IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 26/2022
[2024] NZSC 178

BETWEEN	ATTORNEY-GENERAL First Appellant
	CHIEF EXECUTIVE OF ARA POUTAMA AOTEAROA | DEPARTMENT OF CORRECTIONS Second Appellant
AND	MARK DAVID CHISNALL Respondent

Hearings:	17–18 October 2022 3–4 April 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ
Counsel:	U R Jagose KC, M J McKillop and T Li for Appellants and Cross-Respondents A J Ellis, B J R Keith, G K Edgeler and A C Singleton for Respondent and Cross-Appellant A S Butler KC, R A Kirkness, M D N Harris and D T Haradasa for Te Kāhui Tika Tangata | Human Rights Commission as Intervener
Judgment:	19 December 2024

JUDGMENT OF THE COURT

A **The appeal is allowed in part.**

B **The cross-appeal is dismissed.**

C **We seek submissions from counsel on the form of the declarations of inconsistency, as set out at [269].**

D **Costs are reserved.**

REASONS

WINKELMANN CJ, O'REGAN, WILLIAMS AND KÓS JJ
(Given by Winkelmann CJ)

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Introduction

[1] The respondent (and cross-appellant), Mr Chisnall, has spent much of his adult life in prison or other forms of detention.[1] For some of this time he was serving a sentence of imprisonment, but since his release in 2016 he has been subject to restrictive statutory regimes which can be applied to those who, having committed certain categories of offences in the past, are assessed as posing a high, or very high, risk of further serious sexual or violent offending.

[2] This appeal, and cross-appeal, address whether those statutory regimes, the extended supervision order (ESO) and public protection order (PPO) regimes, are consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights).[2] Orders under the ESO and PPO regimes are not made

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1 Mr Chisnall was sentenced to a term of imprisonment in 2006 at age 20 and has been subject to various orders ever since his release in 2016. He is now 38.

2 The extended supervision orders (ESO) regime is created by Part 1A of the Parole Act 2002, and the public protection order (PPO) regime by the Public Safety (Public Protection Orders) Act 2014

at sentencing but rather toward the end of the sentence of imprisonment, and serve the important purpose of protecting the public from recidivist offenders who present a high, or very high, risk of further serious sexual or violent offending. In order to achieve that purpose, an ESO or PPO can be made against a person even when the offence rendering them eligible for the imposition of the order was committed before the regimes (as they apply to the individual) were enacted.[3] In this sense the regimes operate retrospectively — because when the offence was committed the person was not in jeopardy of being subjected to such orders. This is the way in which we use the terms "retrospectively" and "retrospectivity" throughout these reasons.[4]

[3] Mr Chisnall sought declarations in the High Court that the ESO and PPO regimes are inconsistent with a range of liberty and fair trial rights protected by the Bill of Rights, most notably, the s 26(2) right to immunity from a second penalty for an offence that a person has already been punished for.[5]

[4] He had some limited success with his application in the High Court.[6] Whata J issued a declaration that the ESO regime was inconsistent with s 26(2) of the Bill of Rights in that it imposed a second penalty, but only insofar as it operated retrospectively — that is, insofar as the qualifying offending was committed before

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[PPO Act], Subpart 2.

3 We say "as they apply to the individual" as the scope of the ESO regime has been amended since its enactment to broaden its application (see below at [34]–[35]). Throughout these reasons, for brevity, when we refer to offending taking place before the enactment of the ESO regime, we also intend that to include relevant offending taking place before these subsequent amendments.

4 There is some academic debate as to the different meanings of "retrospective" and "retroactive": Ruth Sullivan *The Construction of Statutes* (7th ed, LexisNexis Canada, Toronto, 2022) at ch 25.02; and Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago LR 631 at 632–633. We do not make any comment on the distinction but simply use "retroactive" when referring to the right in s 26(1) to reflect the heading given to that section in the New Zealand Bill of Rights Act 1990 [the New Zealand Bill of Rights].

5 These include ss 9, 18, 22, 23(5), 25(a) and (c)–(d), 26(1) and 27(1). Mr Chisnall no longer pursues declarations of inconsistency with the rights under ss 18, 24(e) and 27(1) in this Court. In his notice of application for leave to cross-appeal, Mr Chisnall explains that in the context of a regime found to be penal in character, at least some of these broader rights are subsumed within s 26 and the other rights he pursues on the cross-appeal. In written submissions, Mr Chisnall makes reference to s 27(2), the right to judicial review. Leave was not sought or granted for that right, and we proceed on the basis that this was a mistaken reference.

6 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110 [High Court decision].

the relevant part of the ESO regime came into force.[7] The Judge found that the order otherwise could constitute a justified limitation on Mr Chisnall's right not to be subjected to a second penalty.[8] As for the PPO regime, the Judge was satisfied that it was not penal in nature, and therefore did not limit the s 26(2) right.[9]

[5] Mr Chisnall appealed to the Court of Appeal, maintaining that both the ESO and PPO regimes are inconsistent with s 26(2) irrespective of when the qualifying offence was committed.[10] He also pursued his claims for declarations that the regimes breached other rights that are affirmed in the Bill of Rights and that are detailed in his application. The Attorney-General cross-appealed, claiming that the Judge was wrong to find the ESO regime penal in nature, and so wrong to make any declaration of inconsistency.

[6] The Court of Appeal dismissed the Attorney-General's cross-appeal, confirmed the High Court's declaration, and allowed Mr Chisnall's appeal in part, issuing broader declarations.[11] It found that each of the ESO and PPO regimes imposed a second penalty, a limitation upon the s 26(2) right, and one that was not justified for the purposes of s 5.[12] It issued declarations in respect of the ESO regime as it applied to offending committed after the creation of the regime (ie non-retrospectively), and also in respect of the PPO regime. It declined to address the inconsistency arguments in respect of other rights.[13]

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7 At [161]. Despite concluding at [100] that retrospective ESOs also impose an unjustified limit on s 25(g) (the right to the benefit of a lesser penalty where the penalty has changed between the time of offending and sentencing), Whata J did not include s 25(g) in his ultimate declaration: see *Chief Executive of the Department of Corrections v Chisnall (No 2)* [2020] NZHC 243, (2020) 12 HRNZ 149 [High Court declaration decision] at [14]. This is likely because such a declaration was not sought by Mr Chisnall as the ESO and PPO regimes were introduced after he committed the relevant offences (see discussion below n 193).

8 High Court decision, above n 6, at [98]–[99].

9 At [142].

10 *Chisnall v Attorney-General* [2021] NZCA 616, [2021] 2 NZLR 484 (Cooper, Brown, Clifford, Gilbert and Collins JJ) [Court of Appeal decision].

11 At [229]–[230]. The Court subsequently made those declarations in *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107 (Cooper, Brown, Clifford, Gilbert and Collins JJ) [Court of Appeal declaration decision].

12 Court of Appeal decision, above n 10, at [223]–[224].

13 At [227]–[230].

Issues on appeal

[7] Both parties pursue their respective appeals in this Court.[14] The arguments centre upon the application and effect of provisions of the Bill of Rights, in particular s 4 (enactment not impliedly repealed, revoked, invalid or ineffective by reason only of inconsistency with the Bill of Rights), s 5 (rights and freedoms in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society) and s 6 (whenever an enactment can be given a meaning consistent with the rights and freedoms contained in the Bill of Rights, that meaning is to be preferred).

[8] The grounds on which Mr Chisnall cross-appeals to this Court are shortly stated. He continues to argue that declarations of inconsistency should be issued for rights not covered by the existing declarations — including the s 22 right to be free from arbitrary detention and the s 9 right to be free from cruel or disproportionately severe punishment. We come on to discuss those rights shortly.[15] There are other aspects of his case on appeal that are helpful to set out at this point. Mr Chisnall has not pleaded or produced evidence as to the detailed effects of these regimes upon him, relying instead upon the wording of the statutory provisions and the effect of their application. He does not challenge that protection of the public from the risk of serious violent or sexual offending is a socially important objective. The primary argument advanced for Mr Chisnall by his counsel is that it is the nature and effect of the regime imposed by the orders that cannot be justified for the purposes of s 5 of the Bill of Rights because there were other less intrusive alternatives available. He also argues that with models based on risk assessment of future conduct, such as the ESO and PPO regimes, it is irrational, and therefore unjustifiably discriminatory, to limit the operation of the regime to those who have already offended — those who have not offended may pose just as much, or even greater, risk of offending in the future.

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14 *Attorney-General v Chisnall* [2022] NZSC 77 (O'Regan, Ellen France and Williams JJ).

15 Mr Chisnall also raises the right against retroactive criminalisation (s 26(1)), some of the rights to minimum standards of criminal procedure (namely s 25(a) and (c)–(d)) and the right to be free from imprisonment contrary to human dignity and humanity (s 23(5)). As we discuss below, we do not consider these rights are engaged: see below at [149]–[156], [157]–[158] and [168].

[9] There is another feature of Mr Chisnall's challenge to the ESO and PPO regimes which is important to set out at this point. Although the challenges are to the entirety of the regimes, submissions in support of his appeal focused on those aspects of the regimes that authorise detention. While the entirety of the PPO regime authorises detention, there are parts of the ESO regime that place limits upon the individual that do not amount to detention.

[10] As for the Attorney-General's position, the Attorney-General accepts that each of the ESO and PPO regimes entail the imposition of a second penalty for the purposes of s 26(2).[16] The Attorney-General also accepts, and it is common ground, that there is no more rights-consistent interpretation of either the ESO or PPO regimes available under s 6 of the Bill of Rights than the interpretation apparent on the face of the legislation — these appeals have not focused upon issues of interpretation. But the Attorney-General says that rights consistency can instead be achieved, indeed must be achieved, by the judge in the sentencing court when determining applications for an ESO or PPO. This follows from the fact that judges have a discretion whether or not to make the orders in question, and also some discretion as to the form of the orders then made. The Bill of Rights, the Attorney-General submits, requires them to exercise that discretion to ensure that any limitation of rights imposed is justified for the purposes of s 5.

[11] Flowing from this, the Attorney-General argues that the Court of Appeal erred in its approach to the application for declarations of inconsistency. It was wrong to address the issue of a declaration by reference to the ESO and PPO regimes in the abstract. Rather it is the court that has before it the application for the making of an ESO or PPO, not the court considering an application for a declaration of inconsistency, that will have the evidence to enable consideration of whether the orders are demonstrably justified. On the Attorney-General's analysis there is, for the most part, no room for the declaration of inconsistency jurisdiction to operate in respect of

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[16] In the High Court and Court of Appeal the Attorney-General argued that the ESO regime as amended, and the PPO regime, did not entail the imposition of penalties.

the ESO and PPO regimes — the appropriate remedy for Mr Chisnall is to appeal against the making of the orders.[17]

[12] We say "for the most part" because the Attorney-General accepts that there is one aspect of the regime that cannot be accounted for or ameliorated in the exercise of the judicial power to make or decline an ESO or PPO. This is because, as noted above, the eligibility criteria capture people whose convictions pre-date the enactment of the regimes as they apply to them (including Mr Chisnall) and thus have retrospective effect. However, it is argued that this is a reasonable limitation, justified for the purposes of s 5, because of the powerful public protection objectives the regimes respond to, the nature of the risks addressed by the regimes, and the high thresholds imposed for their application.

[13] During the hearing it became apparent that the appeals raised important issues as to the nature of the jurisdiction to issue declarations of inconsistency and as to matters of procedure associated with that jurisdiction. We therefore adjourned the hearing part way through to enable Te Kāhui Tika Tangata | the Human Rights Commission to intervene at our invitation, and also to enable the parties to file additional submissions on those and other issues. We record thanks to the Commission for the very helpful submissions it has provided on the many issues arising in the context of an application for a declaration of inconsistency. Indeed, we thank all parties for the assistance we have received with these important appeals.

Summary

[14] We have allowed the appeal in part and dismissed the cross-appeal. We have found inconsistency with the right affirmed in s 26(2) in connection with the application of the entire PPO regime, but parts only of the ESO regime. In this way our findings result in declarations of inconsistency, although of narrower focus than those issued by the Court of Appeal.

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[17] Mr Chisnall did in fact appeal against the orders themselves in a separate chain of proceedings. He successfully challenged the PPO, which was substituted instead for an ESO: see below at [68]–[69].

The appropriate approach to declarations of inconsistency in respect of the ESO and PPO regimes

[15] We have rejected the Attorney-General's argument that there is no room either for the application of the full s 5 analysis set out in *R v Hansen* or for the declaration of inconsistency jurisdiction to operate in this case (or other cases under these regimes).[18] This argument was based on the premise that the judge considering the application for an ESO or PPO was required, and could use the discretion conferred by the regimes, to achieve rights consistency in the individual case.[19] We have found that the regimes are not properly characterised as discretionary but rather as evaluative — such that, if the relevant level of risk is met, the judge would be required to make orders under the relevant regime to manage that risk.[20] Further, while it is true that the task for a judge, and any other decision-maker, is to interpret and apply legislation as consistently *as possible* with the Bill of Rights, had the judge in the sentencing court concluded that a rights-consistent application was not open to them, they would still have been required to apply the statutory scheme.[21] That is the effect of s 4 of the Bill of Rights. Accordingly, while the judge will be required to apply ss 5 and 6 when considering an application and when tailoring any orders (to the extent there is scope to tailor the orders), those provisions cannot be used to override the statutory scheme.[22]

[16] We have also rejected the Attorney-General's argument that the Court of Appeal erred in taking a regime-based analysis rather than confining itself to the facts of Mr Chisnall's case.[23] The question for this Court is whether the application of statutory provisions is sufficiently predictable or clear-cut to enable consideration of rights consistency reaching beyond the facts of an individual case, encompassing the more general operation of the legislation. For the most part, the operation of the ESO and PPO regimes is standard in effect, enabling the consideration of the entire regimes' rights consistency, not limited to Mr Chisnall's case.

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18 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1. See below at [104].
19 See below at [91].
20 See below at [95]–[96].
21 See below at [97]–[99].
22 See below at [104].
23 See below at [100]–[103].

[17] There are, however, exceptions in this case to the appropriateness of addressing rights consistency on a regime basis. These exceptions are in relation to the rights in s 9 (cruel or disproportionately severe punishment) and s 23(5) (imprisonment contrary to human dignity and humanity). We have concluded that issues of whether these rights are engaged in the context of the ESO and PPO regimes is best determined on a case-by-case basis.[24]

Whether the regimes limit the rights invoked by Mr Chisnall

[18] The first issue for the Court, in terms of the rights consistency of the regimes, is whether they operate to limit the pleaded rights. Our findings in relation to that issue are as follows:

(a) The s 26(2) right to be free from a second penalty is engaged by the ESO and PPO regimes.[25] We have concluded that where the regimes authorise a second penalty amounting to a detention that is applied retrospectively, no justification for the imposition of such a penalty is possible, and to that extent the regimes are inconsistent with that right.[26] In all other cases, issues of justification do arise.[27]

(b) The s 26(1) right to be free from retroactive criminalisation and the s 25(a), (c) and (d) fair trial rights are not engaged by the ESO and PPO regimes as the regimes do not entail retroactive criminalisation of conduct.[28] No issues of justification therefore arise.

(c) The s 22 right to be free from arbitrary detention may be engaged by legislation retrospectively imposing a penalty amounting to detention.[29] However, this was not the basis of the s 22 argument before this Court, so no conclusion in respect of this right has been reached. The other

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24 See below at [167]–[168].
25 See below at [138].
26 See below at [146] and [169].
27 See below at [144]–[145] and [169].
28 See below at [156]–[157].
29 See below at [162].

arguments advanced for Mr Chisnall in relation to s 22 are better addressed under s 26(2).[30]

(d) The ss 9 and 23(5) rights may be infringed by the ESO and PPO regimes in certain circumstances. But Mr Chisnall did not provide evidence establishing a limitation on these rights in his case.[31] No issues of justification therefore arise.[32]

The issue of justification

[19] The second issue for the Court is whether any such limitation on rights (capable of justification) is justified for the purposes of s 5 of the Bill of Rights. We have noted that although s 5 requires the Court to consider whether any such limitation of rights has been demonstrably justified, for the most part the Attorney-General elected not to file evidence to justify the limitations on rights engaged by the regimes.[33] This was with the exception of brief factual evidence as to the operation of the ESO and PPO regimes, and legislative fact evidence — the latter filed to justify the retrospective operation of the regimes.[34] The Court was therefore constrained in its consideration of the issues raised in these appeals by the limited evidence available to us.[35]

[20] We have discussed the weight to be given by the courts, when assessing the issue of justification, to the choice that Parliament did in fact make.[36] We have observed that it is well-established that, when assessing the reasonableness of limits, regard should be had to the justification offered by the decision-maker. As to the weight to be given to Parliament's choice, regard should be had by the courts to Parliament's institutional capacity and expertise with regard to the particular subject matter.

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30 See below at [163]–[164].
31 The Court of Appeal did not address these rights: Court of Appeal decision, above n 10, at [227]–[228].
32 See below at [167]–[168].
33 See below at [191].
34 See below at [199].
35 See below at [214].
36 See below at [249]–[250].

[21] In addressing the issue of justification for the purposes of s 5 of the Bill of Rights, we have distinguished between the retrospective and prospective application of the regimes on the basis that a retrospectively applied second penalty involves a more serious limitation of the affirmed right. We have also distinguished between the aspects of the regimes that contemplate and authorise detention (the entirety of the PPO regime, and the special conditions of the ESO regime that provide for intensive monitoring and/or residential restriction, which can authorise detention in varying forms and degrees) and those that do not (the standard ESO conditions). This is because detention is at the most punitive and most liberty-depriving end of the range of penalties that the law can impose in New Zealand.

Prospective application of the non-detention authorising part of the ESO regime

[22] Addressing first the prospective application of those aspects of the ESO regime that do not authorise detention: we have concluded that the objective of protecting the public from recidivist offenders who, on the basis of good evidence, are assessed as posing a high, or very high, risk of further serious sexual or violent offending, is an objective of sufficiently high societal importance in a free and democratic society to be capable of justifying a limit on the s 26(2) right to be free from the imposition of this form of second penalty.[37] We have concluded, on the evidence before us, that these particular limitations are rationally connected to this objective, and, if administered in accordance with the requirements of s 5 that they be no more intrusive than reasonably necessary to achieve their purpose, are proportionate and therefore justified.[38]

[23] We have not, therefore, found an unjustified limitation of the s 26(2) right in respect of this aspect of the ESO regime.[39] But we have qualified this finding as follows.[40] The Court had very limited evidence before it from Mr Chisnall as to the operation of the standard conditions and their effect on him. There was also very little argument directed to particular conditions. We have expressed concern that the standard condition relating to contact with children may not be responsive to the

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37 See below at [208].
38 See below at [209]–[210] and [230].
39 See below at [256].
40 See below at [257]–[258].

particular offender, or management of the risk in association with them. We have made no finding in relation to that given the absence of argument and evidence.

Retrospective application of the non-detention authorising part of the ESO regime

[24] In respect of that part of the ESO regime authorising the retrospective application of limitations not amounting to detention, it would of course be less rights-intrusive were they not applied retrospectively. Having said that, this would not achieve the purposes of the legislation.[41] The legislative fact material established that the regime was intended to enable management of the risk associated with a number of offenders who had committed the eligible offences before the regime had been enacted — and who posed a real and ongoing risk of similar offending in future.[42]

[25] In light of the nature and seriousness of the risk being managed, the rational connection between the restrictions authorised by the standard conditions and the management of that risk, and the fact that the restrictions are at the lesser range of what constitutes a penalty, we have concluded that the limitation on the s 26(2) right effected by these parts of the ESO regime is justified for the purposes of s 5.[43]

Retrospective application of the PPO regime and of the detention-authorising part of the ESO regime

[26] As noted above, we have concluded that the retrospective application of the detention-authorising parts of the ESO and PPO regimes (retrospective when applied to people who committed a qualifying offence before the enactment of the regimes as it could apply to them) is not capable of justification for the purposes of s 5.[44] This is consistent with case law to the effect that retrospective criminal liability and retrospective increased penalties cannot be justified. A retrospectively imposed second penalty amounting to a detention entails a limitation on the core of the right protected by s 26(2). The application of regimes in this context is therefore inconsistent with the right affirmed in s 26(2) in this regard.[45]

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41 See below at [231] and [259].
42 See below at [201]–[204] and [259].
43 See below at [260].
44 See below at [146]–[148].
45 See below at [169].

Prospective application of the PPO regime and of the detention-authorising part of the ESO regime

[27] As to whether the PPO regime and the detention-authorising parts of the ESO regime are justified when orders are made prospectively, we have found that while the objectives of these aspects of the regimes are important, the limits imposed are not proportionate to those objectives.[46] Based on the legislative fact evidence and overseas case law before us, it appears that other plausible options exist which are likely to be less rights intrusive. Any such model would be based around the following three pillars:[47]

(a) achieving public protection by the least restrictive means possible for each offender;

(b) minimising the punitive impact of the restrictions on the offender; and

(c) requiring mandatory provision of rehabilitation designed to meet the needs of the offender (including where indicated, therapeutic treatment).

[28] The ESO and PPO regimes do not reflect these three pillars, and insufficient justification was given for this more rights-intrusive model.[48] Therefore, we have found the prospective application of the PPO regime and the detention-authorising parts of the ESO regime impose an unjustified limitation on s 26(2).

Discussion of declaration of inconsistency jurisdiction

[29] We have discussed the nature of the jurisdiction to issue a declaration of inconsistency, noting that the jurisdiction is not exercised to review Parliament's legislative choices.[49] Nor does the issue of a declaration invalidate the legislation in question, or affect the orders as they apply to Mr Chisnall.[50] Rather, the court has a duty under the Bill of Rights to assess whether limitations on rights are justified, as

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46 See below at [261]–[262].
47 See below at [235].
48 See below at [238]–[244] and [261]–[262].
49 See below at [247] and [252].
50 See below at [69], [87] and [88].

they are required to be by s 5 of that Act.[51] The court cannot shirk that responsibility. Indeed Parliament has recognised the role that the court plays in this regard in ss 7A and 7B of the Bill of Rights.[52] Nevertheless, legislation is enacted by a democratically elected body — so that a finding that legislation is inconsistent with the Bill of Rights is not to be lightly made.[53]

[30] We have sought further submissions on the form of the declarations of inconsistency to be made in this case.[54]

Roadmap

[31] In addressing the complex issues that arise on appeal, we have divided these reasons into five parts. They are:

(a) Setting the scene (legally and factually).

(b) The threshold question on these appeals: is the declaration of inconsistency jurisdiction available and appropriate where the legislation provides a discretion to the judicial officer making the orders?

(c) Do the ESO and PPO regimes limit any or all of the affirmed rights as contended by Mr Chisnall?

(d) The s 5 inquiry — are these reasonable limits, justified in a free and democratic society?

(e) The exercise of the discretion to issue a declaration.

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51 See below at [247] and [252].
52 See below at [87] and [252].
53 See below at [252].
54 See below at [267].

First section: Setting the scene

[32] We have noted above that the focus of these appeals is on the aspects of the regimes that authorise detention. However, the application was not expressed in such limited terms and was not dealt with by the lower courts in this way. We therefore describe the overall regimes and later address issues of rights compliance.

Development of the ESO and PPO regimes

[33] ESOs were first introduced in 2004 through Part 1A of the Parole Act 2002.[55] In its original iteration the regime empowered the Chief Executive of Ara Poutama Aotearoa | the Department of Corrections (the Chief Executive) to apply for an ESO only in respect of persons imprisoned for a child sex offence.[56] Applications could be made at any time up until the offender's latest sentence expiry date or the expiry of their release conditions, whichever was later.[57] The original purpose of an ESO was to "protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons".[58] The orders were to be made for the "minimum period required for the purposes of the safety of the community" in light of the risk, its duration and the seriousness of the harm that would be caused were the risk realised.[59] Although an ESO could be extended if special circumstances applied, even then the total length of an ESO could not exceed 10 years.[60]

[34] By 2015, the 10-year maximum was due to be reached for some offenders subject to ESOs, and with the expiry of those orders, the ability to manage any continuing risk would come to an end. Proposals were formulated to amend the ESO regime by enabling orders to be renewed for as long as they were needed to meet risk, and to expand the reach of the regime beyond high-risk child sex offenders to include

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55 Inserted by s 11 of the Parole (Extended Supervision) Amendment Act 2004.

56 Parole Act, s 107B(2) and (3) (as enacted) described the relevant sexual offences, which almost entirely involved victims under the age of 16 (the only relevant exceptions being intercourse with "severely subnormal" individuals, which could include adults: subs (2)(i) and (m)).

57 Section 107F (as enacted). See also 107C(1) (as enacted).

58 Section 107I(1) (as enacted).

59 Section 107I(5).

60 Sections 107I(6) and 107N(5) (as enacted). These subsections were repealed on 12 December 2014 by the Parole (Extended Supervision Orders) Amendment Act 2014 [ESO Amendment Act]. Section 6(2) of that same Act amended s 107A(b) to provide that an ESO may last for "not more than 10 years *at a time*" rather than "up to 10 years" (emphasis added).

high-risk sex offenders who offend against adults, and very high-risk serious violent offenders. However, policy work identified that there was a small cohort of the highest risk offenders for whom the ESO regime was considered insufficient to meet risk, an insufficiency said to be evidenced by instances of reoffending by those subject to ESOs.

[35] In 2014, Parliament amended the ESO regime broadly in accordance with these proposals,[61] and also enacted the Public Safety (Public Protection Orders) Act 2014 (the PPO Act). The latter created the PPO regime which provides for detention for an indeterminate term of those found to be the highest risk sexual and violent offenders — a response to the concern identified above that the ESO regime was inadequate to manage the risk associated with these offenders.

[36] Each of the various pieces of ESO legislation were subject to reports made by the Attorney-General under s 7 of the Bill of Rights.[62] All of these reports identified inconsistency with the s 26(2) right to be free from a second penalty.[63] Issues were also identified with the retrospective application of the regime, including under s 26(1), and in respect of aspects of that regime that gave rise to arbitrary detention under s 22.[64] By contrast, the Attorney-General reported that the PPO regime was not penal and was otherwise rights consistent. This was because of the civil nature of the PPO regime; the requirement for a mental health/behavioural threshold supported by expert evidence; the system for regular review of orders; and the emphasis on

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61 ESO Amendment Act, above n 60.

62 As we come to, this provision requires the Attorney-General to report to Parliament where a Bill appears to be inconsistent with the New Zealand Bill of Rights: see below at [81].

63 See Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill* (11 November 2003); Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill* (2 April 2009) [2009 s 7 report]; and Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill* (27 March 2014) [2014 s 7 report]. 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) [2023 s 7 report], a report on the 2023 amendments referred to below n 97.

64 Concerns with s 22 were later said to be addressed by the provision of greater review rights: 2014 s 7 report, above n 63, at [7]–[11]. But see 2023 s 7 report, above n 63, at [25]–[26].

residents' autonomy and needs in the guiding principles of the Public Safety (Public Protection Orders) Bill.[65]

The ESO regime

[37] Following the 2014 amendments, the ESO regime has the purpose of protecting "members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences".[66]

[38] The Chief Executive can apply to the sentencing court[67] for an ESO in respect of an "eligible offender".[68] An eligible offender is someone who has received a sentence of imprisonment for one of a listed number of sexual and violent offences (collectively referred to as "relevant offences"[69]), and is either still subject to a determinate sentence of imprisonment (whether or not for a relevant offence), release conditions or an existing ESO.[70] The application must be supported by a health assessor's report from either a psychiatrist or psychologist.[71]

[39] In the case of an application made in connection with serious sexual offending, the health assessor must address whether there is a high risk that the offender will

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65 Public Safety (Public Protection Orders) Bill 2012 (68-1), cl 5; and Office of the Attorney-General *Public Safety (Public Protection Orders) Bill – Consistency with the New Zealand Bill of Rights Act 1990* (14 October 2012) at [27]–[27.3]. (This was not a s 7 report but an opinion of the Attorney-General on consistency with the New Zealand Bill of Rights. The Attorney-General noted that the s 7 procedure need not be only an "after the event" exercise, but can involve early engagement with legislative proposals to ensure rights consistency: at [7]).

66 Parole Act, s 107I.

67 Section 107D defines the "sentencing court" as the High Court unless every relevant offence for which the offender was most recently subject to a sentence of imprisonment was imposed by the District Court. See also ss 107GAA(2)(a) and 107IAB(2).

68 Section 107F.

69 Section 107B.

70 Section 107C. The definition of eligible offender extends to certain people arriving in New Zealand following serving a sentence for a relevant offence in an overseas jurisdiction. Those provisions are not at issue in these appeals.

71 Section 107F(2)–(2A). See also s 107IAA. The role of health assessor is defined in s 4(1) of the Sentencing Act 2002.

commit a relevant *sexual* offence in future, and whether the offender displays the relevant traits and behavioural characteristics.[72] Those are, whether the offender:[73]

> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and
>
> (d) displays either or both of the following:
>
> > (i) a lack of acceptance of responsibility or remorse for past offending:
> >
> > (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

[40] Where the grounds for the application are that the eligible offender is at very high risk of committing a relevant *violent* offence, the health assessor must address whether there is a very high risk that the offender will commit a relevant violent offence in future, and whether the offender displays each of the relevant behavioural characteristics.[74] Those are, whether the offender:[75]

> (a) has a severe disturbance in behavioural functioning established by evidence of each of the following characteristics:
>
> > (i) intense drive, desires, or urges to commit acts of violence; and
> >
> > (ii) extreme aggressive volatility; and
> >
> > (iii) persistent harbouring of vengeful intentions towards 1 or more other persons; and
>
> (b) either—
>
> > (i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or
> >
> > (ii) has limited self-regulatory capacity; and
>
> (c) displays an absence of understanding for or concern about the impact of his or her violence on actual or potential victims.

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72 Parole Act, s 107F(2A)(a).

73 Section 107IAA(1). This list of traits and characteristics, and that in s 107IAA(2), was amended in 2014 to be more detailed and evidence-based than as originally enacted: ESO Amendment Act, above n 60, s 16.

74 Parole Act, s 107F(2A)(b).

75 Section 107IAA(2).

[41] The court may make an ESO if satisfied that, having reviewed the health assessor's report, the offender has, or has had, a "pervasive pattern of serious sexual or violent offending" and there is a "high risk" of future relevant sexual offending, and/or "a very high risk" of future relevant violent offending.[76]

[42] As to duration, the legislation provides that the ESO *must* be for the minimum period required for the purposes of the safety of the community in light of the level of risk posed by the offender, the seriousness of the harm that might be caused to victims, and the likely duration of the risk,[77] and in any case must be for no longer than 10 years.[78] The Chief Executive may however apply for a fresh ESO, and there is no limit on how many such orders may be made.[79]

[43] As to the nature of restrictions imposed when an ESO is made, the standard conditions largely replicate parole standard conditions, and are administered by probation services — with discretion being delegated to probation officers in respect of the operation of some of the conditions.[80] They include:

(a) reporting requirements;

(b) control (through direction and consent processes) over accommodation, employment and overseas travel;

(c) participation in a rehabilitative needs assessment if required;

(d) non-association with specified persons without permission; and

(e) requirements, if directed, to allow the collection of biometric information.[81]

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76 Sections 107I–107IAA.
77 Section 107I(5).
78 Section 107I(4).
79 Section 107F(1)(b) states that where an offender is already subject to an ESO, the Chief Executive can apply for a further ESO at any time before the expiry of that order.
80 Section 107JA; and see s 14.
81 The biometric information may only be used to help manage offenders to ensure public safety, identify offenders before they leave New Zealand and to support enforcement of the condition that the offender must not leave New Zealand without consent: s 107JB.

[44] Some of the standard ESO conditions are more restrictive than standard conditions for parole. For example, the offender must not associate with or contact a person under the age of 16 years without the written approval of a probation officer, and adult supervision, irrespective of the nature of their offending.[82] There is also greater control on where the offender may live.[83]

[45] While the standard conditions do not authorise detention, special conditions can be imposed that amount to detention. If the ESO is made, the Chief Executive (or any probation officer) can apply to the Parole Board for the imposition of special conditions.[84] If these include residential restrictions, the probation officer must define the area of the residence within which the offender must remain, and the offender must remain within that area for the times specified.[85] Residential restrictions requiring 24-hour home detention can only apply within the first 12 months of the order, but residential restrictions requiring home detention anywhere short of 24 hours a day can apply for the entire length of the ESO.[86] Unlike a parole situation, these residential restrictions can be imposed without the eligible offender's consent.[87] Special conditions can only be imposed for a purpose set out in s 15(2); that is, to reduce the risk of offending, to facilitate or promote rehabilitation, to provide for the reasonable concerns of the victim, or to comply with an intensive monitoring condition.[88]

[46] The Chief Executive can also apply to the court for an order that the Parole Board impose an intensive monitoring condition.[89] An intensive monitoring

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82 Section 107JA(1)(i).

83 The standard ESO conditions require that the offender obtain written consent before moving to *any* new residential address: s 107JA(1)(c). Section 14(1)(c), the equivalent standard parole condition, provides that an offender must not move to a new residential address *in another probation area* without the prior written consent of the probation officer.

84 Sections 107K(1) and (4).

85 Sections 15(3A) and 33(2)(c).

86 Section 107K(3)(a)–(b). In 2009, the special conditions were amended to allow for electronically monitored home detention, short of 24 hours per day, for the entire length of an ESO: Parole (Extended Supervision Orders) Amendment Act 2009, s 4. The explanatory note to the amendment Bill stated this was only reinstating the original position under the Parole (Extended Supervision) Amendment Act 2004 which it said was unintentionally altered by amendments in 2007: Parole (Extended Supervision Orders) Amendment Bill (24–1) (explanatory note) at 1–2. However, in his s 7 report on this Bill, the Attorney-General doubted whether the original Act in fact allowed for the imposition of such conditions for longer than 12 months: 2009 s 7 report, above n 63, at [5], n 3.

87 Parole Act, s 107K(1A).

88 Sections 107J(1)(b) and 107K(1) and (4); and see s 15(2).

89 Sections 107IAB and 107IAC(1) and (4).

condition requires an offender to submit to being accompanied and monitored for up to 24 hours a day by an approved individual.[90] The condition can be for no more than 12 months, and the court may not make such an order more than once.[91] There is no particular risk threshold that applies for the making of the intensive monitoring order — the statutory scheme proceeds on the basis that it is for the Chief Executive to establish that such orders are necessary to manage the risk associated with the offender.

[47] It is plain then 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.

[48] The offender has no explicit right to rehabilitation or therapeutic support under this statutory scheme. However the standard conditions require the offender to undertake a rehabilitative or reintegrative needs assessment as required.[92] Special conditions can also be imposed requiring participation in rehabilitative or reintegrative programmes which include psychiatric or other counselling or assessment, attendance at any medical, psychological, social, therapeutic or employment-related programme, or placement with an appropriate person or agency such as an iwi, hapū, whānau, marae and other community-based group.[93]

[49] The regime provides for rights of review. The decision to impose special conditions is subject to the same review provisions as any decision by the Parole Board under the Parole Act.[94] The Board must also review the appropriateness of any high-impact conditions (certain residential restrictions and electronic monitoring) and certain concurrent special conditions every two years.[95] If an offender is subject to repeated ESOs back-to-back, the sentencing court must, on application by the Chief Executive, review the new ESO 15 years after the first ESO was imposed, and

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90 Section 107IAC(2).
91 Sections 107IAC(3) and (5). Subject to the exception in s 107IAC(6).
92 Section 107JA(1)(h).
93 Sections 15(3)(b) and 16. But any condition requiring the offender to participate in a programme must not result in the offender being supervised, monitored or otherwise restricted each day for longer than necessary to attend and participate in the activities: s 107K(3)(bb)(i).
94 Section 107S; and see s 67.
95 Sections 107RB–107RC.

every five years after the imposition of any subsequent ESOs thereafter.[96] At that point the court may only confirm the order if it is satisfied a high risk of relevant sexual offending, or a very high risk of relevant violent offending, remains.[97]

[50] The language of the provisions is criminal — the person made subject to an ESO is referred to in the statutory provisions as "the offender", and the court dealing with the application is referred to as "the sentencing court". An offender may appeal the sentencing court's order to the Court of Appeal, and in that context an ESO is treated as a "sentence".[98] The forms and procedures that apply to ESO applications are explicitly criminal. Certain provisions of the Criminal Procedure Act 2011 are invoked, with necessary modifications, to set the procedures.[99] A judge has powers under that Act and the Crimes Act 1961 to issue a warrant for the arrest of the offender if necessary to compel their attendance at the hearing of the application for an ESO.[100] The judge has powers to grant bail to an offender who is the subject of an ESO application, with the Bail Act 2000 applying as if the offender were charged with an offence and was not bailable as of right.[101]

[51] As to the consequences of non-compliance by the offender, breach of any condition of the ESO without reasonable excuse is an offence, and the offender is then liable to up to two years' imprisonment.[102] This is in contrast to the offence of breaching parole conditions, which only carries a maximum punishment of a year's imprisonment or a fine of $2,000.[103]

The PPO regime

[52] A PPO is the most restrictive post-sentence order available. The effect of the order is to authorise detention and to place the subject of the order under the control and direction of the Chief Executive. There is neither a maximum nor fixed term to

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96 Section 107RA(1)–(2).

97 Section 107RA(6). These review conditions were not part of the regime as originally enacted. Sections 107RA and 107RB were only inserted in 2014 by the ESO Amendment Act, above n 60, and s 107RC in 2023 by the Parole Amendment Act 2023.

98 Section 107R.

99 Section 107G.

100 Section 107G(3).

101 Section 107G(6).

102 Section 107T.

103 Section 71.

the order. Unless it is cancelled pursuant to the review provisions, it continues for the rest of the subject's life.

[53] Sections 4 and 5 frame all that follows in the PPO Act. Section 4 states that the objective of the Act is not to punish the person against whom orders are made, but rather "to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences". Section 5 sets out the following principles to which those exercising a power under the PPO Act must have regard:

> (a) orders under this Act are not imposed to punish persons and the previous commission of an offence is only 1 of several factors that are relevant to assessing whether there is a very high risk of imminent serious sexual or violent offending by a person:
>
> (b) a public protection order should only be imposed if the magnitude of the risk posed by the respondent justifies the imposition of the order:
>
> (c) a public protection order should not be imposed on a person who is eligible to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:
>
> (d) persons who are detained in a residence under a public protection order should have as much autonomy and quality of life as possible, while ensuring the orderly functioning and safety within the residence.

[54] It is significant that the regime directs certain respondents to other regimes — under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) as appropriate.[104]

[55] The main focus of the PPO Act is upon the making of PPOs, although it provides for other orders ancillary to the operation of that regime. Section 7 defines who is eligible for the making of a PPO, the qualifying criteria tracking back to previous offending by the person. Relevant to these appeals are the criteria that the person is detained in prison for a serious sexual or violent offence or is currently subject to an ESO with special supervision conditions.[105]

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104 PPO Act, s 12.
105 Section 7(1)(a)–(b).

[56] The Chief Executive may apply to the court for a PPO against an eligible person on the ground that there is a very high risk of imminent serious sexual or violent offending by the person, the application to be made within the six months prior to the person's release from detention.[106]

[57] The application must be accompanied by at least two reports prepared by health assessors addressing the questions whether the respondent exhibits, to a high level, four specified behavioural characteristics and whether there is a very high risk of imminent serious sexual or violent offending by the respondent.[107] The relevant characteristics are:[108]

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

[58] The court may then make a PPO only if satisfied on the balance of probabilities that the respondent is eligible under s 7 and poses a very high risk of *imminent* serious sexual or violent offending if released from prison or left unsupervised.[109] The court may not find that risk to be established unless satisfied that the person exhibits a severe disturbance in behavioural functioning, "established by evidence to a high level", of the four behavioural characteristics above.[110] This isa higher threshold than under the ESO regime. The risk of offending must be "very high" and "imminent" — to be contrasted with the risk to be established under the ESO regime, which need only be of offending "in future" and, for sexual offending, need only be a "high" risk.

[59] The structure of the PPO regime is different to that of the ESO regime — there are no standard or defined special conditions. In fact, there is no clear statement of

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106 Sections 7(1)(a)(ii) and 8.
107 Section 9.
108 Section 13(2).
109 Section 13(1).
110 Section 13(2).

the effect of the making of an order in the PPO Act. Rather, it is necessary to work forwards and backwards from definitions to substantive provisions to gain an understanding of the implications of a PPO for the individual.

[60] The Act provides that a building and its adjacent land within a prison precinct, which are adequately separate and secure, may be declared as a residence for the purposes of the Act.[111] Once so declared, such a building ceases to be a prison for the purposes of the Corrections Act 2004.

[61] A person subject to a PPO is defined as a resident, and the Chief Executive has legal custody of every such resident.[112] Residents must stay in the residence that the Chief Executive designates by written notice and must obey all lawful directions.[113] A resident has all the rights of a person of full capacity not subject to a PPO, except to the extent limited by the Act.[114] The Act expressly contemplates or provides for the extensive limitation of some rights. It allows for detention and for the search, restraint and seclusion of residents in defined circumstances.[115] The manager of the residence has power to preclude visits by some visitors, and all visits must be supervised.[116] The resident's rights to communicate in writing or by electronic means may be limited by their management plan which may prohibit communication with designated people, and the right to access to email and Internet may be subject to supervision.[117]

[62] Each resident must have a management plan that determines how they are managed within the residence based on their needs assessment.[118] The plan includes the resident's reasonable needs, any treatment and programmes that may be offered to them, and a personalised management programme for the goals that will contribute to their eventual release and reintegration.[119] Although residents have a right to

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111 Section 114.
112 Section 3 definition of "resident" and s 21. The exception is individuals instead detained in a prison under a prison detention order. See below at [63].
113 Sections 20 and 22.
114 Section 27. See also ss 28–40.
115 Sections 63–67 and 71–73.
116 Section 34. Certain visits may be unsupervised in order to meet a resident's rehabilitative needs.
117 Sections 32–33, 43 and 45. But see s 46.
118 Sections 41–42.
119 Section 42(3).

rehabilitative treatment, that is subject to the requirement that the treatment has "a reasonable prospect of reducing the risk to public safety posed by the resident".[120]

[63] The court is also empowered, on the application of the Chief Executive, to order that a person subject to a PPO be detained in prison rather than a residence.[121] This order can be made immediately after making a PPO, and only ceases to have effect if cancelled or if the person ceases to be subject to a PPO.[122] Detention in prison can only be ordered, however, if the court is satisfied that the person would, if detained in a residence, pose an unacceptably high risk to themselves or others that could not be safely managed, and that all less restrictive options have been considered and any appropriate options have been tried.

[64] The PPO Act makes detailed provision for the review of the status of the resident: every year a panel must review whether the resident remains at a very high risk of imminent serious sexual or violent offending.[123] If the panel considers that there may no longer be such a risk, they may direct the Chief Executive to apply to the court for the review of the order.[124] If the panel does not so direct or, after reviewing the PPO, the court determines that there is continuing justification for the PPO, the panel or court must review the management plan to determine whether it remains appropriate.[125] The management plan must also be reviewed whenever the plan itself provides for it; whenever the court, the review panel, an inspector, or an Ombudsman recommends a review or change; when the resident in good faith requests a change; or when the manager considers it necessary.[126] Every five years the Chief Executive must apply to the court for a review of the continuing justification of the order.[127] The resident may also apply for a review of the order, but only with the leave of the court.[128]

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120 Section 36. Residents are also subject to limitations on their financial freedom: see ss 28 and 40.
121 Section 85.
122 Sections 85(4) and 91.
123 Section 15. The review panel consists of six members appointed by the Minister of Justice, one of whom is, or was, a judge of the High Court or District Court, at least two of whom are health assessors, and at least four of whom have experience in the operation of the Parole Board: s 122.
124 Section 15(2); and see s 18.
125 Sections 15(3) and 19.
126 Section 44(1).
127 Section 16. In some circumstances, the court may direct that reviews instead happen every 10 years: s 16(2).
128 Section 17.

[65] Proceedings under the PPO Act are civil. The language and procedure used is that of the civil jurisdiction. The person against whom the order is sought is referred to as the "respondent".[129] The application proceeds by way of originating application and is subject to the rules that regulate the High Court in its civil jurisdiction.[130] The provisions of the Criminal Procedure Act are not invoked, although the PPO Act does confer a statutory power on the judge to order the interim detention of the respondent prior to the final disposition of the application.[131]

[66] It is however a criminal offence, punishable by a term of imprisonment not exceeding five years, to escape from the residence in which the subject of a PPO is required to stay.[132] This is in contrast to the MHCAT and IDCCR Acts, where escaping from care or breaching conditions carry no criminal penalty.[133] It is also to be contrasted with the maximum sentences of one year's imprisonment for breaching parole conditions and two years' imprisonment for breaching the conditions of an ESO.[134]

The nature of the risk presented by Mr Chisnall and the orders made to address it

[67] Mr Chisnall has spent a total of 11 years of his adult life in prison serving sentences imposed for a series of sexual offences in his teenage years. His victims were all strangers to him, children or adult women, who he approached in public parks. Mr Chisnall had been preoccupied with sexual violence since the age of 10, and committed his first rape around age 15.[135] The following year he was convicted of an unlawful sexual connection and an assault. At age 18 he committed a second rape.[136] When sentencing Mr Chisnall for that offending, the Judge declined to impose a

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129 Section 3.
130 Section 104; and see, for example, s 105.
131 Section 107.
132 Crimes Act 1961, s 120(1)(bb).
133 Mental Health (Compulsory Assessment and Treatment) Act 1992 [MHCAT Act], s 53 and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [IDCCR Act], ss 110–114.
134 Above at [51].
135 *R v Chisnall* DC New Plymouth CRI-2008-021-527, 31 July 2009.
136 *R v Chisnall* HC Whanganui CRI-2005-083-806, 29 March 2006 [2006 sentencing decision].

sentence of preventive detention[137] or to make a compulsory care order under the IDCCR Act.[138]

[68] Ever since his release from prison on 27 April 2016, Mr Chisnall has been subject to various orders. He was initially granted parole to reside with special monitoring conditions at Anglican Action, an approved community support centre in Hamilton.[139] When this offer of accommodation became unavailable, the Parole Board revoked his parole. Mr Chisnall was then made subject to an interim detention order for a PPO pending the end of his prison sentence.[140] This interim order was amended in January 2017 to relocate him to Matawhāiti residence — the status of this residence is discussed further below.[141] While at Matawhāiti, Mr Chisnall was monitored 24 hours a day and allowed to leave only for specified trips with staff supervision.

[69] After a series of unsuccessful appeals by Mr Chisnall,[142] a PPO was issued in December 2017.[143] A further string of appeals resulted in the PPO being quashed, reissued and quashed again.[144] Finally, on 23 August 2023 a 10-year ESO was issued with special conditions, including intensive monitoring for the first 12 months.[145]

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137 At [47]. Preventive detention can be imposed by a court under s 87 of the Sentencing Act at the time of sentencing. It allows for indefinite detention of an offender following their finite sentence of imprisonment.

138 At [52]–[53]. Mr Ellis noted that Mr Chisnall did at one point meet the statutory criteria for intellectual disability, but that he ceased to fit the definition because his adaptive skills increased.

139 *The Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 3120 (Wylie J) [2017 HC judgment] at [6].

140 *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 784 (Fogarty J) [2016 HC judgment]; and *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796 (Fogarty J).

141 Below at [78]. Prior to this, Mr Chisnall was detained at the PPO residence within the Leimon Villas self-care unit inside the perimeter fence of Christchurch Men's Prison: 2016 HC judgment, above n 140, at [2].

142 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 (Asher, Heath and Dobson JJ); *Chisnall v The Chief Executive of the Department of Corrections* [2017] NZSC 50 (Elias CJ, O'Regan and Ellen France JJ); and *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 (Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ) [2017 SC judgment].

143 2017 HC judgment, above n 139.

144 *Chisnall v Chief Executive of the Department of Corrections* [2019] NZCA 510 (Miller, Cooper and Clifford JJ); *The Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32 (Gordon J) [2021 HC judgment]; and *Chisnall v Chief Executive of the Department of Corrections* [2022] NZCA 402 (Clifford, Gilbert and Courtney JJ).

145 *Chief Executive, Department of Corrections v Chisnall* [2023] NZHC 2278 (Downs J) [2023 HC judgment].

[70] Multiple health assessors' reports show that as well as an intense drive and desire for relevant sexual offending, Mr Chisnall demonstrates poor self-control, a lack of remorse or understanding for his victims and a history of difficulties forming interpersonal relationships.[146] Despite his positive progress in effectively dealing with his offending-related thoughts, multiple experts considered these thoughts have, and will continue to be, his primary coping mechanism in stressful situations.[147] Multiple risk assessment tools assess him at posing a high risk of reoffending, particularly against adult women and children, a risk which some experts believe will continue to be present for years to come.[148]

[71] Mr Chisnall does not have a mental disorder for the purposes of the MHCAT Act, and his level of intellectual disability does not clearly qualify him for detention under the IDCCR Act.[149] However, he has at various times been assessed to have low cognitive functioning, psychopathy, paranoid personality traits, PTSD, ADHD and possible autism spectrum disorder.[150] At age 20, his communication and interpersonal skills were equivalent to those of a four-year-old.[151]

[72] Mr Chisnall himself accepts that he poses a high risk of future sexual offending and consented to being subject to an ESO. We accept the submission however that his consent to the making of such an order does not deprive him of the right to seek a declaration that the ESO regime, in its present form, is inconsistent with rights affirmed under the Bill of Rights. It is important to note that the issuing of such a declaration will have no effect on the current orders applying to Mr Chisnall.

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146 2017 HC judgment, above n 139, at [54]–[80]; 2021 HC judgment, above n 144, at [148]–[187]; and 2023 HC judgment, above n 145, at [18]–[21].

147 2017 HC judgment, above n 139, at [56]–[57]; 2021 HC judgment, above n 144, at [148] and [150]; and 2023 HC judgment, above n 145, at [18].

148 2017 HC judgment, above n 139, at [98]–[103]; 2021 HC judgment, above n 144, at [200]–[230]; and 2023 HC judgment, above n 145, at [23]–[27] and [33].

149 2017 HC judgment, above n 139, at [35] and [38]; and 2017 SC judgment, above n 142, at [47].

150 2017 HC judgment, above n 139, at [102]–[103]; and 2021 HC judgment, above n 144, at [220].

151 2006 sentencing decision, above n 136, at [27].

The administration, operation and effect of the ESO and PPO regimes

[73] At the time of the hearing, we did not have evidence before us as to the special conditions that have applied, and continue to apply, to Mr Chisnall under the various orders he has been subject to, or as to the day-to-day effect upon him of these orders.[152]

[74] We did have before us a brief affidavit from Ms Leota, at the time National Commissioner of the Department of Corrections. Ms Leota's evidence was that as at March 2019 there were 263 offenders subject to an ESO, seven whom were subject to an intensive monitoring condition. As for PPOs, there were three individuals subject to a PPO and one subject to an interim detention order.

[75] Ms Leota's evidence described the operation of ESOs and PPOs more generally. She explained that a review panel within Corrections, relying on the health assessors' reports, makes a recommendation to the Chief Executive as to whether application for an ESO should be made.[153] The length of order sought is determined on a case-by-case basis, dependent on a variety of factors including the offender's age, risk level and their ability to engage in treatment.

[76] Ms Leota said that given the range of offending types and manner of offending that can attract an ESO, special conditions are also tailored to each individual based on their particular reoffending risks and rehabilitation and/or reintegrative needs.

[77] After an ESO is granted, the probation officer works with a High Risk Response team within Corrections to assess which conditions will be required to mitigate that individual's particular risks and to address any needs. A detailed application is then made to the Parole Board outlining the rationale for the proposed conditions. This is supported by a psychologist's report endorsing these conditions. Ms Leota explains that the conditions sought and imposed on offenders are therefore highly variable. She says at one end, offenders subject to an ESO with intensive monitoring may be co-located in a residential facility such as Spring Hill

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152 A number of (now expired) interim special ESO conditions are laid out in sch 1 to the 2023 HC judgment, above n 145.

153 Ms Leota notes that in practice the recommendation is made to the National Commissioner, as they hold the delegation from the Chief Executive to make applications for ESOs.

Village — which is on the property of Spring Hill Corrections Facility, although outside the prison wire. At the other end, an offender may be living in their own home, engaged in employment, but subject to reporting requirements and to exclusion zones (such as schools and playgrounds).

[78] Ms Leota explains that there is a much more uniform situation for those subject to a PPO — because they are detained, no conditions are imposed upon them. She does not however explain how, within this broad framework, the particular restrictions to be applied to them, and any rehabilitation to be offered to them, are decided. At the time of making her affidavit she said there was only one PPO residence — Matawhāiti, a 1.055 hectare secure civil detention facility. It is surrounded by a four-metre energised fence within the external boundary of Christchurch Men's Prison, although outside the perimeter of the prison itself. As mentioned, this is where Mr Chisnall was detained while subject to the PPOs and interim detention orders. After his PPO was replaced by an ESO, he was relocated to Tōruatanga residence, an ESO residence also on the grounds of Christchurch Men's Prison (and supported by largely the same staff as Matawhāiti) but outside the energised fence.

The Bill of Rights framework

[79] The Bill of Rights provides much of the relevant legal framework for the issues on appeal. The long title to the Bill of Rights provides that its purpose is as follows:

> (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

[80] Section 2 states that the rights and freedoms set out are affirmed. Section 3 confirms the application of the Bill of Rights to each of the legislative, executive and judicial branches of Government and to "any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".

[81] Also related to the executive's obligations under the Bill of Rights is s 7, which requires the Attorney-General to bring to the attention of the House of Representatives

any provision in a Bill introduced that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights. Any such report does not limit the right of Parliament to enact that provision.[154]

[82] We referred to ss 4, 5 and 6 above.[155] They are the critical provisions for the purposes of these appeals. They provide for how the court is to approach statutory interpretation in order to give effect to the affirmed rights and freedoms, and stipulate the test against which any limitation to a right is to be measured when determining whether there has been an infringement of the right:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Declarations of inconsistency

[83] In *Attorney-General v Taylor* this Court confirmed that the High Court has jurisdiction to make a declaration that an enactment is inconsistent with the Bill of Rights.[156] The majority in that case said that by doing so the court is fulfilling its obligation to grant remedies for breaches of the Bill of Rights, and its obligation under the Declaratory Judgments Act 1908 to vindicate rights through the issue of a

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154 Shi Shen Cai and others *Human Rights Law* (looseleaf ed, Thomson Reuters) at [BOR7.01].
155 See above at [7].
156 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

declaration.[157] Identifying whether the obligation of compliance has been met is a judicial function.[158] As to the purpose of such a declaration, the majority in *Taylor* said that a declaration is in itself a vindication of rights, may be of assistance to Parliament, and may have implications in the context of a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[159] As Elias CJ said, the issue of a declaration is therefore important in terms of compliance with the rule of law — addressing, at least in part, the rule of law deficit that would otherwise exist in respect of the inconsistency with the right, and the absence of any justification for that inconsistency.[160]

[84] The first task for any court when addressing an application for a declaration of inconsistency is to interpret the legislation in question in accordance with the Bill of Rights interpretive framework. This is because the logic of the Bill of Rights, apparent from its provisions, is that a declaration of inconsistency is only appropriate where the court has concluded that the legislation cannot be interpreted in a rights-consistent manner.

[85] If, on the interpretation settled upon by the court, it is satisfied that there is a limitation on rights, the court then proceeds to assess, under s 5, whether that limitation is a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society. This is also called the "proportionality" assessment. At each stage the court may well require evidence to provide necessary context to assist it in assessing the existence, nature and extent of any limitation of rights.

[86] In *R v Oakes* the Canadian Supreme Court proposed a formulation to guide judges through the equivalent proportionality assessment under the Canadian Charter

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157 At [38], [50] and [53] per Glazebrook and Ellen France JJ, and [95] and [100] per Elias CJ.

158 At [53] and [65] per Glazebrook and Ellen France JJ and [103] per Elias CJ.

159 At [55]–[56] per Glazebrook and Ellen France JJ and [101] per Elias CJ. See International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]; and Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

160 At [105].

of Rights and Freedoms.[161] That approach was adopted by this Court in *R v Hansen*.[162] We set that assessment out here, to assist in understanding the Attorney-General's primary argument on appeal. The issues the court is required to address can be summarised as follows:

(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) Is the limit in due proportion to the importance of the objective?

We return to this framework (which we refer to as the *Hansen* proportionality assessment, or methodology) later when we apply it to the facts of this case.

[87] An important point to make is that if the court issues a declaration of inconsistency, it does not thereby declare the law invalid — s 4 makes that clear. Even where a declaration is issued, the statute in question remains in full force and effect. Nor is the court requiring any response from Parliament to the declaration.[163] However, following this Court's decision in *Taylor*, Parliament enacted ss 7A and 7B of the Bill of Rights and the House of Representatives adopted standing orders which together provide for how the executive and Parliament will respond to any such declaration.[164]

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161 *R v Oakes* [1986] 1 SCR 103 at 138–140 per Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ. See Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK) [Canadian Charter].

162 *Hansen*, above n 18, at [64] per Blanchard J and [104] per Tipping J.

163 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1) (explanatory note).

164 See ss 7A and 7B of the New Zealand Bill of Rights, inserted on 30 August 2022 by s 4 of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022; and Standing Orders of the House of Representatives 2023, SO 269A and Appendix F.

[88] As mentioned, in this case it is also important to note that the issue of a declaration will not affect the current orders as they apply to Mr Chisnall.[165]

Second section: Declarations of inconsistency where the legislation provides a discretion

[89] The Attorney-General's primary argument on appeal is that the declaration of inconsistency jurisdiction is not available in cases such as this, where (on the Attorney-General's argument) the power to impose orders limiting rights are discretionary in nature, and where there is sufficient flexibility in the regime to ensure rights consistency.

[90] We deal with this argument first, as it is in a sense a threshold issue. If the Attorney-General is right in this argument, it largely disposes of the appeal and cross-appeal — we say largely, because it still leaves the issue of retrospectivity to be addressed, which it is conceded cannot be cured through the application of a discretion.

[91] Ms Jagose KC argues for the Attorney-General that where a statute confers a discretion on a judge to impose a rights-limiting order, it is for the judge making that order to be satisfied that the limitation of rights undoubtedly entailed in those regimes is reasonably justified to secure the objectives. As a general rule, declarations of inconsistency should only be issued in respect of discretionary regimes in cases where the enactment requires a rights-inconsistent outcome — in other words where the exercise of judicial discretion cannot otherwise secure rights consistency.

[92] Ms Jagose submits that it is significant that all previous declaration of inconsistency applications considered by this Court have related to what she terms "self-executing provisions", by which she means provisions that apply without the exercise of a discretion.[166] These are the cases, she says, in which the *Hansen* methodology is appropriate. In contrast, s 5 jurisprudence on statutory discretions does not tend to engage with the first three parts of the *Hansen* assessment. She offers as authority for this proposition *D (SC 31/2019) v New Zealand Police* and

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165 See above at [69].

166 Citing *Taylor*, above n 156; and *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683.

Moncrief-Spittle v Regional Facilities Auckland Ltd.[167] Mr McKillop, also for the Attorney-General, cites the approach of the Court of Appeal in *Mosen v Chief Executive, Department of Corrections* as an example of how a judge considering an application for an ESO can exercise the discretion in a rights-consistent manner, and why therefore the declaration of inconsistency jurisdiction has no role to play in respect of this type of statutory provision.[168]

[93] It also follows, it is argued, that because the ESO and PPO regimes are discretionary, the Court of Appeal erred in attempting a full *Hansen* assessment and, in particular, erred in requiring that the Attorney-General provide justification for Parliament's choice of legislative regime. It fell into error in concluding that Parliament should not have adopted the law it did — straying impermissibly into Parliament's realm. All that needed to be justified in a case such as this, involving a discretionary regime, was the limitation of rights in the particular case. Or in other words, the Court of Appeal fell into error in failing to direct its attention to the real scenario of Mr Chisnall's circumstances, or the circumstances of a reasonable hypothetical litigant who might come before the court.

Discussion

[94] There are difficulties with the Attorney-General's argument. First, the authorities relied upon provide no support for it. *D* and *Moncrief-Spittle* are not cases concerned with the rights consistency of a statutory provision — the issue which declarations of inconsistency engage — but with the rights consistency of the *exercise* of a statutory power. Each of those cases involved challenges to the lawfulness of a particular decision, rather than applications for a declaration that the legislation itself is inconsistent.

[95] The second difficulty is perhaps more fundamental. The Crown's argument is based upon the notion that the power to make an ESO or PPO is discretionary in nature.

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167 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213; and *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459.

168 *Mosen v Chief Executive, Department of Corrections* [2022] NZCA 507, (2022) 30 CRNZ 751. The Attorney-General also referred us to the decisions in *Department of Corrections v Gray* [2021] NZHC 3558 and *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 but we find those decisions take the matter no further than (and pre-date) the decision in *Mosen*.

But this is not a true discretion. If the offender meets the very high statutory threshold for the making of an ESO or PPO it is hard to conceive of a situation in which that order will not be made.[169] It then follows that, in the case of the PPO regime, the effect of the order is detention and substantial limitation on rights. In the case of the ESO regime, when the order is made, standard conditions apply. The same logic applies to the making of intensive monitoring orders by the court considering the application, and to the decision by the Parole Board to impose residential restrictions. If the Chief Executive makes out the case for the imposition of these restrictions, again it is difficult to conceive of a situation in which the orders will not be made.[170]

[96] It is significant that counsel for the Attorney-General did not identify for us any case in which the statutory risk threshold had been met but the orders were declined. Nor did counsel highlight the decision pathway a judge could follow in declining the making of an order if the statutory pre-conditions were met and there was evidence that managing the level of risk required the imposition of particular conditions. For these reasons the exercise for the judge is better construed as an evaluative rather than discretionary one.[171]

[97] This point is illustrated by the decision of *Mosen*, the case relied upon by the Attorney-General. In that case it was argued that the original District Court Judge had failed to interpret the ESO provisions in a Bill of Rights-consistent manner when addressing whether to impose an ESO. The Court of Appeal in *Mosen* accepted that s 6 requires a court to interpret the ESO regime "as consistently with the [Bill of Rights] as possible", although noting that the interpretation must be open on the words of the statute in light of Parliament's intention.[172] As the Court in *Mosen* acknowledged, the task for a judge is to interpret and apply legislation as consistently *as possible* with the Bill of Rights. Had the judge in the sentencing court concluded that a rights-consistent application was not open to them (notwithstanding the application of a rights-consistent interpretation pursuant to s 6), they would still have

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169 Other than of course where another statutory regime applies: PPO Act, s 12.

170 See below at [105] for an alternative way of framing the Attorney-General's argument.

171 For a discussion as to the distinction between a truly discretionary decision-making process and an evaluative one see *Taipeti v R* [2017] NZCA 547, [2018] 3 NZLR 308 at [49]. See also *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ.

172 *Mosen*, above n 168, at [26].

been required to apply the statutory scheme. That is the effect of s 4 of the Bill of Rights.

[98] This Court has said on previous occasions that there is no single methodology that must be applied in all Bill of Rights cases.[173] This is both necessary and inevitable given that a statute or legal rule, or the application of that statute or rule, can be rights inconsistent in a number of ways. As the Human Rights Commission submits, the methodology to be adopted by a court when considering an application that engages the affirmed rights should be the one that best strives to identify and secure a Bill of Rights-consistent interpretation and application to the individual case utilising ss 5 and 6, and observing the limits imposed by s 4. In identifying what is a rights-consistent interpretation and application, the court also identifies the conduct that is to be avoided for the purposes of the Bill of Rights. The methodology proposed by the Attorney-General does not identify what would amount to a rights-inconsistent application of the regimes. It assumes that rights consistency will be attained if the proportionality exercise contemplated in *Mosen* is undertaken, but, as the Court in *Mosen* itself identified, all that methodology can secure is the most rights-consistent interpretation the statutory scheme can achieve.[174]

[99] We of course accept that it is necessary for the court considering an application for a declaration to ask whether ss 5 and 6 can be properly used by the sentencing court and by the Parole Board to keep those powers within Bill of Rights bounds. But if that is the Attorney-General's contention, the s 5 or s 6 pathway to rights consistency should be capable of articulation (and should have been pleaded in the Attorney-General's notice of opposition to Mr Chisnall's application for declarations of inconsistency). In argument, counsel for the Attorney-General did not identify just what that pathway was — indeed no party did.

[100] This takes us on to the final aspect of this part of the Attorney-General's argument, which is that the Court of Appeal erred by failing to consider Mr Chisnall's

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173 *Hansen*, above n 18, at [61] per Blanchard J, [93]–[94] per Tipping J and [192] per McGrath J; *D*, above n 167, at [101]–[102] per Winkelmann CJ and O'Regan J and [259] per Glazebrook J; *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [46]–[47] per Winkelmann CJ; and *Moncrief-Spittle*, above n 167, at [89] and [91].

174 *Mosen*, above n 168, at [26].

circumstances, or the circumstances of a reasonable hypothetical litigant who might come before the court, by instead straying into a general review of the legislation. The Attorney-General refers us to the judgment of the majority of the Canadian Supreme Court in *R v Nur*.[175] That case concerned a mandatory minimum sentence provision for the offence of possession of loaded prohibited firearms. This was held to be inconsistent with s 12 of the Canadian Charter — the right not be subjected to any cruel or unusual treatment or punishment, which includes grossly disproportionate sentencing. The majority said that answering "yes" to either of the following questions would indicate Charter inconsistency:[176]

(a) Does the statute compel a Charter-inconsistent outcome in the instant case?

(b) If not, does the statute nonetheless compel a Charter-inconsistent outcome in "reasonable hypothetical" cases?

[101] This is a useful framework of analysis.[177] It does not however require that a declaration of inconsistency be limited to the facts only of the individual case. Sometimes the application of statutory provisions will be sufficiently predictable or clear-cut to justify the making of a declaration which reaches beyond the facts of an individual case and encompasses the general operation of the legislation.

[102] As the above analysis of the ESO and PPO regimes shows, the operation of the statutory scheme in this case is clear-cut. Under the ESO regime, there will be some offenders whose risk profile will result in the application of the standard conditions and some whose risk profile will lead to the imposition of an intensive monitoring order and, for others, the imposition of special conditions including residential restrictions. As for the PPO regime, there is even less variability once the threshold

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175 *R v Nur* 2015 SCC 15, [2015] 1 SCR 773.

176 At [56]–[57] per McLachlin CJ, LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ.

177 There is United Kingdom authority that where application of the statute will not result in rights inconsistency in every case, there may be a reason to refuse to issue a declaration of inconsistency (there called a declaration of incompatibility). However, that position is not settled even in the United Kingdom: Shona Wilson Stark "Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998" (2017) 133 LQR 631 citing *Percy v Director of Public Prosecutions* [2001] EWHC Admin 1125, (2002) 166 JP 93, and *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department and others intervening)* [2015] UKSC 49, [2016] AC 88. This is not an issue in this case and we do not therefore discuss those authorities.

for making the order is met. The orders are made without time limit. They are standard as to their effect — placing the person in the legal custody of the Chief Executive, and subjecting them to the Chief Executive's very broad discretionary powers of control over most other aspects of their life.

[103] With each of these regimes then, the task for a court when dealing with an application for a declaration of inconsistency is to assess whether, assuming the high threshold for the making of the orders is met, and assuming that the sentencing court and the Parole Board apply s 5 in the making of individual decisions, the regimes as they apply to those subject to them are reasonably justified in a free and democratic society. This is a regime-based analysis. We are satisfied that the Court of Appeal was correct to take this approach.

[104] We therefore conclude that, contrary to the arguments advanced by the Attorney-General, the *Hansen* methodology appropriately applies to an application for a declaration of inconsistency in this case. Having said that, the sentencing court and the Parole Board will still have a fundamental duty to use ss 5 and 6 of the Bill of Rights to maximise rights consistency to the extent that is consistent with s 4. That duty will have implications for the sentencing court when deciding to make any orders and when tailoring any orders (to the extent there is scope to tailor the orders), and for the Parole Board when imposing conditions. Indeed, this is what is required of all decision-makers when the affirmed rights are engaged, even when the regime itself is, or has been declared to be, rights-inconsistent. Section 4 of the Bill of Rights places a restriction on a court's powers in this regard, such that the court may not interpret and apply the provisions in a way that in substance disapplies or revokes them. The issue for us is whether the fundamental architecture of the regimes, sitting as they must on the s 4 side of the line, compel a rights-inconsistent outcome.

[105] Finally, before leaving this issue, we observe that during the course of argument it was put to counsel for the Attorney-General that there was a different way to frame their argument. It could be framed as an argument that the existence of the statutory preconditions justifies the making of the orders. And indeed the Attorney-General did argue that the statutory purpose is so important, and the criteria and tests so demanding, that it is difficult to envisage a court imposing an ESO or PPO

that is not a demonstrably justified limitation on all of the affirmed rights affected by the regimes. And it is said that further safeguards against breaches are found in the fact that the power is exercised by a judge and is subject to a general appeal right. But that is an argument that the limitation of rights entailed in the statutory schemes are reasonable limits as can be demonstrably justified in a free and democratic society. That is the issue we address in the rest of these reasons.

Third section: Do the ESO and PPO regimes limit any or all of the affirmed rights as contended by Mr Chisnall?

[106] The issue for determination in this part of the judgment is whether the ESO and PPO regimes limit any or all of the affirmed rights as contended by Mr Chisnall. The importance of the right in question (in particular, the purpose it serves in a free and democratic society) and the extent of the limitation on that right, are key considerations in undertaking the *Hansen* proportionality assessment. In fact, assessing the scope and nature of the right, and the extent of the limitation, are necessary pre-steps to that analysis.

[107] Before addressing the rights in question, and any limitations upon them, we briefly describe the findings in the High Court and Court of Appeal as they bear upon this issue.

Decisions of lower Courts

High Court

[108] In the High Court, Whata J found that the ESO regime did entail the imposition of a penalty, and did limit rights and immunities against second penalties affirmed by s 26(2) of the Bill of Rights.[178] He found that the seriousness of the second penalty was increased where the regime applied retrospectively and that limitation could not be justified.[179] But he found that otherwise, the judge in the sentencing court could ensure that any orders made were justified.[180]

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178 High Court decision, above n 6, at [90]. As noted above n 7, he also found the ESO regime limited the s 25(g) right. See the discussion below n 193.

179 At [93]–[97].

180 At [98]–[99].

[109] As to the PPO regime, while recognising some punitive features of the regime, Whata J also had regard to the express disavowal of punitive purposes.[181] He continued:[182]

> As Elias CJ put it, the [PPO Act] is to be interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty. This reduces the prospect of the imposition of a PPO unless the qualifying criteria are clearly met. It also provides surety that a rights consistent administration of the [PPO] regime will be preferred. Cumulatively, these factors strongly point to a committal process for persons with clear behavioural disorders and for the specific purpose of protecting the public.

[110] Whata J therefore found that PPOs were not presumptively a penalty, although in a particular case they might be — such as where the detention was on prison grounds and there was no rehabilitation.[183]

Court of Appeal

[111] The Attorney-General's appeal challenged the finding that the ESO regime unjustifiably limited the right protected by s 26(2). Mr Chisnall's cross-appeal was an effective reassertion of the arguments advanced at first instance that had not found favour.

[112] The Court of Appeal found that both regimes were penal in nature.[184] Although the ESO regime had elements of criminal procedure, and the PPO regime did not, they each imposed significant restrictions on the offender — sanctions which were a subset of those available to be imposed through sentencing, and sanctions which the person was exposed to through their previous offending.[185] Each therefore involved the imposition of a penalty on persons previously convicted and sentenced, and so

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181 At [139]–[140].
182 At [141] (footnote omitted) citing 2017 SC judgment, above n 142, at [38] per Elias CJ.
183 At [142].
184 Court of Appeal decision, above n 10, at [177].
185 See especially at [131] and [192].

constituted a second punishment and, in Mr Chisnall's case, a retrospective penalty. It said:[186]

> This is punishment, in the absence of trial and conviction for a further offence. It is a marked departure from the legal order reflected in s 26(2) of the Bill of Rights Act.

[113] The Court decided not to embark upon an analysis of the other rights Mr Chisnall argued were unjustifiably limited by the imposition upon him of the ESO and PPO regimes. It said there would be an artificiality in bringing inconsistency with other rights into account when any such inconsistency would be premised on the denial of the s 26(2) right.[187]

How Mr Chisnall frames his claim

[114] Mr Chisnall's argument is that if the regimes amount to penalties then, as well as a breach of s 26(2), they further constitute:[188]

(a) a retroactive conviction, contrary to s 26(1) (for those whose requisite offences preceded the enactment of the relevant provisions of the ESO and PPO regimes);

(b) a further conviction and sentence, without attendant protections, contrary to s 25(a), (c) and (d);

(c) arbitrary detention, contrary to s 22;

(d) cruel and disproportionate punishment, contrary to s 9; and

(e) imprisonment contrary to human dignity and humanity, contrary to s 23(5).

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186 At [218].
187 At [228].
188 Citing *Vinter v United Kingdom* (2016) 63 EHRR 1 (Grand Chamber, ECHR); Human Rights Committee *Fardon v Australia* Communication No 1629/2007 (18 March 2010); *James v United Kingdom* (2013) 56 EHRR 12 (ECHR); *R v Jones* [1994] 2 SCR 229; and *Sestan v Director of Area Mental Health Services, Waitemata District Health Board* [2007] 1 NZLR 767 (CA).

[115] As he has formulated it, Mr Chisnall's case turns upon ss 26(1) and 26(2) — with all the other rights largely overlapping with these. The rights affirmed in ss 26(1) and 26(2) overlap with the s 22 right not to be arbitrarily detained and the s 25 rights to minimum standards of criminal procedure (in particular the right to a fair hearing, and to be presumed innocent until proven guilty according to law). So too do they overlap with the s 9 right not to be subjected to cruel or disproportionately severe treatment or punishment, and the related s 23(5) right not to be imprisoned contrary to human dignity and humanity.

[116] The Attorney-General concedes that the ESO and PPO regimes entail the application of a second penalty. The Attorney-General also concedes that the eligibility criteria for the ESO and PPO regimes can mean the regimes are retrospectively applied but argues that this is a justified limitation. The Attorney-General otherwise disputes that the remaining enumerated rights are engaged.

[117] At a more fundamental level the Attorney-General argues that the Court does not have sufficient evidence before it to ascertain the existence and extent of any limitation of rights.

[118] We can deal with this latter argument briefly. It is for the applicant to make out that there has been a limitation of rights, and once they have, the onus shifts onto the other party (here, the Attorney-General) to justify that limit. However, the applicant may not need to call evidence to establish a limitation of rights. In this case it is, for the most part, enough for Mr Chisnall to point to the effect of the statutory provisions as is apparent from the statutory language. As already discussed, in large part these regimes operate in a standard or predictable manner.[189]

[119] Nor is there any prejudice caused to the Attorney-General arising from the absence of detailed evidence regarding the application of the regimes to Mr Chisnall. While we do not exclude the possibility that the Attorney-General might have wished to refer to evidence to prove there was no rights inconsistency for Mr Chisnall, it was open to the Attorney-General to procure this information from the

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189 Above at [102].

Department of Corrections. Indeed, the Attorney-General was better placed than Mr Chisnall in this regard.

[120] We have said above that, for the most part, it was enough for Mr Chisnall to point to the operation of the regimes. However, as we come to, there are some respects in which there is deficiency in Mr Chisnall's evidence — relating to his allegation that his detention infringes s 9, the right to be free from cruel or disproportionately severe punishment, and s 23(5), the right not to be imprisoned contrary to human dignity and humanity.[190]

[121] We now address each of the rights relied upon by Mr Chisnall.

Rights affected: Second penalty (s 26(2))

[122] Mr Chisnall's argument is that the ESO and PPO regimes are inconsistent with the right protected by s 26(2) — in this case, the rule against the imposition of a second penalty for an offence.

[123] Section 26(2) gives effect to art 14(7) of the ICCPR. It is a right reflected also in many multi-national and national bills of rights and constitutions.[191] It is commonly referred to as the "double jeopardy" provision. Section 26(2) provides that "[n]o one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again." The provision protects two principal interests — not to be repeatedly tried for the same offence; and, having been convicted of (and punished for) an offence, not to be punished again for it. The latter interest also finds expression in s 10(4) of the Crimes Act, which states that no one may be punished twice for the same offence. Section 26(2) is fundamentally, as the Human Rights Commission submits, a protection against abuse of state power and thereby is protective of individual liberty.

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190 Below at [167]–[168].

191 See discussion in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [24.3.1]–[24.3.3]. This includes art 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1525 UNTS 195 (opened for signature 22 November 1984, entered into force 1 November 1988) [Protocol No 7 to the European Convention on Human Rights].

[124] In order to determine whether the ESO and PPO regimes limit the right in s 26(2), the first issue is whether they impose restrictions which are penal in nature. In fact, this issue is central to the applicability of all of the rights invoked by Mr Chisnall. Although the Attorney-General accepts that the ESO and PPO regimes involve the application of a penalty, as we come to, that concession has some reservations.[192] It is in any case necessary to define what is a penalty for the purposes of the rights framework contained in the Bill of Rights, so that the significance of any limitations on the right can be assessed.

What is a penalty?

[125] There is extensive case law to assist with this issue, both in New Zealand and overseas. In *Belcher v Chief Executive of the Department of Corrections* the Court of Appeal addressed whether the ESO regime (as it existed prior to the 2014 reforms) limited the rights arising under s 26(2).[193] The Court of Appeal found that the ESO regime did entail the imposition of a penalty — a second penalty for the purposes of s 26(2).[194]

[126] In making this assessment, the Court of Appeal observed that it is not uncommon for legislation to provide for restrictions on those who are at high risk of future criminal, dangerous or otherwise antisocial behaviour.[195] Sometimes that is done through the sentencing process — through the imposition of preventive detention. Sometimes "the powers plainly have nothing to do with the criminal justice

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192 See below at [129].

193 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA). The Court in *Belcher* also considered that the ESO regime engaged the right in s 25(g), but appears to have ultimately found that right was not limited as an ESO is imposed post-sentencing, while s 25(g) is concerned with situations where a penalty "has been varied between the commission of the offence and *sentencing*": at [55] (emphasis added). The Court's reasoning on this issue was not conclusive, but as Mr Chisnall has not raised s 25(g) in this case, we do not discuss it further.

194 At [48]–[49]. The Court adjourned the proceeding to hear argument on further matters, including whether the retrospective nature of the ESO regime was a justified limitation on rights, and whether a declaration of inconsistency should be made in the case (which would have been the first time such a declaration had been issued): at [59]. Only the issue of a declaration came back before the Court, and was dismissed for want of jurisdiction: *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174. But see the comments in *Belcher v The Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6]–[8].

195 *Belcher*, above n 193, at [37].

system", for instance under the MHCAT Act.[196] But, as the case in *Belcher* indicated, there was a third category of regime.

[127] The Court did not see the civil or criminal nature of the regime as decisive, nor that the aim of the ESO regime was to reduce offending, rather than sanctioning of the offender for the purposes of denunciation, deterrence or holding to account. As to the latter, the Court observed that the same is true of other criminal law sanctions, such as preventive detention and supervision, which were nonetheless plainly penalties.[197] The Court carried out a detailed review of the statutory regime, identifying features, both procedural and substantive, supporting the view that an ESO is a form of punishment. The Court identified statutory provisions which suggest it is a criminal process, and identified the effects of the order which suggest that it is punitive.[198]

[128] *Belcher* was applied by this Court in *D (SC 31/2019) v New Zealand Police*.[199] The Court was there addressing whether a registration order under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 constituted the imposition of a penalty. Once on the register, the offender was required to continue to report, over a period measured in years, an extensive list of personal information. The Court held that it did constitute a penalty, notwithstanding that the purpose of the registration regime was to reduce reoffending, because the reporting restricted the person's liberty.

[129] The Attorney-General contends that the approach set out in *Belcher* and *D* establishes a low threshold for what is to be categorised a penalty, if measured against the threshold set in other jurisdictions. Under the New Zealand approach, Ms Jagose argues, that which is not particularly restrictive or punitive (such as a requirement for registration) may be characterised as penal. It is also argued that *Belcher* and *D* extend

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196 At [37].

197 At [48]. To similar effect see *D*, above n 167.

198 At [47](a)–(n). It is appropriate to note that the ESO scheme has been amended since *Belcher* was decided. It was argued in the High Court and Court of Appeal in the present case that those changes were sufficient so that the ESO (and the PPO) regimes should no longer be categorised as penalties. Some of those changes have added better procedural protections (see above n 73). Others have increased the extent of restraint that can be applied through the regime (see above n 86). That argument having been rejected in the Court of Appeal, it was no longer pursued before us.

199 *D*, above n 167, at [56]–[59] per Winkelmann CJ and O'Regan J (with whom the other Judges agreed on this point).

the reach of the doctrine to cases where the point of the regime is not to punish or to hold to account, but rather to prevent, and protect the public from, reoffending. The Attorney-General then builds upon this argument to support the submission that any limits upon the right are therefore more readily found to be justified in New Zealand. We observe that this argument for the Attorney-General has obvious limitations since the PPO and aspects of the ESO regimes authorise the imposition of detention. It is clear that on whatever model is applied, detention amounts to a penalty.

What are the principles to be applied?

[130] As is already clear from *D*, the approach taken in *Belcher* represents the law in this country.[200] It is, as Mr Keith submits, in keeping with a strong thread running through New Zealand's common law that the focus of the law should be upon substance rather than form.

[131] The authorities from other jurisdictions we were referred to by counsel reveal a range of approaches, which are at least partially explicable by matters of domestic legal context. It is plain that the courts of the United Kingdom and Australia give greater emphasis to the purpose of the measure and matters of form and process when assessing the nature of those measures.[201] But it does not follow that the Court of Appeal in *Belcher* was striking out on its own when rejecting an argument that an order imposed for protective, rather than punitive, purposes was not a penalty. Our review of jurisdictions rather supports the conclusion that *Belcher* sits within the mainstream of international jurisprudence. Consistent with the decisions of the Supreme Court of Canada,[202] the United Nations Human Rights Committee[203] and the European Court of Human Rights,[204] in deciding whether a provision is penal for the purposes of the right, a court will have regard to form and purpose of an order, but will

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200 *D*, above n 167; and *Belcher*, above n 193.

201 See, for example, *Regina (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351, [2002] QB 1213; *Regina v Field* [2003] 1 WLR 882 (CA); and *Chief Constable of Lancashire v Wilson* [2015] EWHC 2763 (QB). For the Australian context see *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, (2004) 223 CLR 575; and *Garlett v State of Western Australia* [2022] HCA 30, (2022) 277 CLR 1.

202 *R v KRJ* 2016 SCC 31, [2016] 1 SCR 906 at [36]–[41] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

203 *Fardon v Australia*, above n 188, at [7.3].

204 *M v Germany* (2010) 51 EHRR 41 (ECHR); *Bergmann v Germany* (2016) 63 EHRR 21 (ECHR); and *Ilnseher v Germany* [2018] ECHR 991 (Grand Chamber).

also weigh up its effect on the individual and the extent to which the restrictions or measures imposed are indeed a subset of those used in the criminal justice sentencing response. We therefore do not accept that New Zealand has a very low bar for determining what is, and is not, a penalty.

[132] In light of the authorities we have reviewed, and the approach taken in *Belcher*, which we have approved, we consider that the following principles apply in New Zealand:

(a) The concept of "penalty" must remain autonomous in scope. By this we mean that the court must be prepared to go behind matters of language and form to assess whether a particular measure amounts in substance to a penalty.[205]

(b) For the right in s 26(2) to be engaged, there must be a connection between the offending (for which the offender has already received punishment) and the challenged order.[206]

(c) The purpose of the legislation subject to challenge is not, on its own, decisive. The regime may have a purpose of protecting the public by reducing reoffending, but that is also a purpose of sentencing.[207]

(d) The nomenclature ("civil" rather than "criminal", "respondent" rather than "defendant" or "offender"), or the processes invoked in the legislation may also be relevant to the assessment, but only if that nomenclature reflects substance.[208]

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205 *M v Germany*, above n 204, at [120] and [126]; *Bergmann v Germany*, above n 204, at [150] and [163]; and *Ilnseher v Germany*, above n 204, at [203].

206 *M v Germany*, above n 204, at [88]; and *R v KRJ*, above n 202, at [41] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

207 *Belcher*, above n 193, at [48]; and *R v KRJ*, above n 202, at [33]–[34] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

208 *Belcher*, above n 193, at [47]; and *Fardon v Australia*, above n 188, at [7.4(2)]. See also Human Rights Committee *General Comment No 32 – Article 14: Right to equality before the courts and tribunals and to a fair trial* UN Doc CCPR/C/GC/32 (23 August 2007) [General Comment 32] at [15].

(e) The court must consider whether the sanction is so severe, restrictive, or causative of hardship as to be considered penal in character or nature. It is appropriate to address the impact of the sanction, given that the purpose of s 26(2) is to protect offenders from being punished twice for the same offence. If its impact is trivial and inconsequential, then the purposes of s 26(2) may not be engaged. However, if it operates to significantly restrict the freedom of, or otherwise adversely affect, the offender then its purposes will be engaged.[209]

Do the ESO and PPO regimes entail the imposition of penalties?

[133] Applying the above framework it is apparent that each of the ESO and PPO regimes entail the imposition of penalties. In the case of both an ESO and a PPO there is a clear connection between conviction for offending and the making of the order. Orders may only be made in respect of those who have previously been convicted of identified categories of serious offending. The regimes do add an additional requirement that the judge be satisfied, on the basis of health reports, of a high, or very high, risk of serious sexual or violent offending in the future, respectively.[210] This is because past conduct represented by the offending may be a significant predictor of risk (although we acknowledge that even that evidence has its limitations and must therefore be assessed and weighed with care).[211]

[134] The purpose of each of the regimes is protection of the public from the risk of harm inflicted by the commission of serious sexual or violent offending by recidivist offenders. The PPO Act expressly eschews punishment as a purpose, and we are prepared to infer that punishment is also not one of the purposes of the ESO regime.[212] However, as noted above, the purpose of the regime is not definitive. Public protection is also one of the purposes of sentencing in New Zealand.[213]

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209 *R v KRJ*, above n 202, at [35]–[41] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

210 We note the point made above at [58] that for a PPO the urgency of risk is even higher: it must be "imminent".

211 *Fardon v Australia*, above n 188, at [7.4(4)]. See below n 333.

212 PPO Act, s 4(2).

213 Sentencing Act, s 7(g).

[135] These are, moreover, regimes ordered and administered by institutions and people working within the criminal justice system — the Chief Executive, the Parole Board and the probation service.[214] They exist within the rubric of that system. Subjects of the PPO regime, and those subject to the more restrictive ESO conditions, are housed in spaces within the criminal justice system. The ESO regime employs criminal processes and the language of the criminal justice system. The PPO uses civil processes, referring to the subject as the respondent rather than the offender, but that cannot change the fundamental effect and nature of the orders — particularly where breach of the orders can result in criminal charge, conviction and imprisonment. They are administered through the criminal justice system

[136] The impact on the person who is subject to the orders is highly material to this assessment. The effect of the making of an order is the curtailment of freedoms affirmed in the Bill of Rights. While trifling or minor limitations on those rights may not amount to a penalty, the impositions involved in even the standard ESO conditions are sufficiently severe or causative of hardship as to amount to a penalty — they entail limits on freedom of movement (controlling where the subject can live and travel) and freedom of association (restricting association with others, including through employment). The special conditions can extend to detention of the subject for up to 24 hours a day and to detention in a government-run facility. As to the PPO regime, the effect of the making of an order is a very substantial deprivation of liberty — entailing loss of freedom of movement, detention in a government-run facility within the boundary of a prison fence, and curtailment, or the loss, of many other freedoms.

[137] The ESO and PPO regimes have contents and effects very similar to sentencing responses. Detention is of course one of the key sentencing responses to criminal offending. Detention is an available effect of the ESO regime, and an inevitable effect of the PPO. The conditions and special conditions available under the ESO regime are in large part copied across from the sentencing parole regime, although with greater restrictions available under the ESO regime. Detention under the ESO regime can be, and under the PPO regime will be, on prison grounds — in the case of the PPO

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214 See the discussion of the regimes above at [37]–[66].

regime it is even possible for the court to order detention in prison itself. As mentioned, detention for Mr Chisnall has been on prison grounds, in the Matawhāiti and Tōruatanga residences.

[138] We are therefore satisfied that the Attorney-General was correct to concede that the orders subjecting Mr Chisnall to the ESO and PPO regimes entailed the application of a second penalty, and so are a limit on the s 26(2) right not to be punished twice for the same offence. This conclusion holds whether the penalty is applied retrospectively or not. Although, as Whata J observed, the retrospective application of legislation imposing a second penalty increases the significance of the limitation on the s 26(2) right, and, as we now come to, amplifies the justification required for it.

Can limitations on the s 26(2) right be justified?

[139] An issue arises, in respect of the pleaded rights, whether any limitation can be recognised as justified in a free and democratic society. If no limitation on the pleaded rights can be, then that is the end of the rights-consistency analysis.

[140] The Court of Appeal said that while s 26(2) was not one of those rights that can never be subject to reasonable limits, "on any view the right is clearly of fundamental importance", requiring strong justification should it be departed from.[215]

[141] For Mr Chisnall, Mr Keith submits that only very few limitations on the s 26(2) right have been recognised in law, and regimes such as the ESO and PPO are not among them. Counsel for Mr Chisnall say it is at least arguable that, with the exception of criminal proceedings reopened in certain circumstances, the s 26(2) right against second penalties does not allow for limitation.

[142] As noted earlier, the Attorney-General argues that since New Zealand jurisprudence classes a wide range of orders as penal, ranging from minor through to serious (ie detention), the courts should therefore take a correspondingly expansive approach to what justifies limits upon those rights. At the heart of this argument is the notion that the more broadly drawn a right, the more range there may be to justify its

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215 Court of Appeal decision, above n 10, at [190].

limitation. We accept that this proposition is inherent in the *Hansen* proportionality assessment set out above and explored further below at [195] — inherent in the sense that the more the core purposes of the right are impinged upon by the limitation, the greater the justification may need to be.

[143] The Human Rights Commission submits that the s 26(2) right is not one of the limited number of rights which are immune from limitation. However, as Mr Butler KC put it for the Commission when questioned by the Court on this issue, where the underlying right is interpreted broadly, the level of rigour a court applies or demands of the Crown to justify a limit on the right may be less in respect of limitations at the periphery rather than at the core of the right.

[144] It is clear that some limitations on this right are recognised as being capable of justification. It is of note that the equivalent right in the ICCPR, art 14(7), is not one of the few protected from derogation during times of public emergency.[216] It is also relevant that many jurisdictions, including New Zealand, allow for the reopening of criminal proceedings in limited circumstances. These include if new evidence is discovered.[217]

[145] While these exceptions are concerned with repeat prosecutions rather than punishments, we accept the Human Rights Commission's point that the existence of these exceptions, combined with the omission of this right from the list of non-derogable rights in the ICCPR, support the conclusion that s 26(2) is not amongst the illimitable rights. In some cases, therefore, it will be appropriate and necessary to undertake the justification assessment, noting in that regard the more significant the intrusion on rights effected by the second penalty, the greater the justification required.

[146] We say "in some cases" because there is one limitation upon the s 26(2) right which it is clear is not capable of justification — that is, a second penalty amounting

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216 ICCPR, above n 159, art 4, although the right is so protected under Protocol No 7 to the European Convention on Human Rights, above n 191, art 4(3).

217 See, for example, Protocol No 7 to the European Convention on Human Rights, above n 191, art 4(2); and Criminal Procedure Act, s 154. Although the ICCPR contains no such express proviso, art 14 has been interpreted not to prohibit the resumption of a criminal trial "justified by exceptional circumstances", such as the discovery of new evidence: General Comment 32, above n 208, at [56].

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, as we now explain, 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.

[147] The rule against retrospectivity has strong rule of law justifications — the law must be certain and accessible so that people are able to comply with it, and so that they respect it.[218] It also has the justification of fairness — it is unfair to require people to conduct themselves in accordance with laws and then change those laws, and their consequences, "mid-stream".[219] New Zealand case law confirms that any limit on the rights against retrospective criminal liability and retrospective increased penalties cannot be justified.[220] For example, in *R v Poumako*, Gault J (writing for himself, Richardson P and Keith J) said:[221]

> - The principle against retrospective criminal liability and retrospective increased penalties is well established.
>
> - Its fundamental character does not allow for any "reasonable limits" … ; and
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> - The reasons for the principle in terms of prior direction or deterrence and the consequent possibility of knowing compliance, and justice, in not being subject to unknowable penalties, are long established and impregnable.

[148] *Poumako* and the cases that followed it (such as *R v Pora* and *R v Mist*[222]) were concerned with the issue of retrospectively applied increases in penalty. But the reasoning applies equally in s 26(2) cases. Having said that, in our view it is only that portion of the s 26(2) right that protects against the retrospective application of a second penalty *detention* that is incapable of justified limitation. Although the

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218 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) at 638 per Lord Diplock.

219 *R v KRJ*, above n 202, at [25] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ quoting what is now published as Sullivan, above n 4, at ch 25.01(3).

220 *R v Poumako* [2000] 2 NZLR 695 (CA) at [6] and [33] per Richardson P, Gault and Keith JJ and [75] per Thomas J; *R v Pora* [2001] 2 NZLR 37 (CA) at [79] per Gault, Keith and McGrath JJ; and *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [13] per Elias CJ and Keith J.

221 *R v Poumako*, above n 220, at [6].

222 *R v Pora*, above n 220; and *R v Mist*, above n 220.

Poumako line of cases speak about penalties without this limitation, these cases were in fact concerned with detention. This can be inferred from the fact they refer to s 4 of the Criminal Justice Act 1985 (the predecessor to s 6 of the Sentencing Act 2002) which explicitly refers to imprisonment.[223] Moreover, these cases were decided before *Belcher*, the case which authoritatively defined the concept of penalty for Bill of Rights purposes as including limitations which fall short of detention. It is right that retrospective application of a second penalty is viewed more seriously where the penalty amounts to detention because such a limitation impinges on the core values underpinning the right — predictability and unfairness (injustice).

Rights affected: Retroactive criminalisation of conduct (s 26(1))

[149] Mr Chisnall argues that the orders made were a breach of his rights under s 26(1). This subsection provides that "[n]o one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence … under the law of New Zealand at the time it occurred." Mr Chisnall's argument is, and has been, that he has committed no offence under domestic law upon which the penal measure that he has been made subject to under the ESO and PPO regimes could be based. He says that any offence is beyond mere speculation, the punishment being merely for what he might do. Any charge would be void for vagueness, as it would be incapable of specifying the mens rea, actus reus, date of offence, or victim.

[150] It is necessary at this point to revert again to the notion of retrospectivity. Domestically, the right against retrospective application of criminal law is enshrined in s 26(1) and the closely related s 25(g) — the right to a lesser penalty where the penalty has been varied between the commission of the offence and sentencing — and s 6 of the Sentencing Act.[224] Internationally, these rights are expressed in art 15(1) of the ICCPR and art 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), both of which are

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223 Section 4(1) of the Criminal Justice Act 1985 also refers to fines, but not the broader concept of penalties.

224 Section 25(g) was not raised by Mr Chisnall in this case and is therefore not discussed further beyond the comments above n 193.

non-derogable.[225] There is in practice a substantial overlap in the protection provided by these two affirmed rights, and in the case law, as is apparent from the passage set out above from *Poumako*.[226]

[151] Whata J found that s 26(1) could not apply in the present case, as ESOs and PPOs do not entail a fresh conviction — orders are made rather than convictions entered.[227]

[152] While it is true that the ESO and PPO procedures do not entail charge and conviction, the form of procedure is not necessarily determinative. It is well established that provisions of the Bill of Rights should be given a generous interpretation to ensure that they fulfil the role they are designed to.[228] Jurisprudence under both the ICCPR and European Convention on Human Rights have weighed the following considerations in determining that proceedings that are not criminal in form nevertheless involve a criminal charge: the severity of the sanctions imposed, the purpose of the proceeding (punitive, disciplinary, regulatory, preventive or compensatory), and the domestic classification.[229] For example, in *Fardon v Australia*, the United Nations Human Rights Committee found that the penal character of the imprisonment meant it could only be imposed on conviction for an offence in the same proceedings in which the offence was tried.[230]

[153] That case concerned the Queensland state legislation, the Dangerous Prisoners (Sexual Offenders) Act 2003. The statute, permitting the continuing detention of

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225 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights]. Article 15(2) of the ICCPR, above n 159, however does express a limitation — it provides that nothing in the article "shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". It is worth noting that the provisions in the Bill of Rights and Sentencing Act are narrower in scope than art 15. These limit the time period for which the benefit of the lesser penalty applies to that between offending and sentencing, as opposed to any time after the offending.

226 See above at [147].

227 High Court decision, above n 6, at [16].

228 Courts are to give human rights documents "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to": *R v Mist*, above n 220, at [45] per Elias CJ and Keith J quoting *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

229 Human Rights Committee *EV v Belarus* Communication No 1989/2010 (30 October 2014) at [6.5]; and *Blokhin v Russia* [2016] ECHR 300 (Grand Chamber) at [179]–[180].

230 *Fardon v Australia*, above n 188, at [7.4(2)].

sexual offenders after expiry of their sentences if they were found to be a serious danger to the community, had retrospective effect. In Mr Fardon's case, the further term of imprisonment was the result of court orders made some 14 years after his conviction and sentence. The further imprisonment was ordered because of predicted future criminal conduct based on the very offence for which he had already served his sentence.

[154] After the High Court of Australia upheld the validity of the legislation,[231] Mr Fardon took a complaint to the United Nations Human Rights Committee. He claimed to have been subjected to double jeopardy, contrary to art 14(7) of the ICCPR, and that his detention was arbitrary in breach of art 9(1). The Committee also discussed art 15(1) (the ICCPR equivalent to s 26(1)) but ultimately did not go on to find a breach of that article. This was because, the Committee said, detention pursuant to proceedings contrary to art 15 was necessarily arbitrary for the purpose of art 9.[232] It is nevertheless apparent that the Committee's framing of the issues in respect of art 15 gives support to Mr Chisnall's argument grounded upon s 26(1) — eschewing a formalistic application of art 15, and equating the civil proceedings as having secured a "conviction" leading to a fresh penalty.[233]

[155] There are certainly arguments that the making of an ESO or PPO engages the s 26(1) right. Even if an order is not characterised as a conviction, eligibility for the order turns on offending and the consequences are penal. But having said that, there is a substantial overlap between the rights affirmed in ss 26(1) and 26(2). In all the circumstances of this case, we have concluded that the provision of s 26(2) is better suited to this situation and is adequate to protect the purposes s 26(1) serves. We say this for the following reasons. Even if the ESO and PPO regimes are substantively viewed as having penal effect, they do not entail retroactive criminalisation of conduct. The conduct relied upon under the ESO and PPO regimes is the same conduct that led to the earlier convictions. Another way of putting this is that even if the imposition of the ESO or PPO regimes are treated substantively as criminalisation of conduct, that conduct was already criminal at the time of the offending. The making of these orders

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231 *Fardon v Attorney-General for the State of Queensland*, above n 201.

232 *Fardon v Australia*, above n 188, at [7.4(2)].

233 Human Rights Committee *Tillman v Australia* Communication No 1635/2007 (18 March 2010) is to similar effect.

is therefore more naturally characterised as the imposition of a second penalty, engaging s 26(2) rather than s 26(1).

[156] Accordingly, while an autonomous reading of s 26(1) is necessary if it is to secure the intended protections, the mischief it aims at is the post-fact criminalisation of conduct. What has happened here is rather the imposition of a second penalty for that conduct, and in circumstances where the regime is being retrospectively applied.

Rights affected: Minimum standards of criminal procedure (s 25)

[157] The fair trial rights set out in s 25(a), (c) and (d) (respectively, the rights to a fair hearing, to be presumed innocent, and to not be compelled to confess guilt) reflect rights described in art 14 of the ICCPR. The contention that these rights are engaged flows out of Mr Chisnall's contention that s 26(1) is engaged. Punishment must follow conviction only for something which was an offence at the time (s 26(1)), and conviction can only follow a fair trial (s 25(a), (c) and (d)). For the same reasons set out above in relation to s 26(1), we do not consider that these provisions are directly engaged.

[158] Nevertheless, the fact that the ESO and PPO regimes allow for detention of a person without the usual procedural protections provided upon criminal charge and conviction (as reflected in s 25(a) of the Bill of Rights) is relevant to the proportionality analysis, as we come to later.[234]

Rights affected: Arbitrary detention (s 22)

[159] Section 22 of the Bill of Rights provides that everyone has the right not to be arbitrarily arrested or detained. While this right reflects art 9 of the ICCPR, it is only broadly consistent with the text of art 9(1).[235] Section 22 does not, by its terms, affirm the broad right to liberty and security of the person.[236]

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234 Below at [262].

235 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [44].

236 *R v Barlow* (1995) 2 HRNZ 635 (CA) at 654 per Richardson J. There is no express reference to a protection against arbitrary detention in the European Convention on Human Rights, above n 225. The concerns that motivate the protections in art 9(1) of the ICCPR are instead met through the comprehensive listing in art 5 of the Convention of the grounds upon which a person may be detained.

[160] Mr McKillop for the Attorney-General submits that the ESO and PPO regimes could not be characterised as arbitrary as they provide a legislative, and thus lawful, basis for any detention pursuant to orders made under those regimes. He also emphasised the review processes under each regime, which protect against arbitrariness.

[161] This interpretation of s 22 is overly narrow. The relevant discussion in the White Paper for the Bill of Rights emphasised that the word "arbitrarily" covered not just an absence of legislative authority but was intended to measure the validity of any law allowing for arrest and detention.[237] A more generous approach to interpretation of s 22 is consistent with the fact that the Bill of Rights is intended to affirm New Zealand's commitment to the ICCPR.[238] The concept of arbitrariness under art 9 of the ICCPR is explained in the United Nations Human Rights Committee's General Comment 35 in the following terms:[239]

> The notion of "arbitrariness" is not to be equated with "against the law", but must 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.

[162] On this account there is a substantial overlap between the right affirmed in s 22 and the other rights pleaded by Mr Chisnall — most relevantly, for our purposes, an overlap between s 22 and the s 26(2) right.[240] Both are concerned to promote the values of predictability and proportionality that underpin the rule of law.[241] It is therefore arguable that a retrospectively imposed second penalty amounting to

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237 Butler and Butler, above n 191, at [19.3.1] citing Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [White Paper] at [10.91]. We acknowledge that the discussion in the White Paper was in the context of a proposal for a Bill of Rights which empowered the courts to invalidate legislation.

238 New Zealand Bill of Rights, long title.

239 Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014) [General Comment 35] at [12] (footnote omitted).

240 The distinction between s 22 and s 26(2), of course, is that s 22 can only apply where the second penalty amounts to detention.

241 See Sullivan, above n 4, at ch 25.01(2).

detention is an arbitrary detention for the purposes of s 22.[242] However this was not the focus of Mr Keith's argument.

[163] There were two principal grounds upon which the s 22 argument was advanced. First, that detaining someone in breach of s 26(2) necessarily amounts to arbitrary detention. We observe that, to the extent the arguments of arbitrariness depend on an inconsistency with the s 26(2) right, they really add nothing to that analysis. As we have set out above, there may be circumstances in which the imposition of a second penalty is capable of justification for the purposes of s 5. The elements of reasonableness, necessity and proportionality, identified in United Nations General Comment 35 as relevant to the issue of arbitrariness, naturally also arise under the *Hansen* assessment, and we are satisfied that they are appropriately addressed there.

[164] Secondly, Mr Keith argues that the lack of rational connection between the mechanism selected and the purpose pursued amounts to arbitrariness. The point made here is that a regime constructed to pursue public protection purposes would not, as a matter of logic and reason, be limited to a cohort of subjects who have been convicted of serious offences — it would apply to anyone who meets the dangerousness threshold necessitating such protection. We address, and dismiss, this argument below in the context of the *Hansen* assessment.[243]

Rights affected: Cruel or disproportionately severe punishment (s 9)

[165] Section 9 of the Bill of Rights affirms the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment. It is a right of such fundamental importance that it is recognised as incapable of justified limitation.[244] It derives from art 7 of the ICCPR: "No one shall be subjected to torture

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242 See General Comment 35, above n 239, at [17] citing *Fardon v Australia*, above n 188, at [7.4(2)]. In *Fardon* the United Nations Human Rights Committee said that detention pursuant to a retrospectively applied penalty is necessarily arbitrary. But a majority of the Committee did not agree with this view in *De León Castro v Spain* Communication No 1388/2005 (19 March 2009) at [9.3], and see at 17 per Ruth Wedgwood dissenting.

243 See below at [209].

244 *Fitzgerald*, above n 173, at [160] per O'Regan and Arnold JJ citing *Hansen*, above n 18, at [65] per Blanchard J and [264] per Anderson J, and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [77] per Elias CJ and [170] per Blanchard J.

or to cruel, inhuman or degrading treatment or punishment." The White Paper made clear that s 9 was intended to encompass treatment or punishment incompatible with the worth and dignity of the human person.[245] It was intended to apply, it was said, to punishment that went beyond rational bounds, or was obviously excessive or grossly disproportionate to the offence.[246] In *Fitzgerald v R*, this Court accepted that a punishment would be disproportionately severe for the purposes of s 9 if it was "grossly disproportionate" in the sense that it is "so severe as to shock the national conscience".[247] As this makes clear then, s 9 is aimed at conduct of great seriousness. Given the breadth of the catchment of the notion of "penalty", not all second penalties for the purposes of s 26(2) would meet this threshold. We consider that in the contexts of these regimes, only detention would possibly do so.

[166] The argument made for Mr Chisnall here builds upon the other grounds — that detention in breach of s 26(2) is disproportionately severe punishment.

[167] However, consideration of whether detention could be regarded as so severe as to "shock the national conscience" must be determined on a case-by-case basis. It may well be that a lengthy detention under these regimes, or a detention that is indistinguishable from detention in prison, would meet this threshold. But in this case, as we have already noted, we have little by way of facts of the circumstances of Mr Chisnall's detention. This is therefore one respect in which Mr Chisnall has failed to discharge the evidential burden on him. For this reason we are not satisfied that an infringement of this right is made out.

Rights affected: Imprisonment contrary to human dignity and humanity (s 23(5))

[168] Section 23(5) affirms the right that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person." It is directed at the conditions under which a person is detained. We accept the Attorney-General's submission that it calls for an examination of the circumstances of

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245 White Paper, above n 237, at [10.162] discussing what, in the draft Bill included in the paper, was then cl 20.

246 At [10.163]. The White Paper cited Canadian courts' discussions of mandatory minimum sentences under s 12 of the Canadian Charter: *Regina v Krug* (1982) 7 CCC (3d) 324 (ONDC.JCC); rev'd [1985] 2 SCR 255; and *R v Konechny* [1984] 2 WWR 481 (BCCA).

247 *Fitzgerald*, above n 173 at [77]–[81] per Winkelmann CJ, [167] per O'Regan and Arnold JJ and [239] per Glazebrook J.

a particular detention and does not lend itself to sweeping declarations as to the humanity of a particular regime. Mr Chisnall has failed to plead or prove any conditions relating to his detention and so has not established any limitation upon this right.

Conclusion: Has Mr Chisnall established there is a limitation of rights?

[169] Mr Chisnall has made out that the ESO and PPO regimes:

(a) infringe the s 26(2) right to the extent they authorise the retrospective imposition of a second penalty amounting to detention. We can reach that conclusion at this point because this particular limitation of rights is not capable of justification for the purpose of s 5; and

(b) in all other instances, limit the s 26(2) right. In these categories of case, issues of justification do arise.

Fourth section: The s 5 inquiry — are these reasonable limits that are justified in a free and democratic society?

[170] The next step then is to address whether these limits are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[248] If the court decides the limits are not justified, then the relevant statutory provisions will be inconsistent with the Bill of Rights.

[171] We first set out the lower court decisions on the issue of justification. We then address issues that arise as to how the Attorney-General's justificatory burden in this case is discharged.[249] Finally, we undertake the proportionality exercise contemplated by s 5, using the *Hansen* methodology. On the particular facts of this case, this determines not only whether the limitation on the s 26(2) right is justified, it also

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248 New Zealand Bill of Rights, s 5.

249 We also heard submissions from the intervener on the meaning of the "prescribed by law" requirement, with reference to *Malone v United Kingdom* (1985) 7 EHRR 14 (ECHR) at [67] and *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department and others intervening)* [2015] UKSC 49, [2016] AC 88 at [30]–[32] per Lord Hughes and Lord Hodge SCJJ, but we do not find the matter necessary to determine in this case.

addresses Mr Ellis's argument that all detention in violation of s 26(2) is necessarily arbitrary for the purpose of s 22.

Decisions of lower Courts

High Court

[172] In respect of the ESO regime, Whata J saw the retrospective application of the regime as applied to Mr Chisnall as exacerbating the s 26(2) inconsistency, drawing an analogy with s 25(g). He accepted the importance of the public safety objective and the rational connection between the ESO regime and that objective. He noted the power under the standard and special conditions to require rehabilitation, and said:[250]

> There is also evident scope within the present ESO regime to apply a genuinely rehabilitative and therapeutic approach directed to the offender's risk factors. In a choice between a therapeutic approach and a non-therapeutic approach, it can be fairly assumed I think that a judge (or Parole Board) would look where possible [to] prefer the former over the latter, because the Court and the Parole Board are obliged to prefer a rights consistent outcome. Mr Chisnall's case is illustrative of this.

[173] However, he found that the public protection purposes were not sufficiently important to justify the limitation where the regime operated retrospectively (as it did in Mr Chisnall's case) given the "otherwise impregnable and non-derogable nature of the immunity from retrospective penalty and its deep normative and constitutional significance".[251] He saw the lack of substantive consideration of a civil, expressly non-punitive regime as reinforcing this conclusion.[252]

[174] He saw the position as different in the case of offending that post-dated the creation of the ESO regime. He considered it was relevant to the proportionality and reasonableness assessment that an offender would be aware of the prospect of a ESO post-sentence at the time of the offending. The fact that the regime was an alternative to a sentence of preventive detention also bore upon its reasonableness and proportionality. The ESO regime was "therefore a mechanism for managing the

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250 High Court decision, above n 6, at [95] (footnote omitted).
251 At [96].
252 At [97].

long-term risk to the public without the immediate imposition of the most severe sentence that can be lawfully imposed", referring to preventive detention.[253]

[175] Accordingly, while he accepted there remained something unfair about subjecting an offender to the prospect of an indefinite number of post-sentence ESOs, the Judge said that the extent to which an ESO is an unjustified limitation of the immunity from second penalty needs to be worked out on the facts of the specific case, and in particular in light of the conditions of the ESO and its implementation.[254]

[176] Notwithstanding his finding that the PPO regime did not entail the imposition of a penalty, the Judge addressed the issue of justification. He said the public protection objective of the PPO regime was reasonable, and the limitations imposed "sans the punitive components" were rationally and proportionately connected to that objective.[255] He considered that Parliament had adequately considered alternative regimes. Having said that, the Judge held that in the event that the PPO regime was found to impose a penalty, he would hold the limitation on the immunity from second penalty and retrospective penalty unjustified. He said:[256]

> A retrospective penalty and or prospective second penalty of the form, type and potentially indefinite duration envisaged by a PPO is not capable of reasonable justification given the derogation that entails from the corresponding immunities affirmed by s 25(g) and s 26.

[177] Whata J therefore declined to make a declaration of inconsistency in respect of the PPO regime,[257] but in respect of the ESO regime declared:[258]

> [Section] 107C(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990, to the extent that it permits the retrospective application of section 107I(2) of the Parole Act 2002.

Court of Appeal

[178] The Court of Appeal said that given the nature of the rights limited, there would need to be "a substantial showing by appropriate … evidence that the regimes are

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253 At [98].
254 At [99].
255 At [144].
256 At [144].
257 At [160].
258 High Court declaration decision, above n 7, at [14].

justified as a minimum and necessary response to the potential harm caused by those against whom such orders would be made".[259] The Court said that it did not see, in any of the matters relied on as legislative fact, a demonstrated justification for important aspects of both regimes.[260]

[179] It said the most concerning aspects of the ESO regime were the significant restrictions of movement and association, electronic monitoring and the potential for detention at home.[261] The Court described the restrictions imposed by the PPO regime as not far short of imprisonment, and in some cases, as allowing imprisonment.[262] As to the justification for these regimes, it said that the severe restrictions placed on those subject to ESOs and PPOs are clearly based on the legislature's view that without these restrictions the offenders would constitute a danger to the public.[263] The Court continued:

> [225] … The power of Parliament to implement that view is not and cannot be in doubt. It is obviously unaffected by this decision.
>
> [226] What this case is about is whether the legislative response in the form of the ESO and PPO regimes is inconsistent with the Bill of Rights Act. To establish that required evidence about the basis on which the legislative choices were made such as would provide and submit to scrutiny the rational justification for the measures. …

[180] Without such evidence the Court was not able to find that the regimes are demonstrably justified under s 5 of the Bill of Rights. It issued declarations as follows:[264]

> (a) Part 1A of the Parole Act 2002 is inconsistent with s 26(2) of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under s 5 of that Act.
>
> (b) The Public Safety (Public Protection Orders) Act 2014 is inconsistent with s 26(2) of the New Zealand Bill of Rights Act, and that inconsistency has not been justified under s 5 of the Act.

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259 Court of Appeal decision, above n 10, at [219].
260 At [222].
261 At [223].
262 At [224].
263 At [225].
264 Court of Appeal declaration decision, above n 11, at [3].

How is the justificatory burden discharged?

[181] It is a necessary implication of s 5 that it is for the party defending the limits to "demonstrably" justify them.[265]

[182] The burden the Attorney-General bears is to justify any limits on rights as reasonable. In *RJR-MacDonald Inc v Canada (Attorney General)*, McLachlin J described the justificatory burden in this manner:[266]

> [127] … the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.
>
> [128] … the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

[183] The Attorney-General concedes that where rights are shown to be limited, the language of s 5 places the burden of justification upon the party seeking to defend that limit as reasonable. However, Mr McKillop argues the Attorney-General is entitled to insist upon specificity in the pleading before being required to respond with evidence. Although he says that this required standard of pleading was not met in this case, he quite properly does not insist that the Court take this into account in the present appeals, because the objection was not raised from the outset. We nevertheless address the point in order to clarify proper pleading, to the extent it is appropriate to do so.

[184] Counsel for the Attorney-General helpfully identified the United Kingdom rules as to pleading requirements.[267] They argue that, consistent with the requirements in those rules, in this case the pleadings should have identified the limitation of rights

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265 See White Paper, above n 237, at [10.29]; and *Hansen*, above n 18, at [108] per Tipping J.

266 *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 (emphasis in original).

267 Lord Chief Justice *Practice Direction 16 – Statements of Case* (United Kingdom Ministry of Justice, 1 October 2023) at [14.1(d)]. See also Lord Chief Justice *Practice Direction 54A – Judicial Review* (United Kingdom Ministry of Justice, 6 April 2024) in respect of judicial review proceedings.

with sufficient particularity to allow a cogent response. As to the level of particularity required, the Attorney-General says that the applicant must identify the statutory provision or provisions at issue, and state how, in the circumstances of their case, the provision in question operates to limit their rights. Measured against this standard, the pleadings are said to be inadequate.

[185] The Attorney-General is right that the applicant should plead how, and in what circumstances, the statutory provision operates in a rights-inconsistent manner with respect to the applicant. Or if the plaintiff is not personally affected, they must plead how the statutory provision operates in a rights-inconsistent manner for those who are. Mr Chisnall's application for declarations of inconsistency meets that threshold.[268] It details how it is claimed that the ESO and PPO regimes limit the affirmed rights for Mr Chisnall. It is difficult to know what more Mr Chisnall could usefully have pleaded.[269]

[186] As to how the Attorney-General's burden is to be discharged, sometimes evidence relevant to the reasonableness of the limit may not be required or may be minimal. In *Make It 16 Inc v Attorney-General*, this Court observed that such a situation might arise where a limitation on a right is well-recognised either in the relevant international instruments or common law.[270] Neither of these circumstances of course apply in this case. It may also be the case that the justification for the limitation is plain on the face of the legislation. In this case, at least the public protection purpose of the limitations is explicitly stated.

[187] There is another issue that arises under this heading. It is whether parliamentary materials may be drawn upon by the court as part of the justificatory exercise. The issue arises because ss 11 and 12 of the Parliamentary Privileges Act 2014 prohibit the production of argument or evidence about proceedings in Parliament if done for a number of enumerated purposes.[271] These purposes are broadly drawn including where that is done for the purpose of drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of

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268 Except in respect of the rights in ss 9 and 23(5), as already discussed above at [167]–[168].
269 See above at [117]–[119].
270 *Make It 16*, above n 166, at [45] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ.
271 See also Bill of Rights 1688 (Imp) 1 Will & Mar sess 2 c 2, art 9.

those proceedings in Parliament. "Proceedings in Parliament" is also defined very broadly in s 10(1), and would extend to the documents produced by the Attorney-General in this proceeding. However, s 13 provides that these provisions of the Act do not prevent or restrict a court from admitting such evidence or hearing submissions for the purpose of ascertaining the meaning to be given to any enactment.

[188] Counsel for the Attorney-General, for Mr Chisnall, and for the Human Rights Commission all argue that this provision must be read so as to enable the court to undertake the tasks the courts are set under the Bill of Rights to address the interpretive and associated justification issues under ss 5 and 6 and in connection with the declaration of inconsistency jurisdiction.

[189] We accept counsel's argument that an application for a declaration of inconsistency falls within the s 13 carve-out, in that it entails proceedings for the purpose of ascertaining the meaning of, or the meaning to be given to, an enactment. The Parliamentary Privileges Act does not preclude this material being produced, or relied upon in argument in this case, nor does it prevent reference to it in this judgment. This approach is consistent with the clear intent of ss 11 and 12, which is most easily gleaned from the statutory heading immediately preceding them : "Scope of prohibited impeaching or questioning, in court or tribunal proceedings, of proceedings in Parliament". It is a normal part of statutory interpretation in New Zealand to look at parliamentary materials. As Lord Nicholls said (writing in the United Kingdom context):[272]

> What is important is to recognise there are occasions when courts may properly have regard to ministerial and other statements made in Parliament … without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone.

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[272] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [60].

Do the regimes impose reasonable limits as can be demonstrably justified in a free and democratic society?

Submissions in this Court

[190] For Mr Chisnall it is argued that the limitation on s 26(2) and other rights has not been, and indeed cannot be, justified, because the cited public safety objective would be equally, perhaps better, served by a clinically directed regime. Such a regime would involve no second penalty at all. It is argued that the ESO and PPO regimes apply to people because of their past offending (for which they have already been punished) *and* because of the risk they will offend in the future — a risk arising from ongoing behavioural disorders. Given these circumstances, the regimes created should be therapeutic regimes, directed at rehabilitating the person as soon as possible. With the MHCAT and IDCCR regimes, New Zealand has adopted therapeutic regimes for other persons who are, in some cases, equally as dangerous. It has declined to do so in this case. Other, similar jurisdictions have also implemented therapeutic regimes, counsel for Mr Chisnall citing Germany in particular.

[191] As to the Attorney-General's arguments, it is important context to the disposition of these appeals that, for the most part, the Attorney-General elected not to attempt to justify the limitations consequent upon the imposition of an ESO or PPO. This is because the Attorney-General's argument proceeded on the basis that the only aspect of the ESO and PPO regimes requiring justification is their retrospective application to people whose convictions pre-date the regimes' enactment. We assume that it is for this reason that the evidence filed by the Attorney-General was extremely limited.

[192] The Attorney-General did however accept a justificatory burden in relation to the retrospective application of these regimes. As to that, it is helpful to restate at this point that we have already held that the retrospective application of a second penalty that amounts to detention cannot be justified.[273] That, however, leaves the retrospective application of penalties other than detention for consideration.

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[273] Above at [146]–[148].

[193] As to the provisions giving the regimes retrospective application, the Attorney-General formulates their purpose as follows:

> To protect the public, from the commencement date of the enactments, from convicted sexual and/or violent offenders who continue to pose a significant threat of serious sexual or other violent offending at the end of their term of imprisonment.

[194] The Attorney-General argues that if the regimes did not apply retrospectively, the community would be left with the unmanaged risk of serious and violent reoffending from known high-risk offenders for many years after the passage of the regime. The argument that criminal retrospectivity could have been avoided altogether by delinking the ESO and PPO regimes from a criminal conviction is acknowledged. But this argument does not reckon, it is said, with the purpose of the legislation, which is plainly focused on reoffending rather than offending. And this focus is important because, by adopting that purpose and statutory thresholds for orders, Parliament has already drastically narrowed the potential reach of the ESO and PPO regimes. The option of exposing many more people with similar risk profiles to potential orders through a civil regime would avoid "second penalty" issues altogether, but would overall result in a much broader regime with the potential to limit the freedoms of many more people.

The *Hansen* model

[195] It is helpful at this point to restate the structured proportionality assessment set out in *Hansen*.[274] The issues the court is required to address can be summarised as follows:

(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?

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274 *Hansen*, above n 18, at [64] per Blanchard J and [104] per Tipping J.

(d) Is the limit in due proportion to the importance of the objective?

[196] During the hearing there was discussion as to whether the *Hansen* proportionality assessment required revisiting. Mr Butler for the Human Rights Commission submitted that the structured proportionality assessment set out in *Hansen* is adequate and appropriate. He characterised structured proportionality as adequate because it enables a transparent evaluation and gives a level of predictability to lawmakers and citizens alike. He further submitted that the assessment is appropriate even though it requires that justification be offered, and even where the decision-maker is Parliament. This is because ss 3 and 7 of the Bill of Rights require that the rights at issue will have been addressed through the law-making process so that evidence of the justification for the limitation of rights entailed should be available.

[197] We accept that, as the Human Rights Commission submits, *Hansen* remains adequate and appropriate, for the reasons the Commission advances. Having said that, although the *Hansen* methodology breaks the proportionality exercise down into steps, the s 5 issue is not amenable to a paint-by-numbers exercise. It is important to acknowledge in particular that the final step, (d), draws together for consideration the earlier matters addressed at (a) to (c).

(a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

[198] As noted above, the purpose of the ESO and PPO regimes is to protect the public from serious violent and sexual offending by high- or very high-risk recidivist offenders. There is no doubt that this is a very important purpose. The burden upon the Attorney-General is to establish that the risk of such offending is of sufficient importance to justify the particular limitation of the particular rights.

[199] To support the argument that retrospective application of penalties can be justified, the Attorney-General relies upon the extensive legislative fact evidence they produced, comprised of Cabinet papers, regulatory impact statements, s 7 reports from the previous Attorneys-General, briefings and advice provided to the appropriate select committees considering the various Bills, select committee reports and excerpts

from parliamentary debates in connection with each of the Bills.[275] As it happens we have also found this material useful in considering whether the non-retrospective application of the ESO and PPO regimes can be justified — in the absence of other evidence to assist us with this issue.

[200] There was some discussion at the hearing as to whether broader statistical evidence should have been produced. In many of the cases we were referred to, a broader range of evidence was produced to the court to substantiate the importance of the objective, and the connection between that objective and the measures implemented.[276] Given that the Attorney-General has not provided any such evidence in this case, it is difficult for us to comment on how useful it would have been.

[201] The select committee report on the original draft Bill establishing the ESO regime provides some background to the enactment of the regime and why it was applied retrospectively.[277] The report records that a small number of people with a predisposition for child sex offending were released from psychiatric institutions in 1992 because their condition did not fit the then new definition of "mental disorder" under the MHCAT Act.[278] Several of them went on to commit serious sexual crimes against children. These offenders were sentenced prior to the passage of the Sentencing Act and the introduction of preventive detention. That meant they received finite sentences of imprisonment and, once released, continued to pose a risk to public safety. This, the report implies, is one reason retrospective application was needed.[279]

[202] As to the problem addressed by the PPO regime, the 2012 regulatory impact statement associated with that policy proposal noted that there had been further offending, and breaches of orders which could have led to more serious offending, by those subject to ESOs.[280] The report listed a range of offences and breaches committed

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275 At various times the appropriate select committee was the Justice and Electoral Committee, at others the Law and Order Committee.

276 See, for example, *R v KRJ*, above n 202, at [60] and [87] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ; and *Ilnseher v Germany*, above n 204, at [91]–[92].

277 Parole (Extended Supervision) and Sentencing Amendment Bill 2003 (88-2) (select committee report).

278 At 3.

279 At 4.

280 Department of Corrections *Regulatory Impact Statement: Management of High Risk Sexual and Violent Offenders at End of Sentence* (18 September 2012) [2012 regulatory impact statement] at [17].

by an (unspecified) proportion of the 12 offenders who were then subject to an ESO with special conditions requiring detention at a residence and intensive monitoring. The PPO regime was directed then to applying a more restrictive regime to those whose risk profile was thought to justify that — as noted above, it was to manage offenders whose risk was such that the ESO regime was inadequate to manage it.

[203] As mentioned above, in 2014 the ESO regime was extended to allow ESOs to be renewed for as long as they are needed, and to expand their reach to high-risk sex offenders against adults, and very high-risk serious violent offenders. The Cabinet paper for that extension noted that the existing regimes for the management of high-risk offenders (preventive detention, ESOs and PPOs) left some risk unaddressed. It identified that public safety might be compromised because of the time-limited nature of ESOs and their application only to the risk of sexual offending against children.

[204] Some sense of the importance of the purposes pursued through this legislation can be gained from the extent of reoffending avoided through the regimes. When enacting the ESO regime, Parliament had available to it information about the rate of reoffending of a cohort of offenders released in the 1990s who had been assessed as posing a high risk of reoffending. That rate of reoffending was 43 per cent over the following 10-year period.

[205] Are these purposes sufficiently important to justify the limitation on rights effected through the application of the ESO and PPO regimes? Protecting the public from offenders who are assessed to pose a high, or very high, risk of further serious sexual or violent offending is clearly a legislative purpose of great societal importance. There was also evidence to suggest that there were dangerous individuals who, when released from prison, would meet this risk threshold.

[206] However, the rights infringed in pursuit of this purpose are also of high importance in a free and democratic society. The s 26(2) right not to be punished twice for the same offence is a protection against abuse of state power and thereby is

protective of individual liberty.[281] ESOs can, as outlined above, result in long-term detention. In the case of the PPO regime, the detention may be for life, absent successful review. As was said by the United Nations Human Rights Committee in *Miller v New Zealand*, in a case concerning New Zealand's preventive detention regimes: the longer the detention, the greater the justification required for it.[282]

[207] Finally, in the case of Mr Chisnall, and others subject to these regimes, these regimes also operate retrospectively. The presumption against the retrospective application of criminal law remains a powerful consideration in this case even in respect of the non-detention aspects of the regimes. And while s 26(1) may not be engaged, it is clearly the case that, as the Court of Appeal observed, these are penalties imposed without the procedural protections afforded in respect of charge and conviction.[283]

[208] Having weighed these matters, we have concluded that the purpose of preventing those who are established, on the basis of good evidence, to pose a high, or very high, risk of further serious sexual and violent offending is sufficiently important to justify some limitation of the s 26(2) right (with the exception of the retrospective application of a second penalty amounting to detention, as already noted).[284] We have concluded that the purpose is of such importance that it may even justify detention following the completion of the original sentence of imprisonment.

(b) Is the limiting measure rationally connected with its purpose?

[209] Two key points are made for Mr Chisnall in respect of this ground. First, it is said that given the objectives of the legislation, it is irrational to limit the application of the regimes to those who have already committed eligible offending. That argument certainly has superficial appeal — there will after all be others who have not yet offended, but who pose a high risk of doing so. But, as Ms Jagose submits, a regime that targets all who pose a high risk would be still more oppressive in its reach.

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281 As mentioned above at [167]–[168], we do not rule out that, if adequate evidence were to be produced, ss 9 and 23(5) could also be engaged.

282 Human Rights Committee *Miller v New Zealand* Communication No 2502/2014 (7 November 2017) at [8.5].

283 Court of Appeal decision, above n 10, at [218].

284 Above at [146]–[148].

We also accept, if a regime is to target the risk of future offending based on expert opinion as to risk (and there seems no other justifiable basis for such a regime), proven past conduct is relevant evidence to that assessment of risk.[285]

[210] Secondly, it is argued that the most rational response to this problem is not to simply continue to subject the offender to a punitive response of more or less the same severity as that which has left them at a high risk of reoffending at the end of their sentence. Rather, the most rational response is to create a clinically driven regime which will target and address the causes of the offending, effectively rehabilitating the offender. This point is connected to the third stage of the *Hansen* assessment, which we now address.

(c) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

[211] The Human Rights Commission suggests that the issue is most simply formulated as whether there is a less rights-intrusive alternative that would be effective at securing the measure's objective. We accept that formulation, which is consistent with the overall scheme of the Bill of Rights and is also well supported by authority.[286]

[212] This step can itself be conceptualised as engaging an aspect of the proportionality assessment set out more explicitly in (d). In his book *Public Law after the Human Rights Act*, Tom Hickman describes the significance of this aspect of the proportionality assessment as follows:[287]

> The question will usually be whether it is fair for individuals to bear a more significant interference with their rights where a less intrusive alternative measure could be taken, having regard to the added costs that would be entailed in taking that alternative measure (if any).

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285 Although noting the caution expressed below n 333 as to the limitation upon any form of risk assessment relating to the likelihood of future offending.

286 *Hansen*, above n 18, at [79] per Blanchard J, observing that "[a]ny remedy [to combat street drug-dealing] must be one which is effective and I am persuaded that nothing short of a reverse onus would be sufficient", at [104] and [126] per Tipping J, noting that the court must ask whether Parliament might have "sufficiently achieved its objective" by a less rights-intrusive method, and at [217] per McGrath J: "The inquiry here is into whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness." To similar effect, *Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30, [2007] 2 SCR 610 at [43] it was noted that at this stage of the *Oakes* test "one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament".

287 Tom Hickman *Public Law after the Human Rights Act* (Hart Publishing, Oxford, 2010) at 191.

The costs referred to in this passage are societal costs, which of course include, but are not limited to, consideration of financial cost.

[213] Before we begin this topic, it is important to stress that this step in the *Hansen* assessment does not involve the court stepping into the shoes of the legislature by designing and endorsing its own rights-consistent statutory model. The court's focus must instead be on the core *characteristics* required to make any legislative model as compliant with fundamental rights as can be reasonably achieved in light of the legislative purpose. Nevertheless, in most, if not all cases, it will be impossible to assess proportionality in the abstract. Rather, giving consideration to plausible counterfactual models can help to ensure that the court's search for the core characteristics of a proportionate model is grounded in reality.

[214] We note that we have been hampered in our consideration of this issue due to the Attorney-General's election not to provide evidence to justify the regimes for the purposes of s 5 (beyond their retrospective application). As noted earlier, we have access to the legislative fact evidence, which shows that other models were considered. We also have the benefit of models applied elsewhere, as well as international jurisprudence addressing the issue of justification. The risks New Zealand is attempting to manage in this area are not unique to it.

(i) Alternative models considered prior to enactment

[215] We describe below the legislative fact evidence which establishes that other models were considered in some detail in 2012 in conjunction with the proposed PPO legislation. The 2012 regulatory impact statement sets out alternatives as follows:

(a) *Enhancing preventive detention*: This option was rejected because a number of the offenders who raised public safety concerns were under the age of 18 at the time of the offending, and lowering eligibility for preventive detention to offenders who offended under the age of 18 would raise significant rights issues. Moreover, it was observed that

the level of dangerousness sometimes only becomes apparent during the course of sentence.[288]

(b) *Strengthening ESOs*: It was thought that the very high risk could not be managed safely under this option.[289]

(c) *Broadening the eligibility for compulsory care ord*ers *under the IDCCR Act*: This option would require the qualifying IQ score to be raised or de-emphasised as the qualifying criteria. This was rejected as rendering the IDCCR Act inoperable (as the legal threshold for intellectual disability would become inconsistent with internationally accepted clinical criteria), and as being ineffective (as many offenders would fall outside the threshold in any case).[290]

(d) *Creating civil detention orders*: These orders would be aimed at offenders who were expected to benefit from rehabilitative treatment and programmes, with the proviso that the court was not obliged to make the order if the defendant would not benefit. Under this option, the primary determinant of a prospective detainee's eligibility would have to be the psychological and social characteristics which make them susceptible to further imminent offending, and any link with prior criminal offending would need to be indirect, if included at all. Detainees would need to be in facilities in the community which were secure but not punitive. It was noted that this option, which would allow detention, would reduce the risk to public safety, but was considerably more expensive than the option of detaining prisoners in prison or through the PPO structure, and implementation was likely to be delayed by the need to build facilities.[291]

(e) *Creating a criminal regime involving continued detention at the end of a finite sentence*: The grounds for making such an order would be a

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288 2012 regulatory impact statement, above n 280, at [50]–[53].
289 At [71].
290 At [57]–[59] and [72]–[73].
291 At [60]–[64], [70], [74] and [78]–[80].

"very high risk of imminent and serious sexual or violent re-offending".[292] Rehabilitative programmes and treatments would be available to detainees who were expected to benefit from them. This option was the least expensive and easiest to implement, but had a significant impact on rights and it was noted that it was likely to be inconsistent with the Bill of Rights and the ICCPR.[293]

(f) *Introducing civil detention through PPOs*: This was the option adopted. The regulatory impact statement highlighted that the main difference between this option and the continued detention regime was that the person would be detained in a facility in the community rather than in a prison. It was noted, however, that the human rights risks posed by a PPO are largely the same as for continuing detention.[294]

(ii) Alternative German models

[216] It is also helpful to briefly summarise a series of decisions of the European Court of Human Rights that were referred to us by the parties. These cases address the human rights implications of regimes in Germany that allowed for existing sentences of preventive detention to be retrospectively prolonged — sometimes indefinitely.

[217] In *M v Germany*, the European Court of Human Rights found that such detention was inconsistent with the right in art 7(1) of the European Convention on Human Rights to be free from retrospective and increased penalties.[295] It was also inconsistent with the general right to liberty in art 5 of the European Convention on Human Rights.[296] As is apparent this right is expressed in more expansive terms than the liberty right contained in s 22 of the Bill of Rights.

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292 At [65].
293 At [66], [70], [75], [77] and [79]–[81].
294 At [68] and 19–21.
295 *M v Germany*, above n 204, at [125]–[137]. Article 7(1) is the equivalent of ss 25(g) and 26(1) of the New Zealand Bill of Rights.
296 At [97]–[105].

[218] The related case of *Bergmann v Germany* was considered by the European Court of Human Rights six years after *M*.[297] In *Bergmann*, the issues arose in a new context because of amendments to the domestic law following *M*. First, a requirement had been added that a condition for the making of the order was that the offender be diagnosed with a mental disorder. Secondly, the conditions in which people were held under sentences of preventive detention had been altered to focus upon therapeutic treatment of that mental disorder.[298]

[219] The Court held that Mr Bergmann's detention was justified under art 5(1)(e) — detention of a person of unsound mind.[299] For these purposes, unsound mind was defined to include mental disorders that precipitated criminal behaviour. Mr Bergmann's detention also did not entail a breach of art 7(1).[300] The Court concluded that where preventive detention was extended because of, and with a view to the need to treat, Mr Bergmann's mental disorder, the nature and purpose of his preventive detention substantially changed.[301] This meant that the punitive element, and its connection with his criminal conviction, was eclipsed to such an extent that it could no longer be classified as a penalty within the meaning of art 7(1).

[220] This finding was upheld and reinforced in the later case of *Ilnseher v Germany*, the case in this line of authority to which we were most referred during the hearing.[302] We therefore refer to this as the *Ilnseher* model. On this model, restrictions imposed to address risk connected to a mental health disorder, or an intellectual disability, will not be characterised as penal, even if a precondition for their imposition is a conviction, so long as the conditions under which the individual is held are sufficiently therapeutic.[303] This approach however must be understood within the particular European Convention on Human Rights art 5 framework and within a particular legislative definition of mental health disorder. Nevertheless, the focus in these cases upon the requirement that a regime be structured around providing rehabilitation and

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297 *Bergmann v Germany*, above n 204.
298 At [52]–[53] and [63]–[65].
299 At [103]–[134].
300 At [183]. See also at [150]–[177].
301 At [182].
302 *Ilnseher v Germany*, above n 204.
303 See at [206], [227] and [236].

therapeutic support for the subject of the orders is highly relevant to the issues in this case.

(iii) Alternative models proposed by counsel for Mr Chisnall

[221] Mr Keith's submissions as to possible less rights-intrusive alternatives can be seen as linked to some of the alternative models discussed in the legislative fact evidence and to the *Ilnseher* model. On his submission, while some level of restriction, and even detention, may be needed to secure public safety, those limits on freedom can only be justified if:

(a) the regime is not solely focused upon certain offenders who have already served their sentence, but rather is extended to those with a diagnosed mental health condition or intellectual disability; and

(b) the structure and operation of the regime is shaped by the rehabilitative, and hence in context, clinical needs of those subjected to it.

[222] We refer to this alternative formulated by Mr Keith as the "mental health" model, derived from, but not exactly replicating, the German legislation considered in *Ilnseher*. On this model, previous serious offending is a relevant, but not necessary or sufficient, condition for the making of the order. A regime of this nature, he argues, would not be inconsistent with s 26(2), even when applied to offenders, as the diagnosis of mental disorder or the finding of intellectual disability would be a sufficient break between the offending and the making of the order, so that it cannot be said to amount to a penalty. Nor then would s 9 be engaged. This fact along with the rehabilitative focus would also ensure that any detention was not arbitrary under s 22.

[223] It is significant that implementation of this model would require:

(a) the expansion of the definition of mental disorder and/or intellectual disability to include those at high/very high risk of future/imminent serious sexual or violent offending; and

(b) the application of the regimes to all who fall within that new aspect of the definition of mental disorder and not limited to those who have previously committed serious violent or sexual offences.

[224] There are already statutory schemes that are directed both at treatment and care for those with mental disorders or intellectual disability and who have been charged with or convicted of an offence.[304] The policy behind the ESO and PPO regimes is directed to those who fall outside of those regimes. The model suggested by Mr Keith, then, would entail a reworking of our mental health and disability legislative regimes, greatly expanding them, and seemingly without clinical justification. Not all offending is attributable to mental illness or intellectual disability, and nor is a propensity to criminally offend always diagnostic of mental illness or intellectual disability. Indeed those propositions were not urged upon us. We do not therefore consider that the mental health model proposed by Mr Keith is the least rights restricting alternative as it would greatly expand the number of those subject to restrictive regimes which may well not be appropriate to their circumstances. Without the requirement for the strong indication of risk provided by a history of proven serious sexual or violent offending, those restrictions would seem to be incapable of justification.

[225] We also note that in the regulatory impact statement, expanding the IDCCR regime was not recommended because it would render the present regime inoperable, and be ineffective in meeting the risk.[305]

[226] The legislative fact evidence identifies preventive detention as an alternative approach to managing risk. That is the approach that is taken in Canada and many other jurisdictions.[306] It has the advantage that that ss 9, 22, 23, 25 and 26 would not

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304 MHCAT Act, above n 133; and IDCCR Act, above n 133.

305 See above at [215](c).

306 The Canadian system enables the sentencing judge to impose a sentence roughly equivalent to an ESO at the time of sentencing and as a less restrictive alternative to a sentence of preventive detention, which is also available. See Criminal Code RSC 1985 c C-46, Part XXIV (ss 752–761); and *R v Boutilier* 2017 SCC 64, [2017] 2 SCR 936. See also Kirstin Drenkhahn and Christine Morgenstern "Preventive Detention in Germany and Europe" in Alan R Felthous and Henning Saß (eds) *The Wiley International Handbook on Psychopathic Disorders and the Law: Volume II Diagnosis and Treatment* (2nd ed, John Wiley & Sons, Hoboken (USA), 2021) 87 at 90; and *Ilnseher v Germany*, above n 204, at [85]–[86].

be engaged if a preventive detention regime were implemented which complied with the requirements of General Comment 35.

[227] We mention General Comment 35 above.[307] It lays out a number of principles that apply where a finite sentence is, based on assessment of risk, followed by an extended detention for the purposes of public protection — to put this in domestic terms, these principles apply to preventive detention sentences. The principles identify the conditions such a statutory regime must meet in order not to be arbitrary.[308] The principles are that the detention:[309]

(a) must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future;

(b) should only be used as a last resort;

(c) must be subject to regular periodic reviews by an independent body to decide whether continued detention is justified;

(d) must contain conditions that are distinct from the conditions for convicted prisoners serving a punitive sentence;

(e) must be aimed at the detainee's rehabilitation and reintegration into society; and

(f) must not be an attempt to circumvent the prohibition against a retroactive increase in sentence by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.

[228] Having considered this material to which we have been referred, we are not persuaded that expanding the preventive detention regime amounts to a less

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307 Above at [161].

308 We note that preventive detention sentences cannot entail a breach of s 26(2) as they are imposed as part of the sentencing process.

309 General Comment 35, above n 239, at [21].

rights-infringing response. Preventive detention is itself a highly rights-limiting regime. It is a sentence that applies for the life of the offender (even after release from prison). It is based on an assessment made prior to sentence, and therefore makes no allowance for the potential rehabilitative effect of that sentence. Rehabilitative programmes offered in prison should address the causes of offending and thereby reduce the risk of reoffending. Indeed, rehabilitation is one of the purposes of sentencing.[310] The level of risk on release may therefore be better assessed at the time of release when the results of the rehabilitation programmes provided to the offender can be taken into account.

(iv) Our analysis

[229] This review of the various alternative models proposed, assessed against a rights framework, enables us now to address whether there are less rights-intrusive ways of achieving the purpose of the legislation.

[230] In respect of the parts of the ESO regime that do not entail detention, and are applied prospectively, we are not satisfied that there is a less rights-intrusive model available. The standard conditions allow the individual to remain in the community, thus enabling their reintegration. Although they impose reporting requirements, and entail restrictions upon accommodation, travel, employment and association (limiting the affirmed rights in respect of freedom of association and freedom of movement) they are designed, and it seems to us appropriately calibrated, to enable the risk of reoffending to be minimised. In our assessment we must proceed on the basis that, in each case, the decision-maker (the probation officer) will ensure that the standard conditions are applied in a manner no more extensive than necessary to meet those risks. That is what a rights-compliant approach to decision-making requires.

[231] To the extent the conditions of the ESO regime not entailing detention operate retrospectively, it is clear that a less rights-intrusive model was available — which of course is one that did not authorise or effect a retrospectively applied second penalty. However, a purely prospectively applied regime would not be as effective at securing the legislative objective — it would leave unmanaged the category of high-risk

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310 See above at [134].

offenders discussed in the legislative fact evidence who were due to be released from prison. As Ms Jagose argues, it was one of the purposes of the regime to provide for these offenders for whom there was no satisfactory risk management under the regime as it stood.

[232] In respect of those parts of the ESO and PPO regimes that contemplate and authorise detention, the arguments and materials presented to us do make out the case that there are less rights-intrusive options that could be as effective, perhaps more effective, at managing the risk in the long term. As we have noted above, constructing a model for New Zealand's conditions is a matter for Parliament alone. The task of the court is to identify the core characteristics of a rights-consistent model. This is within the particular expertise of the courts, as the enactment of the Bill of Rights demonstrates. Delineating rights and determining proportionality is familiar judicial work. Other characteristics of the model — not least cost and wider community concerns — must be for the legislature with its broader institutional capacity and democratic mandate.

[233] As to these core characteristics, we have the guidance provided by General Comment 35, as to the characteristics of a less rights-intrusive model for post-sentence containment of assessed risk — highlighting conditions (d) and (e) in particular; conditions that are distinct from those in prison and, along with risk management, have rehabilitation and reintegration as a primary focus.[311]

[234] We also have the therapeutic and rehabilitative models discussed in the *Ilnseher* line of cases. As discussed in *Ilnseher*, the regime should impose the least intrusive restrictions consistent with the public protection objectives; it should minimise the extent to which the conditions are experienced by the subject as punishment (and for that reason, any detention should not occur in prison or prison-like circumstances); and the focus of the regime should be rehabilitation, including (where appropriate) a therapeutic underpinning.[312]

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311 See above at [227].

312 *Ilnseher v Germany*, above n 204, at [49], [195] and [227]. See also *R v KRJ*, above n 202, at [70] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ; and *Bergmann v Germany*, above n 204, at [65] and [128].

[235] On the basis of this material we are satisfied that there are other plausible options which are likely to be less rights intrusive. Any such model would be based around the following three pillars: first, achieving public protection by the least restrictive means possible for each offender; secondly, minimising the punitive impact of the restrictions on the offender; and thirdly, requiring mandatory provision of rehabilitation designed to meet the needs of the offender (including where indicated, therapeutic treatment).

[236] The rehabilitative focus is critical because rehabilitation enables the individual to address the causes of the offending, thereby minimising the extent and length of any restraint. A rehabilitative focus also more clearly distinguishes these regimes from punishment.[313]

[237] 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.[314]

[238] How do the ESO and PPO regimes measure against these characteristics? As to the first pillar, it is appropriate first to acknowledge aspects of the regimes which do operate to minimise rights intrusion. They include a range of procedural protections. As noted above, the regimes set very high thresholds for the imposition of orders; both previous evidence of serious offending and risk assessments undertaken by at least one health assessor. As Ms Jagose submits, this has the important effect of narrowing the regimes' application — restricting it to those assessed, on the basis of evidence provided, to be at high (or very high) risk of future (or imminent) offending, as the case may be.

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313 Although we note that rehabilitation is also a purpose of sentencing, it is only one of a number of purposes: Sentencing Act, s 7(h).

314 *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2023] NZCA 660 at [87] citing *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659, [2012] 1 NZLR 641 at [74].

[239] The statutory regimes can be read, consistent with s 5 of the Bill of Rights, as requiring that the restrictions imposed be no greater than is required. However, the ability to ensure this is limited by the architecture of the regime and by s 4 of the Bill of Rights. As noted above, the making of a PPO places the person in the custody and under the control of the Chief Executive. As to the ESO regime, the possibility of detention is expressly contemplated and authorised by its terms.

[240] The review provisions in each of the ESO and PPO regimes are important in addressing concerns about arbitrariness. It is, however, of concern that in the case of the PPO regime, the conditions on which the individual is held are set by the Chief Executive and not by the court. And in the case of the ESO regime the special conditions (potentially the most onerous conditions) are set by the Parole Board, not the court.[315]

[241] As to the second pillar, there is no significant statutory recognition of the need to ensure the circumstances and conditions of the detention are distinct from the circumstances and conditions of imprisonment, so as to minimise the punitive impact on the individual.[316] Again, it is significant that we received no evidence to detail the existence or extent of steps taken to ensure this.

[242] As to the third pillar, rehabilitation and a therapeutic approach cannot be said to lie at the core of either regime. There is no statutory obligation on the Chief Executive to provide rehabilitative or therapeutic support to those subject to an ESO, although the subject may be required to undergo rehabilitative programmes. The PPO regime does impose a statutory obligation upon the Chief Executive to provide rehabilitation to the individual, but that is a qualified obligation; they are only required to do so where there is "a reasonable prospect of reducing the risk to public safety posed by the resident".[317] This is an assessment of the likely benefit to the community rather than the resident, suggesting an overly narrow view of what amounts to rehabilitation. It is also true that the legislation provides for a needs assessment and management plan, which we would expect to be administered by the

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315 The exception is intensive monitoring, which may only be ordered by the court: Parole Act, s 15(3)(g).

316 Although we note the presence of the rights in ss 27–40 of the PPO Act.

317 PPO Act, s 36.

Chief Executive so as to address rehabilitative and therapeutic needs. But it has been important in our consideration of this issue that the Attorney-General, who bore the justificatory burden, offered no evidence as to how these are designed and administered in practice. Nor as to the extent of rehabilitative and therapeutic support provided to those subject to either regime.

[243] It is also of note that rehabilitation of the offender is not one of the express purposes of either piece of legislation. The Legislation Advisory Committee recommended the PPO Act be amended to include rehabilitation in its objects,[318] but that recommendation was not taken up.

[244] It follows that in respect of the PPO regime and the detention aspects of the ESO regime, on the evidence we have available to us, there are less rights-intrusive approaches available that would be as effective in securing the objective of reducing the risk to the public posed by high-risk offenders reoffending.[319]

(d) Are the limits in due proportion to the importance of the objective?

[245] The s 5 assessment draws together the preceding three steps: is the purpose sufficiently important to justify the particular limits upon these particular rights, are the limits rationally connected to the purpose and, finally, is there a less rights-intrusive measure available to achieve this purpose? The stepped *Hansen* assessment thereby guides the court making the ultimate assessment whether the balance struck in that legislation "between social advantage and harm to the right" was proportionate.[320]

[246] At this point in the analysis, the Court of Appeal found that for the Attorney-General to establish that the correct balance had been struck required "evidence about the basis on which the legislative choices were made such as would provide and submit to scrutiny the rational justification for the measures".[321]

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318 Legislation Advisory Committee "Submission to the Justice and Electoral Committee on the Public Safety (Public Protection Orders) Bill 2012" at [5].

319 We note there is one fundamental respect in which these alternatives would not be as effective: they would not apply retrospectively.

320 *Hansen*, above n 18, at [134] per Tipping J.

321 Court of Appeal decision, above n 10, at [226].

The Attorney-General argues that this was the wrong approach — the declaration of inconsistency jurisdiction does not involve the courts reviewing legislative choices. The Attorney-General, it is argued, was not required to justify Parliament's decision to create these particular regimes, rather than some other approach that laid greater emphasis on therapy. The submission is made that Parliament is accountable only to the electorate for its legislative choices. Having made that choice, it is the resulting legislation that must be measured for its consistency with the Bill of Rights.

[247] We agree that the declaration of inconsistency jurisdiction does not entail the court reviewing Parliament's legislative choices. However, the sentence in the Court of Appeal judgment pointed to by the Attorney-General appears in a conclusory paragraph, following on from an orthodox application of the *Hansen* proportionality assessment. In context, we do not read it as suggesting that judicial review of Parliament's choices was for the courts.

[248] In any case, it is clearly not the task of the court to check whether Parliament has made the best choice possible to address the problem the challenged legislation seeks to remedy. The issue for the court is not whether Parliament was correct to make the choice it made, but rather whether the limitations of rights are justified for the purposes of s 5. Having said that, and as already discussed, the court is inevitably assisted in this task by receiving evidence as to the objectives the legislation seeks to secure, and as to alternatives addressed in the legislative process.[322]

[249] There is another issue, however. What weight should the court give to the choice that Parliament did in fact make? There is considerable debate in academic literature, and many pages of case law devoted to when and how courts should give weight to Parliament's enactment of the legislation in question in the context of assessing the rights consistency of legislation.[323] We do not propose to review the terms of that debate other than to state that, as is well established, when assessing the

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322 See above at [198]–[208] and [213]–[215].

323 See, for example, *Regina (Nicklinson) v Ministry of Justice (CNK Alliance Ltd and others intervening)* [2014] UKSC 38, [2015] AC 657 at [166]–[171] per Lord Mance SCJ; Conall Mallory and Hélène Tyrrell "Discretionary Space and Declarations of Incompatibility" (2021) 32 KLJ 466; and, in the New Zealand context, Paul Rishworth "The Bill of Rights and administrative law" (paper presented to the New Zealand Law Society Human Rights Intensive Conference, October 2022) 55 at 63.

reasonableness of limits, regard will be had to the justification offered by the decision-maker.[324] That is true in proceedings where it is the rights consistency of a particular decision that is at issue.[325] It is also true even though the issue before the court is the rights consistency of legislation and the decision-maker is Parliament. As the House of Lords noted in *Huang v Secretary of State for the Home Department*, this is:[326]

> … performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.

[250] Of course, in determining issues of weight for these purposes, regard should be had by the courts to Parliament's institutional capacity. It may, for example, be the case that when it comes to complex social problems Parliament has institutional capacity and expertise to which weight should be given. Or the issue may raise vexed ethical issues to which there is, at the time, no clearly more rights-consistent answer.[327] We accept, as a point well made by the Human Rights Commission, that the circumstances in which the issue of weight will arise are so varied that it would be incautious to attempt some formulation or scheme — it is better at this point in the development of the law relating to declarations of inconsistency to address the issue on a case-by-case basis, being explicit as to how and why weight is afforded to the decision taken and the reasons given.[328]

[251] There is also ample discussion in the literature and case law as to whether the courts should show deference to Parliament's legislative choices — this is a different point to that made in relation to Parliament's institutional capacity.[329] In this case Ms Jagose submits that where the question of justification involves controversial issues of social and economic policy, with major implications for public expenditure,

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324 *Hansen*, above n 18, at [108] per Tipping J.

325 *Moncrief-Spittle*, above n 167, at [102].

326 *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [16].

327 *Nicklinson*, above n 323, at [165] per Lord Mance SCJ.

328 Compare *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 at [82]–[87] per Laws LJ; and *M v H* [1999] 2 SCR 3 at [305]–[321] per Bastarache J.

329 See *Regina (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [150] per Lord Kerr SCJ. See also TRS Allan "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671.

greater deference to the assessment of democratically elected institutions may be appropriate.[330] In *Hansen*, Tipping J used the language of giving Parliament "latitude" or a "margin of appreciation", observing that "[t]here is a spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other", suggesting that the closer to the legal end of the spectrum the more intense the court's review will be.[331]

[252] While, as noted above, we do not characterise the court's task in connection with declarations of inconsistency as one of reviewing Parliament's choices, we accept it is appropriate for the courts to acknowledge that the legislation in question has been enacted by a democratically elected body, so that a finding that it is inconsistent with the affirmed rights is not to be lightly be made. Beyond that point, we think the issue is better addressed as one of institutional capacity as discussed above. Ultimately, Parliament has imposed on the courts the duty to undertake the s 5 analysis, and the courts cannot shirk the responsibility to address issue of rights consistency. As the Human Rights Commission submits, it cannot be the case that the courts must assume that a pressing social need and the compatibility of means chosen to pursue it are justified just because Parliament has adopted them.[332]

[253] That takes us to the proportionality assessment in this case. As set out above, the purpose these regimes serve is of very high importance in a free and democratic society — keeping the public safe from serious sexual and violent offending by a group of offenders at high, or very high, risk of reoffending. We have also found that the regimes are rationally connected to the objective of reducing and managing that risk.

[254] However, we have found the rights infringed are also of high importance in a free and democratic society. The ESO and PPO regimes are extraordinary and truly exceptional measures for a society to implement. Offenders such as Mr Chisnall are subjected to punitive restrictions and detention, potentially for life, not as a sentence in response to past offending — they have already served that sentence. They are

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330 Citing *Regina (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] UKSC 16, [2015] 1 WLR 1449 at [93] per Lord Reed SCJ. Though we note that most policy decisions have at least indirect implications for public spending, and this case was specifically referring to welfare benefits.

331 *Hansen*, above n 18, at [113]–[116] per Tipping J.

332 *RJR-MacDonald*, above n 266, at [136] per McLachlin J.

subjected to them on the basis of opinion evidence as to the risk that, having served their time for serious offending, they are very likely to offend in a similar way again.[333] As counsel for Mr Chisnall submits, 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.

[255] We have already, by this point, divided consideration of this issue into those provisions in the ESO regime that do not authorise detention (which can be identified as the standard conditions for an ESO) and the detention-authorising aspects of the regimes.

[256] In respect of the non-detention aspects of the ESO regime where not applied retrospectively, we have concluded that there is no less rights-intrusive alternative. We have also identified that the standard conditions must be administered by decision-makers (probation officers) to ensure that they are applied in the least rights-intrusive manner necessary to achieve the objective. Taking all these matters into account, we are satisfied that these limitations on rights are reasonable limits that have been demonstrably justified in a free and democratic society.

[257] However, we make two qualifications to this finding. The first is in respect of the standard condition that prohibits contact with a person under the age of 16. This condition is distinct from the traditional parole conditions. We surmise that its inclusion reflects the original purpose of the ESO regime — to protect against child sex offenders. Since the expansion of the regime, however, it now applies irrespective of the nature of the offending. This condition may not be responsive to the particular offender, or management of the risk in association with them. However, we received no evidence or argument on this issue so make no finding as to rights consistency in relation to this condition.

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[333] While we have acknowledged earlier at [133] that past conduct by the offender may be a significant predictor of risk, it is still subjecting the individual to conditions on the basis of what they may do, not what they have done. It is well-recognised that risk prediction is not an infallible science: *Fardon v Australia*, above n 188, at [7.4(4)]; and *Tillman*, above n 233, at [7.4(4)].

[258] Secondly, the Court had very limited evidence before it from Mr Chisnall as to the operation of the standard conditions and their effect on him. There was also very little argument directed to particular conditions.

[259] In respect of the non-detention aspects of the ESO regime, where they apply retrospectively, we have found that it would be less rights-intrusive for them not to be applied retrospectively, but this would not achieve the purposes of the legislation — to manage a high risk of future serious offending by those who had committed eligible offences before the enactment of the ESO regime. The legislative fact material established that there were a number of offenders who fitted into this category.

[260] In light of this, and given the nature of the risk, the rational connection between the restrictions entailed and managing that risk, and given the fact that the restrictions, whilst penal, are not amongst the most severe category of penalty, we are satisfied that the limitation on the s 26(2) right effected by the retrospective application of the parts of the ESO regime which do not authorise detention is justified for the purposes of s 5.

[261] That takes us to the detention-authorising aspects of these regimes. In the case of these provisions, we have found there is a less rights-intrusive model available to meet the social objective. The issue for the courts therefore is what justification there is for the more rights-intrusive model. The justifications for the more rights-intrusive model that appear on the legislative fact materials are to do with financial cost and the practicalities of providing appropriate facilities. Those references related only to the PPO regime. Even then, they were not to the effect that the financial cost of other models was prohibitive — just that it was more. The Attorney-General did not produce any evidence to further substantiate this point, or to enable us to assess the significance of the practicalities associated with the provision of facilities.

[262] We step back from this detailed analysis in order to undertake the proportionality exercise in respect of the detention-authorising aspects of the regimes. We accept the limitation of rights is rationally connected to an important social objective. Nevertheless, given the substantial limitation of the rights involved and the importance of those rights, powerful justification is required. Still more so, given the lesser procedural protection available to the subject of an application than that

available to a person subject to charge and conviction. That justification has not been provided in this case. On the evidence available to us, there were less rights-intrusive options that would have better reflected the three core characteristics we have discussed. Although it is not our role to design or prescribe such a model, we have set out the three pillars that characterise it. While the objectives of the detention-authorising aspects of the regimes were important, the limits imposed were not proportionate to those objectives. Therefore, those limitations on the s 26(2) right not to be subjected to a second penalty have not been justified for the purposes of s 5 of the Bill of Rights.

Fifth section: The exercise of the discretion to issue a declaration

[263] Mr Chisnall submits that if a court determines that an enactment is inconsistent with one or more rights protected by the Bill of Rights, the court should ordinarily make a declaration of inconsistency. The Human Rights Commission supports this submission, but says that in exceptional circumstances a court may determine it would not be appropriate to make a declaration — for example, where there would be no utility in granting the relief.

[264] The Attorney-General's submission is that a declaration is a relief of last resort. That is correct if it is meant that, as is apparent from the structure of the Bill of Rights itself, a declaration of inconsistency should not be issued where rights consistency can be achieved through the s 6 interpretive exercise. The decision-maker, and the courts, must do the hard work of securing a rights-consistent application and interpretation. As to the Human Rights Commission's submission, there is clearly a discretion not to issue a declaration, and authority to support the proposition that the utility of that relief is a material consideration in the exercise of that discretion.[334] If, for example, the court concludes that a declaration is unnecessary in the circumstances it may decide not to issue one. But it was not suggested there were reasons not to issue a declaration in this case, other than the Attorney-General's primary (and unsuccessful) argument

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[334] See *Taylor*, above n 156, at [58] per Glazebrook and Ellen France JJ. See also *Regina (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 at [39] per Lord Mance, Lord Kerr, Lord Hughes and Lord Hope SCJJ, [105] per Lord Clarke SCJ and [112] per Lord Sumption SCJ; *Regina (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 at [52] per Lord Hoffmann; and *Flood v Times Newspapers Ltd (No 2)* [2017] UKSC 33, [2017] 1 WLR 1415 at [64].

that rights consistency in the application and effect of the regimes could be secured by the sentencing court. No relevant reason having been offered as to why a declaration of inconsistency should not be issued in this case, we are satisfied that it should.

[265] For the avoidance of doubt, the declarations will be in respect of s 26(2) of the Bill of Rights and will relate to the entirety of the PPO regime and the detention-authorising aspects of the ESO regime, retrospective or otherwise. The declaration will not include the aspects of the ESO regime that do not authorise detention, ie the standard conditions.

[266] The issues in this case having developed since the issue of a declaration was addressed by the Court of Appeal, we consider it is appropriate to provide the parties with an opportunity to make submissions on the form of the declarations.

Result

[267] The appeal is allowed in part.

[268] The cross-appeal is dismissed.

[269] Submissions for the parties as to the form of the declarations should be no longer than 10 pages in length each, and should be filed in accordance with the filing timetable as follows:

(a) Appellants: by 3 March 2025.

(b) Respondent: by 10 March 2025.

[270] Costs are reserved. If costs cannot be agreed, the parties should also address the issue of costs in their submissions on the form of the declaration.

GLAZEBROOK J

[271] I write separately because I would not make a declaration of inconsistency. As this is a minority view, I express my reasons very briefly.[335] I concentrate on public protection orders (PPOs) but most of the points made also apply to the detention aspects of the extended supervision order (ESO) regime.

[272] First, I consider that there is a clash of rights involved: between the rights of potential victims and the person detained subject to a PPO. In this regard, I note the test for the imposition of a PPO: there must be "a *very high* risk of *imminent serious* sexual or violent offending" and the court must be satisfied that the person "exhibits a *severe disturbance* in behavioural functioning established by evidence to a *high* level" of the four characteristics set out.[336] The threshold means that, without the PPO, there is a very high risk of serious offending in the short term against particular victims, albeit as yet unidentified. It goes without saying that both serious sexual and violent offending have devastating and long-lasting effects on the lives of victims.[337] But the appeals were not argued on the basis of a clash of rights and it is therefore inappropriate to say more.[338]

[273] Second, I consider that the PPO regime in its current form is capable of being rehabilitative and therapeutic.[339] We, however, had limited evidence of how it operates in practice.[340]

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335 Because I take this view I do not comment on the majority's reasoning, except as it relates to the three points I make here.

336 Public Safety (Public Protection Orders) Act 2014 [PPO Act], s 13(1)(b) and (2) (emphasis added).

337 In relation to sexual and violent abuse it is sufficient to refer to Coral Shaw, Andrew Erueti and Paul Gibson *Whanaketia: Impacts | I mahue kau noa i te tika* (Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions, 25 June 2024).

338 For more on clashes of rights see Eva Brems (ed) *Conflicts Between Fundamental Rights* (Intersentia, Antwerp, 2008); Shaheen Azmi, Lorne Foster and Lesley Jacobs (eds) *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Irwin Law, Toronto, 2012); Robert J Sharpe and Kent Roach *The Charter of Rights and Freedoms* (7th ed, Irwin Law, Toronto, 2021) at 62–64; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.6.19]–[6.6.36]. I would also have been assisted by submissions on the views expressed, in particular on *R v Pora* [2001] 2 NZLR 37 (CA), in Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago LR 631 at 633–634 and 643–646.

339 PPO Act, ss 36 and 41–42.

340 See above at [241]–[243] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

[274] Third, Te Aka Matua o te Ture | the Law Commission (the Commission) is reviewing the laws that aim to protect the community from reoffending risks posed by some people convicted of serious crimes, namely preventive detention, ESOs and PPOs. The Commission has recently issued a paper outlining its preferred approach.[341] It seems to me that in this case it would be better to wait until the final recommendations of the Commission and the Government response before considering whether it is appropriate to make a declaration.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Appellants and Cross-Respondents
F J Handy, Wellington for Respondent and Cross-Appellant
J S Hancock, Te Kāhui Tika Tangata | Human Rights Commission, Wellington for Intervener

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[341] Te Aka Matua o te Ture | Law Commission *Here ora? Preventive measures for community safety, rehabilitation and reintegration: Preferred Approach Paper* (NZLC IP54, 2024). The period for submissions on this paper closed on 20 September 2024.