IN THE SUPREME COURT **SC147/2023**

I TE KOTI MANA NUI

BRETT DAVID GRINDER
Appellant

v

ATTORNEY-GENERAL
First Respondent

NEW ZEALAND PAROLE BOARD
Second Respondent

SUBMISSIONS ON BEHALF OF THE LAW ASSOCIATION INTERVENING COUNSEL
Dated: 6 September 2024

Counsel for The Law Association certify that these submissions contain no suppressed information and are suitable for publication

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MAY IT PLEASE THE COURT:

Introduction

1. The Law Association Parole and Prisoner Rights Committee (TLA) has been granted leave to intervene in this appeal. These submissions will address public policy considerations and broad application of the issues generally. TLA consulted with the specialist parole committed of Te Kahui Ture O Aotearoa, The New Zealand Law Society. They have reviewed, and endorse, these submissions.

2. The perceived risk of recidivism for those subject to preventive detention has created a climate of fear in the community. This has translated into pressure on political bodies to control those who are subject to life sentences in the community, especially in the case of a child sex offender (CSO). Underpinning this fear is the concern that while the risk is small, the potential harm caused by CSOs is high. Resultingly, policies and legislation which favour offender surveillance have overwhelmed those which foster reintegration and rehabilitation. The law is being wielded as a sword (with the effect of continued punishment of offenders) rather than a shield (providing the least restriction necessary to ensure that the risk of reoffending is not undue).

3. TLA endorses the appellant's position that the Parole Act 2002 ("The Parole Act") ought to provide 'guard rails' constraining the Parole Board's powers to impose, vary and discharge special conditions. Special conditions designed to avoid "undue risk" must always satisfy the threshold of being the minimum reasonable, necessary and proportionate to ensuring the applicant does not represent an undue risk to the community. A global assessment of the proposed conditions is appropriate.[1]

4. TLA submits that if conditions are imposed without justification or necessity, they encroach on an offender's ability to successfully reintegrate into society. The outcome is contrary to The Parole Act, increasing risk. The powers of the state are always subordinate to the protections of the New Zealand Bill of Rights Act 190 (NZBORA). Restrictions must be reasonable and

[1] Appellants Submissions, 23 August 2024 at 3.

necessary. Guiding principles of The Parole Act ensure that offenders are not detained longer than necessary.[2] While the paramount consideration if the safety of the community,[3] parole may only be declined if offenders present an undue risk to the community.[4] Under s 28(2), the offender's risk of reoffending must be assessed having regard to the support and supervision available to him or her following a release, and also the public interest in his or her reintegration. CSOs are often subject to the CSO register, providing an additional level of ongoing scrutiny by the police.[5]

5. The test articulated in s 7 and s 28(2) of The Parole Act is that the offender can only be released if they do not pose an "undue risk to the safety of the community". "Undue" when used to describe the risk, means that the risk to the community is disproportionate to, and outweighs, the prisoner's personal interests in retaining his liberty".[6] Risk also has to be balanced against the public's interest in facilitating the reintegration of the offender into society.[7] Put another way, is the risk to the community sufficiently undue to displace a prisoner's rights protected under the NZBORA. Can any residual risk to the community be lowered to an acceptable level through the imposition of special conditions which are collectively designed to reduce or manage the risk to the safety of the community.

Procedural History of Preventive Detention in New Zealand

6. The origins of preventive detention in New Zealand begins with the Habitual Criminals and Offenders Act of 1906 which authorised the Court to impose a non-finite reformative sentence of detention following a finite prison term.[8] The Criminal Justice Act 1954 introduced 'preventive detention' in New Zealand for the first time.[9] In its original form, preventive detention was

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[2] Section 7(2)(a) Parole Act 2002.
[3] Section 7(1) Parole Act 2002.
[4] Section 7(3) Parole Act 2002: This involves an assessment of the likelihood of further offending, and the nature and seriousness of any likely subsequent offending.
[5] Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (not included in Joint Bundle).
[6] *Clarke v Parole Board* HC Christchurch CRI-2005-409-11 at [35] (not included in joint bundle)
[7] *Edmonds v New Zealand Parole Board* [2015] NZHC 386, at [33] referring to s 28(2)(b) (not included in Joint Bundle).
[8] Ministry of Justice, Sentencing Policy and Guidance: A Discussion Paper (Ministry of Justice, New Zealand, Wellington, 1997 (not included in Joint Bundle).
[9] Criminal Justice Act 1954, s 75. (not included in Joint Bundle).

available for three categories of offender over the age of 25: repeat minor offenders; repeat middle range offenders; and sexual offenders against children with at least one prior similar conviction.

7. The criterion for the imposition of this sentence was whether the High Court was "satisfied that it was expedient for the protection of the public that the offender should be detained in custody for a substantial period".[10] Preventive Detention in this form was abolished in 1967, except for persons qualifying by reason of sexual offending. One of the reasons given by the Minister of Justice for repealing the provisions "was the inappropriateness of preventive detention for offenders whose record, though long did not make them a menace to society".[11] The sentence of preventive detention has since focussed more narrowly on violent and sexual offenders considered likely to pose future serious harm.

8. In 1993 the Criminal Justice Act 1985 was amended to permit the Court to impose a sentence of preventive detention with a non-parole period greater than 10 years in "exceptional" cases. [12] The Sentencing Act 2002 ("The Sentencing Act") and The Parole Act were enacted in response to a 1999 law and order referendum in which 92 per cent of voters agreed with the question:[13]

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

9. The Sentencing Act removed the requirement for a person being sentenced to preventive detention to have been convicted of a qualifying offence on a previous occasion and allowed for it to be imposed upon a person's first offence. Furthermore, the age of eligibility was lowered from 21 years to 18 years. There have been no substantive amendments to the sentence of

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[10] Ministry of Justice, Sentencing Policy and Guidance: A Discussion Paper (Ministry of Justice, New Zealand, Wellington, 1997 [at 75] (not included in Joint Bundle).
[11] Ibid [at 74]
[12] Criminal Justice Amendment Act 1993 (not included in Joint Bundle).
[13] 599 NZPD (Sentencing and Parole Reform Bill – Second Reading, Phil Goff) (not included in Joint Bundle).

preventive detention since 2002. [14] It is currently subject to review by the Law Commission. [15]

10. In order to impose a sentence of preventive detention, the Court must be satisfied that the person is likely to commit another qualifying sexual or violent offence if the person was released at the expiry date of any other sentence the Court could impose. As of June 2022, there were 310 people subject to preventive detention.[16]

Overseas jurisdictions

11. The Law Commission noted that the laws of all comparable jurisdictions they had researched provided for preventive measures, including a form of supervision in the community for those considered at high risk of reoffending.[17] A summary of overseas law is attached in **Appendix A**.

Preventive Detention and Human Rights in New Zealand

12. The Law Commission have identified that a significant complaint with the current law is that it emphasises incarceration and restriction while neglecting the rehabilitative, therapeutic and other needs of people subject to preventive measures.[18] This regime, along with ESO and PPO's[19] authorise some of the most coercive exercises of state power known to New Zealand Law and engage several human rights, including the right to freedom from arbitrary detention. This requires detention to be justified in the sense it is reasonable, necessary and proportionate.[20]

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[14] Public safety and serious offenders: a review of preventive detention and post sentence orders, NZ Law Commission 2023.
[15] Ibid.
[16] Email from Phil Meredith (Manager Strategic Analysis – Research & Analysis, Ara Poutama Department of Corrections to John Luke Day regarding data on preventive detention and ESOs (14 March 2023) (not included in Joint Bundle).
[17] The Law Commission considered New South Wales, Queensland, Victoria, Western Australia, Tasmania, South Australia, Northern Territory, England and Wales, Scotland, Ireland, Canada, Finland and Norway. See LCC preferred approach paper at [3.20.]
[18] Law Commission, *Public Safety and serious offenders: a review of preventive detention and post-sentence orders*, May 2023 at 10.57
[19] Extended supervision orders and public protection orders.
[20] *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee General Comment No.35, Article 8 (Liberty and Security of the Person).

13. Although the Courts use different approaches to determine whether a limitation is reasonably justified, the test used most often asks whether the limiting measure:

    (a) Serves a purpose sufficiently important to justify restrictions on the right or freedom and;
    (b) Is rationally connected with is purpose, whether it impairs the right or freedom more than reasonably necessary and whether the limit is in due proportion to the importance of the objective. [21]

14. In turn, the operation of preventive detention in New Zealand has not been without criticism. The United Nations Human Rights Committee (UNHRC) has found that preventive detention in Aotearoa breaches the protections against arbitrary detention under the International Covenant on Civil and Political Rights.[22] In *Miller v New Zealand*,[23] the Committee found that preventive detention of two people in Aotearoa breached the protections against arbitrary detention under the International Covenant on Civil and Political Rights. The Committee explained that people subject to parole when on preventive detention must be managed in conditions that are distinct from conditions for convicted prisoners serving punitive sentences.[24] They must be aimed at the detainee's rehabilitation and reintegration into society.

15. Despite preventive detention being imposed as a single sentence in place of a determinate sentence, the Courts and UNHRC view preventive detention as comprising two periods. The first is referred to as the "tariff element" or "punitive period" and the second period relates to the time the person remains detained solely for preventive reasons.[25]

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[21] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in R v Oakes [1986] 1 SCR 103.
[22] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December, entered into force 23 March 1976 (not included in Joint Bundle).
[23] *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) (not included in Joint Bundle).
[24] Ibid at [8.3] citing United Nations Human Rights Committee General Comment No. 35, Article 9 (*Liberty and Security of the Person)* CCPR/C/GC/35 (16 December) at [21].
[25] *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [71] (not included in joint bundle); *Miller v New Zealand Parole Board* [2010] NZCA 600 at [30] and *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [85] (not included in Joint Bundle).

16. The UNHR has explained that arbitrary detention must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as the elements of reasonableness, necessity and proportionality.[26] Furthermore, the UNHRC has said that in order to meet those requirements, the cogency of the justification for detaining a person must increase with the length of detention. Crucially, in order to be free from arbitrariness, the conditions of preventive detention must be distinct from the conditions for convicted prisoners serving punitive sentences and must be aimed at the detainee's rehabilitation and reintegration into society.[27]

17. It is noted that there are corresponding international and domestic rights of individuals in the community who may be victims of reoffending.[28]

Restriction of movement, association and surveillance as a Special Condition for Parolees in New Zealand

18. Over the past 10 years, the criminal justice system has shifted inexorably toward policies and legislation favouring offender surveillance and fear driven community protection over evidence-based conditions promoting reintegration and rehabilitation. While serious sexual and violent offending is relatively rare, there have been isolated instances of individuals who, having completed determinate prison sentences for serious sexual and violent offending have gone on to commit further serious offences. Some of these instances have been influential in policy detentions to retain preventive detention and introduce ESOS. [29]

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[26] *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee General Comment NO. 35, Article 9 (*Liberty and Security of the Person*) CCPR/C/GC/35. (not included in Joint Bundle).

[27] *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) at [8.3] citing United Nations Human Rights Committee General Comment No.35, Article 9 (*Liberty and Security of the Person*) CCPR/C/GC/35 (16 December 2014) at [21]. (not included in Joint Bundle).

[28] These include the United Nations Convention on the Rights of the Child, The Committee on the Elimination of All Forms of Discrimination Against Women and article 6 of the International Covenant on Civil and Political Rights. See LC preferred approach paper at [3.8]

[29] For example, high profile cases such as Joshua Brider sentenced to preventive detention for the rape and murder of his neighbour shortly after release from prison for rape and violent offending. https://www.nzherald.co.nz/nz/cruel-brutal-callous-and-depraved-psychopathic-convicted-rapist-sentenced-for-murder-of-juliana-herrera-in-her-christchurch-home/OLOSFERRV5BS5HWW7CGXZDIYBY/#google_vignette . A review of the parole board decision revealed that he may have been met the criteria for an ESO. See LC paper 2023 at para 3.47.

19. Since 2002, eight pieces of surveillance legislation have been introduced into parliament, four of which are amendments to earlier legislation, and designed to either increase the punitiveness of existing legislation, expand its reach to include new classes of offenders, or apply additional conditions to existing regimes.[30] Underlying this approach is the belief by policymakers that released prisoners will respond best to the threat of punishment. This has led to measures including electronic monitoring, intensive supervision, random drug testing, curfews and expanded period of supervision. There is no evidence to support that this approach is working.

20. With the amplification of this punitive fear-based mindset amongst the pubic and legislature, surveillance legislation and policy with the goals of retribution, incapacitation and specific deterrence are superseding the goals of rehabilitation and specific deterrence for offenders. It is vital that the recognition of the rehabilitation and reintegration needs of offenders be balanced against the need to protect the community. The NZBORA demands it. Professor of Sociology at New York University, Mr David Garland has described initiatives of this kind as contributing to a "culture of control" and a "new systemic norm of surveillance".[31] This a frightening reality which has shifted the focus away from the importance or rehabilitation, a concept which should be at the forefront of policy making in New Zealand.

Electronic Monitoring

21. Electronic monitoring 'EM' was introduced under the provisions of The Sentencing Act and The Parole Act. Startlingly, New Zealand has the highest use of electronic monitoring per capita globally.[32] However at this stage there has been no independent research as to the correlation of GPSD monitoring on parolees in New Zealand with successful reintegration/ risks of reoffending. Corrections cite two pieces of literature to support the use of GPS monitoring to reduce recidivism. These include that GPS monitoring

[30] Kim Workman, *Is this the Dawning of the Act of Surveillance? – Monitoring Offenders in New Zealand,* Journal of New Zealand Studies NS21 (2015) at 69.
[31] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: Chicago University Press, 2001). (Book – not included in Joint Bundle).
[32] *Prisons without walls: From incarceration to e-carceration in Aotearoa New Zealand*, Dr Liam Martin, Victoria University of Wellington, 2 November 2023 (not included in Joint Bundle).

prevents offenders from committing crime, that offenders feel "observed" and are therefore more likely to be compliant, that offenders avoid exclusion zones, are less likely to resume contact with former associates. They do not that it is unknown whether GPS monitoring has a sustainable impact on offender's behaviour modification.[33]

22. These findings demonstrate that GPS conditions are being wielded as a punitive sword to ensure compliance rather than supporting pro-social reintegration. The findings state the natural consequences of fear based complaince with EM conditions, rather than any long-term benefit in terms of recidivism or rehabilitation.

23. The Parole Act allows for "residential restrictions" to be imposed as a condition on parole. Notably, the Supreme Court in *Woods v Police* found that the Parole Act empowers the Parole Board to impose residential restrictions provided there is a nexus to risk.[34] The majority of the Supreme Court commented on the rationale for the procedural requirements relating to residential restrictions:

> … the provisions … reflect a careful balancing of the purposes of such restrictions and the rights and freedoms preserved under the New Zealand Bill of Rights Act … ensuring that the intrusion upon rights is no more than is justifiable in a free and democratic society.[35]

24. Prior to *Woods*, the Parole Board set nightly curfews as a routine reintegrative condition for many offenders, justified as a stepping stone to freedom. As a result of *Woods,* the Board held urgent hearings for parolees with curfews, with over 800 cancelled where there was no nexus to risk. [36]

25. The same logic applies to all EM conditions. There must be an evidential basis to support the imposition *and* continuation of 'whereabouts' and EM conditions. This is particularly so where Corrections are unopposed to the

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[33] M Martinovich, *New Zealand's extensive electronic monitoring application: "Out on a limb" or "leading the world?"* | Department of Corrections, Practice – The New Zealand Corrections Journal – Volume 5, Issue 1: July 2017.
[34] *Woods v New Zealand Police* [2020] NZSC 141. [2020] 1 NZLR 743 AT [23].
[35] Ibid at [74].
[36] *New Zealand Parole Board Cancels curfews of more than 800 criminals, deems them unlawful*, 24 October 2022, https://www.stuff.co.nz/national/crime/300717079/parole-board-cancels-curfews-of-more-than-800-criminals-deems-them-unlawful

removed of such conditions or where an offender is assessed by psychologists as being of low risk as was the case for the appellant.

The Impact of EM monitoring on Offenders on Parole

26. Kim Workman's report "Is this the Dawning of the Age of Surveillance-Monitoring Offenders in New Zealand"[37] argues that the introduction of surveillance measures has occurred in the absence of any scientific evidence as to its effectiveness. This has harmed our international human rights record and impeded effective prisoner reintegration.[38] The Workman report opines that the surveillance of released CSOs has become an end in itself rather than as a means of protecting children.[39] We agree.

27. The Workman report helpfully summarises what the most recent evidence *does* tell us:[40]

    (i) Additional controls increase the probability that technical violations will be detected leading to greater use of imprisonment and higher taxpayer costs;

    (ii) Power-coercive strategies are the least likely to promote internalisation for long term change. Power and coercion may achieve instrumental compliance but is least likely to promote "normative re-education" and long-term transformation once the "change agent" has been removed;

    (iii) Heavy-handed control tactics serve to undermine respect for the Probation service. Persons returning from prison with few resources and little hope become defiant when they are faced with a series of sanctions. Constant threats that are not backed up can lead to a form of psychological inoculation.

28. Stringent monitoring of parolees in New Zealand is not dissimilar to those in the United States. Associate Professor Kate Weisburd of George Washington University has coined the tactics used to monitor parolees in the United

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[37] Kim Workman, *Is this the Dawning of the Act of Surveillance? – Monitoring Offenders in New Zealand,* Journal of New Zealand Studies NS21 (2015) at 69.

[38] Ibid.

[39] Kim Workman, *Is this the Dawning of the Act of Surveillance? – Monitoring Offenders in New Zealand,* Journal of New Zealand Studies NS21 (2015) at 78.

[40] Ibid at 73.

States as *"punitive surveillance"*.[41] Professor Weisburd's findings mirror the experiences of parole lawyers working with offenders in New Zealand. Parolees in New Zealand experience punitive surveillance too.

29. Weisburd's study established that the electronic surveillance on parolees in the community reflects a new type of incarceration that exists outside of traditional prisons.[42] Surveillance itself is a form of punishment clearly meant to take the place of incarceration even if it depicted as being less harsh.[43] It found that the invasive and restrictive nature of punitive surveillance creates a subgroup of persons under surveillance who are increasingly divorced from the civic life of their community, prevented from opportunities for social mobilisation and restricted from educational and life opportunities.[44]

30. Those on preventive detention already struggle with reintegration into a society where they are ostracised. Oppressive conditions amplify this. Those subject to strict preventive detention monitoring conditions can be likened to a "modern day Scarlett letter". This impedes these low-risk offenders from building a new life.

Ensuring consistency with the New Zealand Bill of Rights

31. There has been an increasing recognition of human rights in caselaw. The inconsistency between NZBORA and the legislation has highlighted the conflict between public policy objectives of protection of the community vs individual rights. The Courts have recognised the correlation between the test for release on parole and the need for consistency with NZBORA. *Vincent v New Zealand Parole Board*[45] established that the test is subject to an "implicit proportionality assessment" that requires the Parole Board to weigh the risk to community (measured in the likelihood, nature and seriousness of possible further offender) against the person's interest in retaining liberty.[46] Furthermore the Court held that the provision in section 28(1AA) of the Parole Act that a prison has no entitlement to release on parole must also be

[41] Kate Weisburd, *Punitive Surveillance,* Virginia Law Review Volume 108, Issue 1, 2022.
[42] Ibid at [159].
[43] Ibid at [160].
[44] Ibid at [200].
[45] *Vincent v New Zealand Parole Board* [2020] NZHC 3316 (not included in Joint Bundle).
[46] Ibid at [86].

interpreted consistently with the Bill of Rights and thus if a person imprisoned on preventive detention no longer constitutes an undue risk, there is no basis for continued detention.

32. Conditions imposed on parolees significantly restrict the rights and freedoms of persons on parole. The Law Commission[47] states that restrictions in the form of conditions must be rationally connected to the risk posed by an individual. They must impair an individual's rights or freedoms no more than is reasonably necessary, in the circumstances, to achieve the restriction's important purpose. Management of conditions should be flexible. They ought to take into account diverse backgrounds, needs and risks. They must be dynamic.[48] It is therefore not enough to impose stringent surveillance-based conditions on a parolee based on their offending alone. Blanket conditions are unlawful.[49] Offenders must be evaluated based on their individual risks and circumstances to ensure any imposed condition does not encroach on their rights and freedoms no more than is reasonably necessary.

33. Decisions by the Parole Board imposing conditions on people subject to preventive (and life) sentences, as well as decisions by probation officers managing conditions, must comply with the New Zealand Bill of Rights. This requirement is not explicitly stated in legislation governing preventive regimes but rather it reflects the general requirements under NZBORA.[50] where it was affirmed that decisions of the Parole Board in imposing special conditions must be consistent with NZBORA. The Courts have been clear that the Parole Board must exercise its review responsibilities consistently with NZBORA to ensure the where a person subject to preventive detention no longer constitutes undue risk, the basis for ongoing detention ends.[51] The Law Commission states that restrictions in the form of conditions must be rationally connected to the risk posed by an individual and impair the

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[47] Law Commission, *Public Safety and serious offenders: a review of preventive detention and post-sentence orders*, May 2023 at 10.57.

[48] Law Commission, *Public Safety and serious offenders: a review of preventive detention and post-sentence orders*, May 2023 at 10.57.

[49] *Woods v New Zealand Police* [2020] NZSC 141. [2020] 1 NZLR 743 at [23]

[50] *McGeevy v Chief Executive of the Department of Corrections* [2019] NZCA 495 at [21]. See also *The Attorney-General and The Chief Executive, Ara Poutama Aotearoa Department of Corrections v Chisnall* SC 26/2022 recognising the conflict between ESO/ PPO's and the NZBORA. (Not included in joint bundle).

[51] *Vincent v New Zealand Parole Board* [2020] NZHC 3316.(Not included in joint bundle)

individual's rights or freedoms no more than reasonably necessary in the circumstances to achieve the restriction's important purpose.[52] The Parole Board regime does not ensure consistency or transparency in decision making. Each board acts autonomously and does not bind future boards. Review and appellate processes are ineffective and difficult to access. Clear guidance for the Parole Board is essential to give real effect of the rights of serious offenders.

Conditions proven to reduce risk and promote successful reintegration.

34. In the absence of evidence that long-term conditions reduce risk, the focus must shift to implementing practices that are proven to support long term change. Research suggests that an offender's environment is a significant factor in preventing reoffending and promoting successful reintegration.[53] Many offenders consider their desistance from crime to be a conscious decision influenced by environmental and development factors. These include ceasing association with criminal associates and joining a new social group.[54] Increased tangible and emotional support can positively impact reintegration by reducing post release depression, increasing employment prospects, reducing substance abuse and reducing risk of recidivism and reconviction.[55]

35. CSOs are particularly ostracised. They have limited social networks. They may be prohibited from contacting family members or returning to towns or cities where they have familial ties. Instead, they often live in supported accommodation or boarding houses. Their friend groups are often limited to other CSO's who they have developed friendships within prison or who they meet in community support groups. This increases the likelihood they will

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[52] Law Commission, *Public Safety and serious offenders: a review of preventive detention and post-sentence orders*, May 2023 at 10.57. A report prepared by the House of Commons Justice Committee on indeterminate sentence of imprisonment for public protection found that "the indefinite nature of the sentence has contributed to feelings of hopelessness and despair that has resulted in high levels of self-harm and some suicides in the indefinite public protection population."

[53] A Blokland, *The effects of life circumstances on longitudinal trajectories of offending, Criminology,* 43(4), 1203-1240 [2005]. (Not included in joint bundle).

[54] U Haggard, *Against all odds: a qualitative follow-up study of high risk violent offenders who were not reconvicted*. Journal of Interpersonal Violence, 16(10), 1048-1065 [2001]. (Not included in joint bundle).

[55] C Hairston, *The importance of families in prisoners' community reentry. The ICCA Journal of Community Corrections*, April 11-14 [2002]. (Not included in joint bundle).

have contact with negative associates and return to antisocial habits and beliefs.

36. Literature suggests that there are five underlying principles enable successful reintegration including early intervention with an offender in the community, timely and flexible responses to an individual's needs and tailored reintegration initiatives (intensity, pace and content). To obtain long term stable change a long-term commitment to reintegration is necessary. Offenders cannot adjust from dependence to independence overnight and instead progress through a series of stages.[56] A focus on positive change and providing hope is important for those who face ostracism as result of serious convictions. The benefits to the community are also significant. The social, psychological and financial benefits in avoiding future victims of crime support a preventive model.

37. In contrast, overly restrictive conditions foster a climate of apprehension and anxiety. Behaviour is driven by fear. Parole on strict conditions is akin to prison is the community. Anecdotally, parolees subject to indeterminate sentences receive little support. Apart from regularly check-ins with probation, their interactions is commonly limited to requests for exceptions to conditions to be approved and policing of conditions including EM. It is notable that nowhere amongst literature are EM or surveillance conditions recorded as assisting reintegration or reducing recidivism in any way. The correlation between strict EM monitoring and lower recidivism are simplistic. Short term benefits are derived from strict surveillance. There is no evidence about long term recidivism rates.[57]

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[56] J Graffam, *Variables affecting successful reintegration as perceived by offenders and professionals,* Journal of Offender Rehabilitation, 147-171 [2004]. (Not included in joint bundle).

[57] M Martinovic "New Zealand's extensive electronic monitoring application: "Out on a limb" or "leading the world?" (2017) Volume 5 Issue 1 Practice: the New Zealand Corrections Journal
Corrections cite large scale assessments of EM's deterrent effect: Padgett, K. Bales, W. & Blomberg, T. (2006). *Under surveillance: An empirical test of the effectiveness and consequences of electronic monitoring*. Criminology and public policy, 5(1), 61-92. This study concluded that less technical violations, revocation and recidivism rates while on the sanction were found in comparison with offenders on other community-based dispositions without EM. Corrections refer to a New Jersey State Parole Board report which suggested that sex offenders on GPS monitoring had a lower recidivism rate than nationwide data for high-risk offenders.[57] New Jersey State Parole Board (2007**).** *Report on New Jersey's GPS Monitoring of Sex Offenders*. United States: New Jersey State Parole Board.

38. Care must be taken from a public policy perspective to instil hope and motivation, not promote ongoing punishment and control. Strict conditions send a message that probation lacks confidence in the parolee's capacity for change. It undermines the determination on release that they do not present an undue risk. The system waits for parolees to fail. Strict enforcement of minor breaches of conditions is a temporary fix. It undermines confidence in rehabilitation and does not address recidivism in the long term.

Law Commission Proposals

39. The Law Commission preferred approach paper sets out a new legislative regime for preventive detention, ESOs and PPOs. Recognising the need to protect human rights, the proposed purposes of the new Act are to:

    a. protect the community by preventing serious sexual and violent reoffending;

    b. support a person considered at high risk of serious sexual and/or violent reoffending to be restored to safe and unrestricted life in the community; and

    c. ensure that limits on a person's freedoms to address the high risk they will sexually and/or violently reoffend are proportionate to the risks and are the least restrictive necessary. [58]

40. Whilst protection of the community is the first purpose of the new proposal. The Law Commission submits that this should have equal prominence with the second purpose – to support a person to be restored to safe and unrestricted life in the community.[59] The third purpose would be to ensure that restrictions on a person are limited to only those justified for community safety. These are mirrored in the legislative tests for imposing preventive orders. This acknowledges the importance of NZBORA rights and freedoms and seeks to align the legislation with the development of caselaw.[60]

41. Successful reintegration of an offenders is paramount. We see this supported through proposed extended name suppression for those subject to preventive detention.[61] All offenders subject to preventive detention are to receive a treatment and supervision plan which is focused on the person's

[58] New Zealand Law Commission, *Preventive measures for community safety, rehabilitation and reintegration:* Preferred Approach Paper, July 2024 [P7 1.23-24]
[59] Ibid at [1.24].
[60] Ibid at [1.25].
[61] Ibid at [1.85].

restoration to safe and unrestricted life in the community, a plan to transition to less restrictive conditions as well as targeting rehabilitative treatment and reintegration support as well as fostering opportunities to engage with life in the community.[62]

42. The Law Commission propose removal of blanket community conditions, including the condition not to associate with someone under the age of 16 for CSO's. The proposal prohibits any kind of detention beyond conditions to be at a residence for up to 12 hours per day and any intensive monitoring condition (in person, line of sight monitoring). Furthermore, special conditions should be imposed for the same period as the preventive measure itself. [63] This demonstrates a strong public policy shift towards reintegration and human rights as its focus, recognising that those who are in the community have already meet the lowered risk threshold for release.

Conclusion

43. Reintegration of offenders, including CSOs, post-imprisonment is most successful if matched to the needs of offenders, victims and the community whilst minimising the risk of recidivism and developing offenders into prosocial citizens. The notion that an offender *'may'* offend in the future despite being assessed as low risk of re-offending and not an 'undue risk' to the community cannot justify restricting the liberties of offenders who are making genuine efforts to rehabilitate and reintegrate into society. There is no evidence to support the submission that stringent monitoring conditions such as the whereabouts condition and EM monitoring both protect the community in the long term and foster successful reintegration.

44. Section 6 of NZBORA says if an interpretation is open that allows NZBORA compliance though restricting conditions to only those that are proportionate and necessary, then that is the interpretation that should be adopted. EM and whereabouts conditions require a strong justification given their impact on fundamental rights. The Parole Act must, and can be, read consistently with that requirement.

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[62] Ibid at [1.100].
[63] Ibid at [1.110].

6 September 2024

Emma Priest/Jasmine Jackson
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LIST OF INTERVENERS AUTHORITIES

A Legislation

1 New Zealand
Child Protection (Child Sex Offender Government Agency Registration) Act 2016.
Criminal Justice Act 1954, s 75.
Criminal Justice Amendment Act 1993.
Parole Act 2002, s 7.
Sentencing and Parole Reform Bill 2010 – Second Reading.

2 International
International Covenant on Civil and Political Rights 1976.

3 Australia
Penalties and Sentences Act 1992, s 163.
Sentencing Act 1995 s 98(2).
Criminal Law Amendment Act 1945 ss 18(1)-(3).
Dangerous Sexual Offenders Act 2006, ss 14(2)(a), 37
Crimes (Serious Sex Offenders) Act 2006 (NSW) ss 9(2), 17(2)-(3)
Dangerous Prisoners (Sexual Offenders) Act 2003 ss 13(1)-(3)(b), 30(1)-(2)(b);
Serious Sex Offenders Act 2013 (Northern Territory) ss, 7(1)

4 Canada
Criminal Code (R.S.C. 1985) Canada.
Correctional Service Canada, Corrections and Conditional Release Regulations, 1992, S 133(3).

5 United Kingdom
Correctional Service Canada, Corrections and Conditional Release Regulations, 1992, S 124.
Sentencing Act 2020, S280(1).

B New Zealand Law Commission Reports

New Zealand Law Commission, *Public Safety and serious offenders: a review of preventive detention and post-sentence orders*, May 2023

New Zealand Law Commission, *Preventive measures for community safety, rehabilitation and reintegration:* Preferred Approach Paper, July 2024

C Papers and Journal Articles

A Blokland, *The effects of life circumstances on longitudinal trajectories of offending, Criminology,* 2005.

British Columbia Prosecution Service, *Dangerous Offenders and Long-Term Offenders*, April 2019.

C Hairston *The importance of families in prisoners' community re-entry,* The ICCA Journal of Community Corrections, April 2002.

D Garland *The Culture of Control: Crime and Social Order in Contemporary Society* Chicago University Press, 2001.

Government of Canada*, Parole Decision-Making: Myths and Realities,* July 2023.

J Graffam *Variables affecting successful reintegration as perceived by offenders and professionals,* Journal of Offender Rehabilitation, 147-171.

K Weisburd *Punitive Surveillance,* Virginia Law Review Volume 108, Issue 1, 2022.

K Padgett, W Bales, T Blomberg, *Under surveillance: An empirical test of the effectiveness and consequences of electronic monitoring* (2006).

K Workman *Is this the Dawning of the Act of Surveillance? – Monitoring Offenders in New Zealand,* Journal of New Zealand Studies NS21 (2015).

L Martin *Prisons without walls: From incarceration to e-carceration in Aotearoa New Zealand,* Victoria University of Wellington, 2 November 2023.

M Martinovich *New Zealand's extensive electronic monitoring application: "Out on a limb" or "leading the world?"* Department of Corrections, 2017.

Ministry of Justice *Sentencing Police and Guidance: A Discussion Paper* Wellington, New Zealand 1997.

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

U Haggard *Against all odds: a qualitative follow-up study of high-risk violent offenders who were not reconvicted*. Journal of Interpersonal Violence, 16(10), [2001].

D Cases

1 New Zealand

Ara Poutama Aotearoa Department of Corrections v Chisnall - SC 26/2022.

Attorney General and the Chief Executive, Ara Poutama Aotearoa Department of Corrections v Chisnall – SC 26/2022.

Clarke v Parole Board HC Christchurch CRI-2005-409-11.

Edmonds v New Zealand Parole Board [2015] NZHC 386.

McGeevy v Chief Executive of the Department of Corrections [2019] NZCA 495.

Miller v New Zealand [2017] 11 HRNZ 400 (UNHRC).

Miller v New Zealand Parole Board [2010] NZCA 600.

Manuel v Superintendent of Hawkes Bay Regional Prison [2005] 1 NZLR 161 (CA).

R v Hansen [2007] NZSC 7 3 NZLR 1.

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

Woods v New Zealand Police [2020] NZSC 141.

2 Australia

Director of Public Prosecutions (WA) v D [2008] WASCA 188.

R v Moffatt [1998] 2 VR 229

3 United Kingdom

R. v Lang & Others [2005] EWCA Crim 2864.

Appendix A: Preventive Detention in Overseas Jurisdictions

Australia

1. Preventive detention schemes have been accepted as constitutional in Australia, but Judges have cautioned that they should be used sparingly and with great care.

2. In *R v Moffatt*[1], the Victorian Court of Appeal confirmed the legality of the Victorian indefinite sentence provisions, noting that the ability to pass such a sentence was tied to a finding of guilt for an offence, and that a person was deprived of liberty because of what that person had done rather than because of what he or she *might* do.[2]

3. In Queensland a Court may impose an indefinite sentence on offenders considered to be 'a serious danger to the community', provided the offence is of sufficient severity.[3] In order to direct an indefinite sentence, the Court must be 'satisfied on the balance of probabilities that when the offender would otherwise be released from custody…he or she would be danger to society, or a part of it' due to one or more of the following factors:

    (i) The exceptional seriousness of the offence.
    (ii) The risk that the offender will commit other indictable offences;
    (iii) The character of the offender and in particular-
        (a) Any psychological, psychiatric or medical condition affecting the offender;
        (b) The number of seriousness of other offences of which the offender has been convicted;
        (c) Any other exceptional circumstances.[4]

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[1] *R v Moffatt* [1998] 2 VR 229 (not in Joint Bundle).
[2] *R v Moffatt* [1998] 2 VR 229.
[3] Penalties and Sentences Act 1992, s 163 sch 2 (not in Joint Bundle).
[4] Sentencing Act 1995, s 98(2) (not in Joint Bundle).

Indefinite Detention Schemes for Sex Offenders

4. Queensland and South Australia have special indefinite detention schemes for sex offenders which enable the Attorney General to apply for an order for continuing detention during the term of imprisonment.
5. In Queensland, special provisions operate alongside the power to order an indefinite sentence under the Penalties and Sentences Act 1992. A person convicted of 'an offence of a sexual nature', committed against a child under the age of 16, may be detained indefinitely at sentencing if there is evidence from two medical practitioners, one of whom must be a psychiatrist, that the offender is 'incapable of exercising proper control over the offender's sexual instincts', and the Judge makes a declaration to this effect.[5]

Post Sentence Preventive Detention and Supervision of Sex Offenders

6. Post sentence preventive detention schemes in Queensland, New South Wales, Victoria and the Northern Territory enable an application to be made to a specific Court prior to the offender completing a finite sentence, for an order for continuing detention in prison or for continuing supervision in the community. The Court must consider risk assessment testimony from psychiatrists (and/or psychologists) concerning whether the offender poses an unacceptable risk of reoffending.

7. A key feature of these preventive detention determinations is that the standard of proof that applies is not the criminal standard of beyond a reasonable doubt. Section 7(2) of the Western Australia Act requires the Director of Public Prosecutions to adduce 'acceptable and cogent evidence' and satisfy the Court 'to a high degree of probability' that there is an unacceptable risk that 'if the person concerned were not subject to a continuing detention order or supervision order, the person would commit a serious sexual offence'.[6] In determining risk, the legislation mandates the Court to consider reports from two psychiatrists who have assessed the offender as well as 'any other medical, psychiatric, psychological, or other

[5] Criminal Law Amendment Act 1945 ss 18(1)-(3) (not in Joint Bundle).
[6] Dangerous Sexual Offenders Act 2006, ss 14(2)(a), 37 (not in Joint Bundle).

assessment'. The ability to impose restrictions on liberty are correlated to high and unacceptable risk.

8. Queensland, New South Wales and Northern Territory laws similarly require a 'high degree of probability' the the offender is a serious danger to the community based on an unacceptable risk of reoffending.[7] What a "high degree of probability" actually means has been the subject of judicial interpretation in Australia. In *Director of Public Prosecutions (WA) v D,* Hasluck J described this as 'more than a finding on the balance of probabilities but less than a finding of proof beyond reasonable doubt'.[8] The New South Wales Legislation has since been amended to state "the Supreme Court is not required to determine that the risk of a person committing a serious sex offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious offence".[9]

International Studies on Preventive Detention

9. A study of 104 people managed in the community under Queensland's Dangerous Prisoner's (Sexual Offenders) Act 2003 examined their recidivism rates based on available Court data. Recidivism rates over a six-year period were measured based on convictions and contraventions of orders involving sexual behaviour.[10] The authors of the study found that the recidivism rate was low (7.69%). Only eight people had been convicted of sexual offences (four were considered contraventions and four were reconvictions).[11]

10. The Victorian Post Sentence Authority has commented on the recidivism rates of those monitored and supervised in the community subject to post-sentence orders in Victoria under the Serious Offenders Act 2018. For the three reporting years between 2018 and 2021, there were an average of 136 people on supervision or interim orders. During that period, 10 people subject to

[7] Crimes (Serious Sex Offenders) Act 2006 (NSW) ss 9(2), 17(2)-(3) (not in Joint Bundle).
[8] *Director of Public Prosecutions (WA) v D* [2008] (not in Joint Bundle).
[9] Crimes (Serious Sex Offender's Act) 2006, s 9(2A) (not in Joint Bundle).
[10] Michael Rowlands, Gavan Palk and Ross Young "Recidivism rates of sex offenders under the Dangerous Prisoners (Sexual Offenders) Act 2003: an evaluation of actuarial justice (2021) 28 Psychiatry, Psychology and Law 310 at 317 (not in Joint Bundle).
[11] Ibid.

orders were convicted of serious sexual offences (an average of 3.3% per year) and one convicted of a serious violent offence (an average of 0.3 per year).[12]

Preventive Detention in Canada

Dangerous Offenders

11. Canadian legislation permits the indeterminate sentencing of persons deemed to be a 'Dangerous Offender' ("DO"). The Court can find an offender to be a DO where they are convicted of "a serious injury offence" and the offender constitutes a threat to the life, safety or physical mental well-being of others, on evidence establishing:

    (i) A pattern of repetitive behaviour that shows a failure to restrain their behaviour which is likely to cause physical or severe psychological harm to others;

    (ii) A pattern of persistent aggressive behaviour that shows a substantial degree of indifference to the consequences; and,

    (iii) The brutal nature of the offence compels the conclusion that the offender is unlikely to be inhibited by normal standards of behavioural constraint OR

    (iv) Sexual assault, and the offender has shown a failure to control their sexual impulses such that harm to others is likely.[13]

Long Term Offenders

12. The Long Term Offenders ('LTO') designation was created as a residual sentencing regime to help deal with offenders who are not captured by the DO provisions.[14] Crown Counsel can apply for an LTO designation from sentencing, or it can be imposed by the court if it finds that the evidence falls short of the legal test for a DO designation. It targets sexual and violent offenders who, on the evidence, are likely to re-offend. The court can designate an offender an LTO where:

    (i) a sentence of two or more years is appropriate for the current offence;

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[12] Post Sentence Authority "Submission to the Inquiry into Victoria's Criminal Justice System" (September 2021) at [46] (not in Joint Bundle).
[13] Criminal Code (R.S.C) 1985, c. C-46, s 753(1) (not in Joint Bundle).
[14] Criminal Code (R.S.C) 1985, c. C-46, s 753(2A) (not in Joint Bundle).

(ii) the offender poses a substantial risk of reoffending and causing serious harm; and

(iii) there is a reasonable possibility they can eventually be controlled in the community.

Parole Eligibility

13. Offenders sentenced as dangerous offenders or long-term offenders still become eligible for parole. Dangerous offenders serving an indeterminate sentence become eligible for full parole after completing seven years from the date they were taken into custody. Long-term offenders, and dangerous offenders not serving an indeterminate sentence, are subject to the normal parole provisions which allow for full parole after completing one third of the jail sentence.[15]

14. Section 761 of the *Criminal Code*[16], came into force on August 1, 1997, and provides that a person incarcerated as a Dangerous Offender must be reviewed for parole seven years after custody commenced, and at least every two years thereafter. The criteria for granting parole are that the offender will not present an undue risk to society and the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law abiding citizen.[17]

15. Dangerous Offenders serving an indeterminate sentence who are paroled remain on parole for the rest of their lives unless parole is revoked, and they are returned to prison. Without a grant of parole, the offender will remain incarcerated for the rest of their lives.

Special Conditions

16. The National Parole Board may, in addition, impose additional special conditions on the release of the offender. The authority for special conditions is in section 133 (3) of the *CCRA*[18]:

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[15] British Columbia Prosecution Service, Dangerous Offenders and Long Term Offenders, April 2019.
[16] Criminal Code (R.S.C. 1985), Canada (not in Joint Bundle).
[17] Government of Canada, Parole Decision-Making: Myths and Realities, July 2023 (not in Joint Bundle).
[18] Correctional Service Canada, Corrections and Conditional Release Regulations, 1992, S 133(3) (not in the Joint Bundle).

> *The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.*

17. There are no examples in the *CCRA* or the *CCRR* of these special conditions. These special conditions generally relate to factors that have contributed to the offender's criminal lifestyle. These conditions may include;

    (i) prohibiting the consumption of alcohol or drugs,

    (ii) prohibiting any association with known criminals,

    (iii) requiring attendance at counselling or treatment programs, abstaining from gambling or driving,

    (iv) not to have contact with victims or children without supervision, and

    (v) orders prescribing where the offender may live.[19]

United Kingdom

18. Section 124 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') governs "extended determinate sentences' ('EDS') in the United Kingdom which is comparable to preventive detention. These sentences are imposed in certain cases where the Court considers that an offender is dangerous and therefore an extended license period is required to protect the public from harm. 'License periods' are the equivalent of parole.

19. The EDS applies where:[20]

    (i) The offence is a specified offence,

    (ii) the offender is aged 21 or over when convicted of the offence,

    (iii) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences [...],

[19] Correctional Service Canada, Corrections and Conditional Release Regulations, 1992, S 124 (not in Joint Bundle).

[20] Section 280(1) of the Sentencing Act 2020. Offenders under 18 can be sentenced to an EDS by virtue of section 255 of the Sentencing Act 2020 and offenders aged 18-20 can be sentenced to an EDS by virtue of section 267 of the Sentencing Act 2020 (not in Joint Bundle).

(iv) the court is not required by section 283 or 285 to impose a sentence of imprisonment for life, and (the earlier offence condition or the 4 year term condition is met.

20. When assessing whether to impose an EDS, a sentencing Judge must determine whether 'there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences'.[21] In interpreting the meaning of 'significant risk to members of the public', *R. v Lang & Others*[22] is the leading authority on the assessment of dangerousness. In *Lang*, the Court of Appeal held that 'significant risk' must be interpreted as a 'higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Oxford Dictionary) noteworthy, of considerable amount or importance'.[23]

21. Offenders on EDS must serve two thirds of their sentence in custody and may only be released subject to a decision by the Parole Board. EDS is made up of two parts; a custodial element and a license element. The license element is served in the community and the period of time on a license is determined by the sentencing Judge. The licence period can be no more than 5 years for a violent offence and 8 years for a sexual offence. The length of both elements combined must not exceed the maximum sentence that can be imposed for the offence in question.

22. It is important to note that the 'Sentencing Bill' is currently at the committee stage in its passage through the House of Commons. If successful this bill would require prisoners sentenced for rape and certain other serious sexual offences to serve all of their custodial term in prison, removing the current possibility of release into the community on licence after they have served two thirds of their custodial term.[24]

[21] Section 308(1) Sentencing Act 2020 (not in Joint Bundle).
[22] R. v Lang & Others [2005] EWCA Crim 2864 (not in Joint Bundle).
[23] R. v Lang & Others [2005] EWCA Crim 2864 at [17] (not in Joint Bundle).
[24] UK Parliament, Sentencing Bill 2023-2024, published 4 December 2023 (not in Joint Bundle).