the proposals for reform in this chapter?
