IN THE COURT OF APPEAL OF NEW ZEALAND

CA184/05

JOSEPH RONALD BELCHER

v

CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS

Hearing:	28 February and 1 March 2006
Court:	William Young P, Hammond, Chambers, O'Regan and Robertson JJ
Counsel:	T Ellis and M R Bott for Appellant C R Gwyn, A Markham and M G Coleman for Respondent
Judgment:	19 September 2006 at 2 pm

INTERIM JUDGMENT OF THE COURT

A The application for a declaration of inconsistency is adjourned for further hearing in 2007.

B In all other respects the appeal is dismissed.

REASONS OF THE COURT

(Given by William Young P)

Table of Contents **Para No.**

Introduction

[1] On 22 April 2005 Keane J made an extended supervision order (ESO) in respect of Joseph Ronald Belcher. This order was made under s 107I of the Parole Act 2002. The appellant subsequently appealed to this Court against that order.

[2] The appeal was originally to be heard on 30 August 2005 before a division of this Court comprising one permanent member of the Court and two High Court Judges. Prior to the hearing of the appeal, the appellant signalled a desire to raise issues which went well beyond those which had been argued before Keane J. The

Court concluded that these issues warranted consideration by a panel comprised of five permanent members of the Court and the hearing was adjourned accordingly.

The legislative scheme – an overview

[3] The case involves Part 1A of the Parole Act, as inserted by the Parole (Extended Supervision) Amendment Act 2004 which came into effect on 7 July 2004. We will refer to the Parole Act as "the Act" and to Part 1A as "the ESO legislation".

[4] Section 107A provides an overview of the ESO legislation:

> This Part—
>
> (a) provides that offenders who have been convicted of certain sexual offences may, after assessment by a health assessor, be made subject to an extended supervision order by a court; and
>
> (b) provides that an extended supervision order may last for up to 10 years; and
>
> (c) provides that the conditions of an extended supervision order are the standard release conditions and any special conditions imposed by the Board; and
>
> (d) provides rights of appeal and review relating to extended supervision orders.

[5] The purpose of the legislation is to limit the risk that offenders will re-offend in a sexual manner against children and young persons, a purpose which is made clear by the definition of "relevant offence" provided by s 107B and the eligibility criteria provided in s 107C. The expression "relevant offence" is defined so as to include sexual offending against children and young people, ie those who are under 16 at the time of the offending.

[6] The other key sections are:

107F Chief executive may apply for extended supervision order

(1) The chief executive may apply to the sentencing court for an extended supervision order in respect of an eligible offender at any time before the later of—

(a) the sentence expiry date of the sentence to which the offender is subject that has the latest sentence expiry date, regardless of whether that sentence is for a relevant offence; and

(b) the date on which the offender ceases to be subject to any release conditions.

(2) An application under this section must be in the prescribed form and be accompanied by a report by a health assessor (as defined in section 4 of the Sentencing Act 2002) that addresses (without limitation) the following matters:

(a) the nature of any likely future sexual offending by the offender, including the age and sex of likely victims:

(b) the offender's ability to control his or her sexual impulses:

(c) the offender's predilection and proclivity for sexual offending:

(d) the offender's acceptance of responsibility and remorse for past offending:

(e) any other relevant factors.

…

107H Hearings relating to extended supervision orders

(1) In this section, hearing means any hearing before a sentencing court or the Court of Appeal that relates to any of the following:

(a) an application for an extended supervision order:

…

(d) an appeal under section 107R.

(2) At any hearing, the court may receive and take into account any evidence or information that it thinks fit for the purpose of determining the application or appeal, whether or not it would be admissible in a court of law.

…

107I Sentencing court may make extended supervision order

(1) The purpose of an extended supervision order is 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.

> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2), that the offender is likely to commit any of the relevant offences referred to in section 107B(2) on ceasing to be an eligible offender.
>
> (3) To avoid doubt, a sentencing court may make an extended supervision order in relation to an offender who was, at the time the application for the order was made, an eligible offender, even if, by the time the order is made, the offender has ceased to be an eligible offender.
>
> (4) Every extended supervision order must state the term of the order, which may not exceed 10 years.
>
> (5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of –
>
> (a) the level of risk posed by the offender; and
>
> (b) the seriousness of the harm that might be caused to victims; and
>
> (c) the likely duration of the risk.
>
> (6) If the person to whom an application for an extended supervision order relates is already subject to an extended supervision order, any new order may not be made for a period that, when added to the unexpired portion of the earlier order, exceeds 10 years.

[7] The expression "sentencing court" is defined in s 107D in slightly awkward terms which in effect mean that the sentencing court is the court which imposed the sentence of imprisonment for the offences which trigger eligibility. Rights of appeal are provided for by s 107R which treats such appeals as if sentence appeals under s 383 of the Crimes Act 1961.

[8] Sections 107J-107L deal with the conditions that apply as part of an ESO and the commencement and expiry of an ESO. The conditions are the standard conditions of release under the Act and any special conditions imposed by the Parole Board (which can include home detention for up to twelve months).

What must be established to justify the imposition of an ESO

[9] The jurisdiction to impose an ESO on the appellant depended on him being an eligible offender at the time the Chief Executive made his application. At the

hearing, the Court could only make an order if satisfied that, having regard to the matters considered in the health assessor's report, the appellant was "likely" to commit a relevant offence on ceasing to be an eligible offender.

[10] Anticipating a conclusion which we reach later, the appellant was an eligible offender. This was by reason of the combined effect of ss 107C and 107Y. This eligibility arose because he had been sentenced to imprisonment for a relevant offence and had not, prior to 11 November 2003, ceased to be subject to imprisonment or to release or detention conditions since his latest conviction for a relevant offence. He had been released from prison on 14 November 2001 and was subject to release conditions until 13 November 2003. For the purposes of s 107Y he was a "transitional eligible offender" and it was open to the Chief Executive to seek an ESO in respect of the appellant providing he did so within six months of the ESO legislation coming into effect, a time limit which expired on 7 January 2005 and with which the Chief Executive complied.

[11] The word "likely" does not, in itself, provide much guidance on the level of probability required. When used in the Crimes Act, it usually refers to what might be regarded as an "appreciable risk", a "real risk" or to "something that might well happen". In the context of the ESO legislation, it must be read in light of s 107I(1) which provides that the purpose of an ESO is to protect the community from those who

> pose a real and ongoing risk of committing sexual offences against children or young persons.

Panckhurst J has treated "likely" as connoting "a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case", see *Chief Executive of the Department of Corrections v Taha* HC TIM CRI 2005-476-000004 30 September 2005 at [31]. Panckhurst J took this language from the speech of Lord Nicholls of Birkenhead in *Re H (Minors)* [1996] AC 563 at 585 (HL). We consider that Panckhurst J was right to emphasise the seriousness of the anticipated harm but think it best to adapt the test he proposed by tying it more closely to the language of s 107(1). So in our view, the jurisdiction depends upon

the risk of relevant offending being both real and ongoing and one that cannot sensibly be ignored having regard to the nature and gravity of the likely re-offending.

The appellant and his background

[12] The appellant is now aged 51.

[13] The appellant's first conviction was recorded as long ago as 1970. Since then he has displayed what has been described as "criminal versatility". His sexual offending began in the 1980s. In July 1988 he offended sufficiently seriously to be later sentenced to an effective term of seven years imprisonment. While in prison he completed the Kia Marama programme. On 3 March 1995, the appellant kidnapped and indecently assaulting a ten year old girl. Semen was located near the victim's genitalia. For this very serious offending, he was sentenced to an effective term of ten years imprisonment on 10 February 1996, narrowly escaping a sentence of preventive detention.

[14] As noted, the appellant was released on parole on 14 November 2001.

[15] Since his release he has accumulated convictions for theft, fraud and cannabis possession and cultivation.

The proceedings in the High Court

[16] On 15 October 2004, the Chief Executive applied for an ESO in respect of the appellant.

[17] The application was heard by Keane J on 12 April 2005.

[18] He had before him two reports, one from Dr Wilson and the other from Dr Moskowitz.

[19] Dr Wilson is a psychologist employed by the Department of Corrections. His report was based on his review of assessments made of the appellant dating back to 1989. He was not able to interview Mr Belcher as his request to do so was denied. The report was in part based on actuarial instruments measuring the likelihood of Mr Belcher re-offending including RoC*RoI, Static-AS and SONAR. We will discuss these instruments later in this judgment. Dr Wilson also referred to what he described as "risk factors not directly assessed by [these] instruments". These he recorded as:

> The large number and young age of his previous victims;
>
> His first sexual offending occurring when he was an adolescent;
>
> History of diverse deviant sexual behaviours (e.g. voyeurism, fronteurism [sic], and exhibitionism);
>
> Prominence of hostile beliefs;
>
> Aggressive interpersonal style;
>
> High previous PCL:SV assessment in 1998 indicating presence of anti-social personality;
>
> High levels of reported deviant sexual preferences;
>
> High levels of previous treatment failure;
>
> Poor previous response to supervision.

The second of these points refers to an incident which apparently occurred when the appellant was 15 and he had sex with a girl of a similar age. On the basis of the limited material available as to this incident, it appears that there may have been a gang or group context to what happened.

[20] Dr Wilson concluded:

> If Mr Belcher continues to have intimacy deficits, poor social influences, a deviant sexual arousal preference for young children, sexual preoccupation, hostility towards others, little insight into high risk situations, and poor response to supervision; then there is a high probability (high *RoC*RoI*, *Static-AS* and Sonar ratings) that he will engage in serious sexual offending involving kidnapping and sexual assault within five years of release that may place stranger female children at risk of indecent assault.
>
> …
>
> Mr Belcher is assessed as likely to commit further sexual offences against children and adolescents under the age of 12 with his victims likely to be

> female and strangers. He has a poor ability to control his sexual impulses and is believed to continue to have a predilection and proclivity for sexual offences against children. Mr Belcher was reported in treatment prior to release to have taken responsibility for his offending, learned the skills to manage his risk, and developed better strategies to reduce his aggressive interpersonal style. However, his behaviour since release has not confirmed this, especially his poor response to supervision, aggressive and hostile behaviour, substance abuse, association with anti-social associates, continued non-sexual re-offending, and reported unsupervised relationship with a vulnerable 15 year old girl.
>
> …
>
> Research indicates that individuals of Mr Belcher's assessed risk level remain as likely to reoffend over an extended period as they are within a shorter period. For this reason it is recommended that, if an order is applied [for] it should be for the maximum length available under the legislation, that is ten years.

[21] Dr Moskowitz's report was based on a review of Departmental material (but all post-1995) and a three and a half hour interview with the appellant in his home. Dr Moskowitz noted that, at the time of the report, Mr Belcher had been living for three and a half years in the community without sexually re-offending; this despite living with a vulnerable young woman who was working as a prostitute. As well, the appellant had by this stage reached 50 years of age, an age at which the risk of sexual offending decreases. In addition, there was a late onset to the appellant's sexual offending (with Dr Moskowitz apparently not counting the incident when the appellant was 15), limited magnitude to the offending (at least in Dr Moskowitz's view), adequate functioning by the appellant when previously released from prison, the appellant now recognising the association between his previous offending and depression and the appellant's previous abuse of alcohol and heroin (which contributed to some of his offending) now having ceased. He considered that these factors weighed against the making of an ESO.

[22] Overall, Keane J preferred Dr Wilson's assessment of risk. He saw it as founded on a more complete review of Departmental assessments than Dr Moskowitz was able to make. Furthermore, the Judge considered that there were some incorrect assumptions in Dr Moskowitz's report. As well, Dr Wilson's assessment had the advantage of actuarial instruments which Dr Moskowitz was unable to contest.

[23] His conclusions were expressed in this way:

> [46] To this application, Mr Belcher's past sexual offending has to be of the first importance. In those offences, which the Courts on sentence and appeal described as of a very serious order, Mr Belcher preyed sexually on the young. He exposed himself, and sometimes masturbated, in front of young children during the day. At night he entered their tents, when they were asleep and were even more vulnerable. He abducted two. He indecently assaulted two. His 1995 offence, one of indecency, could well on the facts on which the Judge sentenced have been more serious than that charged. Semen was found in the vicinity of the child's genitalia.
>
> [47] As concerning has to be that the 1995 offending, the relevant offending for the purpose of this application, happened after Mr Belcher had completed the seven year term imposed for the 1998 [sic – presumably the 1988] offences and had been in the community for three years. And it was strikingly similar. Whatever led Mr Belcher to re-offend as he did, and isolation and depression appear to have played a part, the lengthy sentence of imprisonment served not long before, and the Kia Marama programme, proved ineffectual.
>
> [48] No absolute assurance can be taken, therefore, from the fact that in the last three years Mr Belcher, once again in the community, has not offended sexually, especially as for two of those years he has been under supervision. The issue has to be whether, if he becomes liable to depression again, and is isolated from any objective aid, he may revert.
>
> [49] Mr Belcher had to leave the Te Piriti programme early, in itself a troubling fact, and the various assessments made of him for sentence, and during sentence, most especially the most recent, and the actuarial assessments, converge, nearly unanimously, in describing Mr Belcher as at high continuing risk.
>
> [50] Of equal concern has to be the studies, to which Dr Wilson referred, which show that, where an offender has the proclivity to offend sexually, as Mr Belcher has plainly had, that risk first reduces at age 40, but only begins to dissipate in a real sense at age 60. Mr Belcher is aged 50. Even if his life is stable presently, the risk he poses will remain alive for the next ten years.
>
> [51] How stable Mr Belcher's life is presently one cannot be sure. Dr Moskowitz and Dr Wilson differ diametrically. Mr Belcher may maintain a well conducted household. His relations with others are by far more significant and much less easy to assess. Perhaps, unsurprisingly, he does not interrelate well with those supervising him, or those responsible for his entitlements. The only relationships he is known to have raise questions. He may well be isolated. He may still be vulnerable to depression. He may no longer be addicted to heroin. That apart, most of the triggers that impelled him to offend so seriously in 1988 and 1995 may still be there.
>
> [52] These several factors, combined, satisfy me, in terms of s 107I(2), that while Mr Belcher has not offended sexually in the last three years it is likely that, unless supervised, he will commit a relevant offence, and that in

> that sense he continues to pose a real and ongoing risk to the young. The ten year period of supervision sought, I consider, in terms of s 107I(5), is the only sensible measure. There is no obvious earlier minimum end point. The studies suggest the contrary. There will be the order applied for.

Grounds of appeal

[24] The appeal was presented on two different although to some extent overlapping bases; first, a challenge to the ESO regime and its implementation based on human rights arguments, and secondly the contention that the evidence did not warrant the making of an order.

[25] We will deal with each in turn.

The challenge to the ESO regime and its implementation based on human rights arguments

Overview

[26] Except in times of national emergency or war, Western societies such as New Zealand have not been accustomed to the imposition of substantial restraint on individual freedom (particularly in the form of detention) except through the criminal justice or mental health systems. But, more recently, and controversially, legislation both here and in other jurisdictions has provided for administrative detention (including forms of house arrest) in other contexts, particularly in immigration cases (especially where national security is thought to be at risk) and, coming closer to the facts of the present case, where particular individuals are thought to be at high risk of undesirable behaviour. As part of this trend, legislatures have enacted specific legislative regimes which permit the imposition of restrictions short of detention on the movement or activities of such individuals to limit the risk of anti-social behaviour. We will discuss some examples later in this section of the judgment. In other instances, legislatures have provided for similar restrictions or detention, sometimes open-ended, for those who are seen to pose unacceptable risks of serious offending. Examples of this type of legislation will also be discussed later. Such legislation necessarily gives rise to human rights concerns.

The relevant human rights instruments

[27] Sections 9, 22, 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990 (NZBORA) provide:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.
>
> …
>
> **22 Liberty of the person**
>
> Everyone has the right not to be arbitrarily arrested or detained.
>
> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty … .
>
> **26 Retroactive penalties and double jeopardy**
>
> …
>
> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[28] Also relevant is s 5 of NZBORA which provides:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, 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.

[29] Articles 14(7) and 15 of the International Covenant on Civil and Political Rights are in these terms:

Article 14

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this 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.

The evolution of the ESO legislation and its passage through Parliament

[30] For present purposes, it is sufficient to start with a 2003 paper prepared within the Ministry of Justice for the Cabinet Social Development Committee, "Extended Supervision of Child Sex Offenders". The scheme as enacted by the ESO legislation is very much based on what was proposed in that paper.

2. Public concern and media attention over the risks posed by child sex offenders in the community is high.

3. Improved knowledge about child sex offending recognises the distinct and long-term risks posed by this group of offenders to a vulnerable group of society and the need to manage those risks. Tools are now available to more accurately assess an offender's risk of re-offending and there is increased knowledge of how to treat, support and monitor offenders both in prison and in the community.

4. A critical gap in the ability to monitor offenders beyond the end of parole has been identified. This proposal seeks to address this gap by introducing an extended supervision regime to allow for the monitoring of medium-high and high risk child sex offenders sentenced to a finite period of imprisonment (not including preventive detainees) for up to 10 years from the end of their sentence.

5. Under the proposed regime, applications for an extended supervision order will be able to be made in respect of persons convicted of a specified sexual offence involving a child victim who receives a finite term of imprisonment. After completing an assessment of an offender's

risk of re-offending, the Department of Corrections will be able to apply to the sentencing court for an extended supervision order. Before making an order the Court must be satisfied that there is a substantial risk of re-offending beyond the period of parole or release conditions. In practice, this will mean that the Department of Corrections will make applications for extended supervision orders in relation to offenders assessed as being at medium-high and high risk of re-offending.

…

19. Amendments to the Sentencing Act and the Parole Act will be required to establish an extended supervision regime. The key features of the proposed legislative regime will be:

    (a) *Eligibility*. Applications for an extended supervision order will be able to be made in respect of persons convicted of a specified sexual offence involving a child victim who receive a finite term of imprisonment. The list of specified sexual offences is attached in Appendix One and includes offences where the victim is known to be or can be ascertained to have been at or under the age of 16. A separate transitional regime will be provided for offenders serving a finite term of imprisonment for a specified sexual offence who have not reached their statutory release date or are still subject to release conditions at the introduction date of this legislation.

    (b) *Risk Assessment*. Before imposing an extended supervision order a Judge must be satisfied that an offender has a substantial risk of committing relevant offences beyond the end of parole or release conditions. To identify offenders likely to meet this test the Department of Corrections must assess every eligible offender while in custody to determine whether an application for an extended supervision order would be appropriate. In practice, it will generally be offenders assessed by a proven assessment tool as being at medium-high or high risk of re-offending who will be the subject of an application for an extended supervision order. Those in the medium-low and low risk categories do not pose a sufficiently high risk of re-offending to justify inclusion in such a restrictive regime. Of the sex offenders released in 1992-1993, 43% of those assessed as having a high risk of re-offending and 24% of those assessed as having a medium-high risk of re-offending, went on to commit subsequent sex offences in the next 10 years. By comparison, in the same period only 12% of offenders assessed as having a medium-low risk of re-offending and 8% of those assessed as having a low risk of re-offending went on to re-offend. Inclusion of medium-low risk offenders would more than double the number of offenders potentially subject to extended supervision and significantly increase the financial implications of the proposal.

…

(m) *Transitional Provisions*. The amendment will apply to all offenders sentenced to a finite term of imprisonment for a specified sexual offence who have not reached their statutory release date or who are still subject to release conditions at the time the Bill is introduced to Parliament. This will bring medium-high and high risk offenders sentenced prior to the 2002 sentencing reforms into the regime. The transitional regime will allow, for a limited time only, applications for an extended supervision order to be brought for those offenders as appropriate.

…

20. It is proposed that there be two levels of extended supervision:

- A *standard management regime* for medium-high and high risk child sex offenders similar to that currently used for offenders released on parole.

- An *intensive management regime* for the highest risk offenders who represent a serious and imminent threat to the community. This small but significant group, some of whom have low levels of intellectual functioning or severe personality or developmental deficits, were imprisoned prior to the commencement of the Sentencing and Parole Acts. These offenders could not be sentenced to preventive detention because of the criteria that applied at that time. This may no longer be the case now that the criteria for considering a sentence of preventive detention have been lowered in terms of previous offending and age. The Department of Corrections considers that for many of these offenders the risk of re-offending is extremely high. It is estimated that approximately 4 offenders could be made subject to an extended supervision order each year. Under the regime the Department of Corrections could provide targeted services tailored to the inclinations of the individual offender.

…

30. The proposal is also likely to be contentious. Effective monitoring and control of offenders over a long period of time can be viewed as an encroachment on the civil liberties of the offenders. This is especially so for high-level interventions such as electronic monitoring. The parameters of the legislative scheme will need to be carefully crafted and all Bill of Rights implications assessed. The Crown Law Office will be consulted on these aspects before and during the vetting process.

31. The retrospective application of the proposal to include all offenders sentenced to a finite term of imprisonment who have not reached their statutory release date or who are still subject to release conditions at the time the Bill is introduced to Parliament is also likely to be contentious. However, this is seen as essential to cover high risk offenders sentenced prior to the 2002 sentencing reforms.

…

38. Aspects of the proposed regime may be inconsistent with provisions of the New Zealand Bill of Rights Act 1990. The extent to which the proposal gives risk to issues of consistency with the New Zealand Bill of Rights Act 1990 will depend on the drafting of the legislation to enact the proposal in this paper.

[31] When the Attorney-General reported to Parliament under s 7 of NZBORA she said:

11. The Bill clearly places the proposed ESO regime within the rubric of the criminal justice and penal system. In addition, the Bill continues to connect the imposition and conditions of an ESO with the previous conviction for a relevant sexual offence by:

    11.1 Requiring an ESO to be sought from the Court that originally sentenced the individual for the relevant sexual offence (new section 107B(3));

    11.2 Requiring the Parole Board to take account of the views of the offender's victims when considering the imposition or alteration of ESO conditions (new section 107I(3) and 107L); and

    11.3 Making the imposition of successive ESOs dependent on an intervening conviction for a relevant sexual offence (new section 107B).

12. The possible imposition of significant movement restrictions, electronic monitoring and home detention, strengthens the argument that the retrospective imposition of these aspects of the ESO on an individual who has been convicted of a relevant offence prior to the Bill coming into force should be viewed as a "punishment" for the purposes of s 26(2) of the Bill of Rights Act. Such individuals can be viewed as duly completing (or having duly completed) the penalty imposed for their previous offence; indeed, they may well have made decisions about how to plead to charges they faced on the basis that the only punishment they were thereby liable to was a term of imprisonment (of possibly relatively short duration – a significant factor if the defendant had been remanded in custody pending trial). But the Bill allows the further imposition of significant restrictions explicitly connected to the previous conviction. In the case of those already released into the community (ie the transitional offenders and current parolees) this is being done without further evidence of inappropriate behaviour by them after they have been released into society.

13. I am also conscious that in *R v Poumako* [[2000] 2 NZLR 695 (CA)] and *R v Pora* [[2001] 2 NZLR 37 (CA)] … the Court of Appeal took a firm line that s 26(2) was triggered, even though the amendments

in question only affected parole eligibility and not overall sentence length.

14. Accordingly, I consider that the provisions of the bill that allow for the more significant restrictions of liberty (i.e. significant restrictions of movement and association, electronic monitoring, and 12 months home detention) available under the ESO to be (retrospectively) imposed on transitional eligible offenders and current inmates and parolees, constitute a prima facie infringement of s 26(2) of the Bill of Rights Act that is not capable of justification under s 5 of the Act.

[32] We have examined the subsequent parliamentary history of the ESO legislation.

[33] The report of the Justice and Electoral Committee noted of the Attorney-General's report:

> The Attorney-General's report on the bill under the New Zealand Bill of Rights Act 1990 found that its provisions were inconsistent with the rights and freedoms contained in that Act on the following counts:
>
> - unreasonable limit on right not to be subject to double jeopardy (clause 10, new sections 107B and 107T)
>
> …
>
> The key question for the "double jeopardy" finding is whether retrospective application of an extended supervision order should be considered "punishment". The Attorney-General considered that the retrospective application of the provisions that allow for the more significant restrictions of liberty on someone convicted before the bill came into force should be viewed as a punishment.
>
> It is possible to consider retrospective application of the extended supervision regime not to be "punishment". Some eligible offenders may welcome the protection afforded by an extended supervision order. They may recognise that the intensive monitoring will assist them to remain in the community, and provide an element of self-protection. They may consider the restrictive conditions of an order to be rehabilitative rather than punitive.
>
> …

[34] Although the report thus suggested that there was scope for debate as to the correctness of the Attorney-General's conclusion that the retrospective implementation of the ESO scheme was in breach of s 26(2) of NZBORA, the drift of what was said in the course of later parliamentary debate indicates that the

enactment of the ESO legislation with retrospective effect proceeded on the basis that the legislation was justified on public policy grounds.

Does the imposition of an ESO amount to a "penalty" or a "punishment"?

[35] The primary (although by no means the only) argument advanced by Mr Ellis for the appellant proceeds on the basis that an ESO is a "penalty" for the purposes of s 25(g) and that an offender who is subjected to an ESO is thereby "punished" for the underlying offending for the purposes of s 26(2) and thus that it is a breach of s 26(2) for such "punishment" to be imposed retrospectively on the appellant. This argument in a real sense echoes the conclusions of the Attorney-General.

[36] In argument before us, the Crown maintained that the ESO legislation should not be regarded as providing for penalties or punishment.

[37] It is not uncommon for legislation to provide for restrictions on those who are at high risk of future criminal, dangerous or otherwise anti-social behaviour. Sometimes the power to do so is necessarily a part of the criminal justice system, as with the power to impose sentences of preventive detention. Sometimes the powers plainly have nothing to do with the criminal justice system (for instance under the Mental Health (Compulsory Assessment and Treatment) Act 1992). As this case indicates, there is a third category of legislative schemes the status of which is debatable.

[38] The characterisation of such a scheme as civil or criminal may be important as to whether:

(a) The criminal standard of proof applies;

(b) The scheme should be applied retrospectively; or

(c) The restrictions/sanctions available under the scheme involve double jeopardy.

[39] Some care is required with the overseas cases which address these issues. For instance, issues as to the criminal or civil standard of proof in the end may turn on the intention to be attributed the legislature in relation to the scheme in question. The same may be true where questions of retrospectivity arise.

[40] These issues have arisen most acutely in the United Kingdom and the United States.

[41] The Courts in England and Wales have taken what is perhaps a rather literal approach to what constitutes criminal proceedings and punishment. On this approach, criminal proceedings involve a prosecutor accusing a defendant of a specific crime on conviction for which the defendant will be susceptible to a criminal sanction. Punishment is usually seen as being confined to sanctions imposed following conviction. Thus sanctions and restrictions imposed otherwise than through orthodox criminal proceedings are not by way of punishment.

[42] This has been the approach in cases concerning the Crime and Disorder Act 1998 (UK), see for instance *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562 at [24] (QBD) per Lord Bingham of Cornhill CJ and *R (McCann and others) v The Crown Court at Manchester* [2003] 1 AC 787 (HL). Thus the criminal standard of proof does not apply to such proceedings, see *B* at [25] and *McCann* (albeit that the standard actually applied is not much different). Consistently with this approach, the order itself is not seen as a punishment, see *B* at [24] and *McCann*. In *B*, in a passage which was obviously approved in *McCann*, Lord Bingham noted:

> 25. There is no room for doubt about the mischief against which this legislation is directed, which is the risk of re-offending by sex offenders who have offended in the past and have shown a continuing propensity to offend. Parliament might have decided to wait until, if at all, the offender did offend again and then appropriate charges could be laid on the basis of that further offending. Before 1998 there was effectively no choice but to act in that way. But the obvious disadvantage was that, by the time the offender had offended again, some victim had suffered. The rationale of s 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case

> of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him. I am accordingly satisfied that, as a matter of English domestic law, the application is a civil proceeding, as Parliament undoubtedly intended it to be.

[43] The same approach has been taken to banning orders under the Football Spectators Act 1989 (UK), see *Gough v Chief Constable of the Derbyshire Constabulary* [2001] 4 All ER 289 (QBD); affirmed [2002] 2 All ER 985 (CA). In *Gough* there was an element of retrospectivity. This arose because in the case of one of the applicants, the maximum duration of a banning order at the time of his misconduct was three years but he was subjected to a six year banning order as was permitted by the legislation which was current when his case was heard. Further, some banning orders (being those made under s 14A of the 1989 Act) followed conviction for offences and were imposed as part and parcel of the sentencing process. *Gough* provides reasonably strong support for the Crown argument before us.

[44] *R v Field* [2003] 3 All ER 769 (CA) concerned disqualification orders made under Criminal Justice and Court Services Act 2000. The effect of these orders was to prevent the appellants from working with children. The power to make such an order did not exist at the time the appellants committed the qualifying sexual offences against children. They therefore claimed that they had been subjected to a retrospectively imposed penalty. This challenge was unsuccessful as the Court held the disqualification orders were not penalties for the purpose of art 7 of the European Convention on Human Rights (which corresponds to s 26(2) of NZBORA).

[45] A broadly similar approach has been adopted in the United States. Some state legislatures have passed legislation providing for the civil commitment of those who are held to be sexually violent predators. An example is a statute passed by the Kansas state legislature styled the Sexually Violent Predators Act 1994. In *Kansas v Hendricks*, 521 US 346 (1997), the respondent, who was about to be released from prison to a half-way house, was subject to procedures under the Act which resulted in him being held to be a sexually violent predator (by reason of his prior offending

and paedophilia) and thus liable to indefinite detention. His qualifying offending occurred 10 years before the Act was passed. The United States Supreme Court held, inter alia, that the relevant proceedings were not criminal in nature and the detention under the statute was not a punishment. To a broadly similar effect is the Supreme Court's decision in *Smith v Doe*, 538 US 84 (2003) upholding the version of "Megan's Law" enacted in Alaska (imposing registration and associated obligations on those who committed sexual offences against children prior to the enactment of the statute).

[46] In Australia, the Queensland Parliament enacted the Dangerous Prisoners (Sexual Offenders) Act 2003 which is to much the same effect as the Kansas statute which was addressed in *Hendricks*. This statute permits the continuing detention of sexual offenders after expiry of their sentences if they are held to be dangerous. The statute has retrospective effect. Its validity was upheld by the High Court of Australia, see *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50. The challenge to the validity of the statute in *Fardon* indirectly involved human rights considerations including arguments associated with retrospectively imposed punishments, see for instance Gummow J at [74] – [82] and Kirby J (dissenting) [125] – [126] and [147] – [186].

[47] There are a number of factors which support the view that an ESO is by way of punishment:

(a) The triggering event is a criminal conviction;

(b) The respondent to an ESO application is, throughout the ESO legislation, referred to as "the offender";

(c) Eligibility for an ESO (in non-transitional cases) depends upon an application either before sentence expiry date or while the offender is still subject to release conditions;

(d) An application for an ESO is made to the "the sentencing court";

(e) Where an application is made, a summons may be issued to secure the attendance of the offender and the provisions of s 24-25 of the Summary Proceedings Act 1957 apply (s 107G(2));

(f) Alternatively, the appearance of the offender can be secured by the issue of a warrant for the offender's arrest (s 107G(3)), in which case ss 22 and 23 of the Summary Proceedings Act and s 316 of the Crimes Act apply;

(g) The offender must be present at the hearing (s 107G(4));

(h) If the proceedings are adjourned, the offender, if not already in custody, can be remanded to the new date at large, on bail or in custody (although only for periods of up to eight days (s 107G(5)-(6)));

(i) Sections 71, 201, 203, 204 and 206 of the Summary Proceedings Act, ss 138-141 of the Criminal Justice Act 1985 and the Costs in Criminal Cases Act 1967 apply to applications for ESOs (s 107G(7)-(10));

(j) Victims are to be notified of hearings and may make submissions in writing or, with the leave of the Court, orally (s 107H(5));

(k) The consequences of an ESO are in effect a subset of the sanctions which can be imposed on offenders and extend to detention for up to 12 months (in the form of home detention) (ss 107J and 107K);

(l) The right of appeal is borrowed from the Crimes Act (s 107R);

(m) It is an offence to breach the terms of an ESO and an offender is liable to up to two years imprisonment; and

(n) Applications for ESOs are classed as being criminal for the purposes of the Legal Services Act 2000 (s 107X).

[48] We do not see it as decisive that the aim of the ESO scheme is to reduce offending and that the incidents of an ESO order are associated with this aim as opposed to the direct sanctioning of the offender for purposes of denunciation, deterrence or holding to account. The same is true (or partly true) of many criminal

law sanctions (for instance preventive detention and supervision) which are nonetheless plainly penalties.

[49] We recognise that the authorities relied on by the Crown could support a different conclusion. But, in the end, we have concluded that the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour amounts to punishment and thus engages ss 25 and 26 of the NZBORA. We see this approach as more properly representative of our legal tradition. If the imposition of such sanctions is truly in the public interest, then justification under s 5 is available and, in any event, there is the ability of the legislature to override ss 25 and 26.

Does it affect the determination of this appeal that the ESO legislation provides for retrospective punishment?

[50] Section 5 of NZBORA is drafted in terms which suggest that the party (which will usually be the State) which invokes s 5 can be expected to demonstrate that the section does indeed apply. In this case, the Crown, without conceding that the retrospectivity complained of lies outside s 5, has not set out to justify that retrospectivity by reference to the s 5 criteria.

[51] We accept that a s 5 justification should be established by the party alleging it. Further, as the Crown did not seek to justify under s 5 the retrospective nature of the ESO scheme, we should approach the key interpretation issues on the basis that the retrospective nature of the ESO scheme is not justified for the purposes of s 5.

[52] That said, the ESO legislation makes it perfectly clear that it was intended to have retrospective effect. This is apparent from ss 107Y and 107Z which address particularly the position of transitional offenders and provide:

> **107Y Definitions**
>
> In this section and section 107Z,—

"introduction date" means 11 November 2003, which was the date on which the Parole (Extended Supervision) and Sentencing Amendment Bill 2003 was introduced into the House of Representatives

"transitional eligible offender" means any one of the following:

(a) any person who, on or after the introduction date, would have been an eligible offender if this Part had been in force on or after that date, but who ceases to be an eligible offender before this Part comes into force:

(b) any person who, on the date on which this Part comes into force, is an eligible offender, but who ceases to be an eligible offender within 6 months after this Part comes into force.

107Z Applications in respect of transitional eligible offenders to be made within first 6 months after commencement

(1) This Part applies to a transitional eligible offender in the same way as it applies to an eligible offender, except as provided in subsection (2).

(2) The chief executive may apply for an extended supervision order in respect of a transitional eligible offender until 5 pm on the day that is 6 months after the date on which this section comes into force, but no later. This subsection overrides section 107F(1)(a) and (b).

(3) However, nothing in this section prevents the chief executive applying for an extended supervision order more than 6 months after this section comes into force if, after that date, the offender is an eligible offender.

As well, s 107C provides:

107C Meaning of eligible offender

(1) In this Part, eligible offender means an offender who—

(a) has been sentenced to imprisonment for a relevant offence, and that sentence has not been quashed or otherwise set aside; and

(b) has not ceased, since his or her latest conviction for a relevant offence that has not been quashed or otherwise set aside, to be subject to a sentence of imprisonment (whether for a relevant offence or otherwise) or to release conditions or detention conditions (whether those conditions are suspended or not); but

(c) is not subject to an indeterminate sentence.

(2) To avoid doubt, and to confirm the retrospective application of this provision, despite any enactment or rule of law, an offender may be an eligible offender (including a transitional eligible offender as defined in section 107Y) even if he or she committed a relevant offence, was

> most recently convicted, or became subject to release conditions or detention conditions, before this Part came into force.

[53] Mr Ellis's primary argument on this point was that the ESO legislation could be read as being compatible with NZBORA by treating the power to impose an ESO retrospectively as being subject to the consent of the offender.

[54] In developing this submission, Mr Ellis relied on s 4 of the now repealed Criminal Justice Act 1985:

> **4 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) Notwithstanding any other enactment or rule of law to the contrary, where the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence is altered between the time when the offender commits the offence and the time when sentence is to be passed, the maximum term of imprisonment or the maximum fine that may be imposed on the offender for the offence shall be either—
>
> (a) The maximum term or the maximum fine that could have been imposed at the time of the offence, where that maximum has subsequently been increased; or
>
> (b) The maximum term or the maximum fine that can be imposed on the day on which sentence is to be passed, where that maximum is less than that prescribed at the time of the offence.
>
> (2) Without limiting subsection (1) of this section, except as provided in sections 152(1) and 155(1) of this Act but notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, *except with the offender's consent*.
>
> …
>
> (Emphasis added)

Mr Ellis maintained that this section was of continuing application to the appellant by reason of s 19(2)(c) of the Interpretation Act 1999. He also relied on s 6 of the Sentencing Act 2002 which provides:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

Both sections are discussed extensively in *R v Mist* (2005) 22 CRNZ 192 (SCNZ).

[55] At the risk of being thought to have taken an ungenerously literal approach, we conclude that neither section is directly applicable to the case of the appellant. The ESO legislation was not introduced between the appellant's offending and his sentencing (which occurred in 1995). So s 4(1) of the Criminal Justice Act does not apply. The ESO to which the appellant has been made subject was not imposed "on the conviction" of the appellant. So s 4(2) does not apply. Section 6 of the Sentencing Act does not apply for the reason given in respect of s 4(1) of the Criminal Justice Act.

[56] We are reinforced in thinking that this literal approach is correct by the reality that in this case there can be absolutely no room for doubt that the intention of the legislature in enacting the ESO legislation was that it should apply retrospectively and that orders could be imposed retrospectively in the absence of consent from the offender.

Should we make a declaration of inconsistency?

[57] Given our views as already expressed, the ESO legislation is inconsistent with NZBORA unless justified under s 5. As is apparent from what we have said, the Crown did not seek, affirmatively, to show that the retrospective nature of the ESO legislation is justified under s 5.

[58] This leaves in contention the request by Mr Ellis that we make a declaration that the ESO legislation is inconsistent with NZBORA. This is an important issue but was only one of many questions which arose in the context of the appeal.

Perhaps for this reason, it did not receive in the course of argument as full consideration as it warranted. We therefore reserve for further consideration the question whether we should make such a declaration.

[59] This aspect of the case will be set down for hearing next year for argument on this question at a time to be arranged with counsel. We expect the arguments to address:

(a) Whether the Crown seeks to justify under s 5 the retrospective nature of the ESO regime and if so why;

(b) Whether the Courts have (or should exercise) jurisdiction to make a declaration of inconsistency;

(c) If so, whether such jurisdiction may or should be exercised in criminal proceedings;

(d) If so, whether such jurisdiction may or should be exercised in response to an argument which is made for the first time in this Court; and

(e) If so, whether such a declaration should be made in this case.

If the Crown seeks to establish a s 5 justification, that may have to be the subject of evidence (presumably by affidavit). Consideration will also have to be given to what, if any, other parties should be joined in the present proceedings which, in name anyway, are between the appellant and the Chief Executive of the Department of Corrections. Any issues associated with what, if any, additional evidence is to be adduced and what, if any, additional parties should be joined can be addressed at a conference to be convened later this year.

Other human rights arguments

[60] Mr Ellis raised a number of other human rights arguments. Some were, in effect, merely subsets of the issues we have just addressed (in particular his contention that the legislation provides for arbitrary detention and breaches the right to be presumed innocent). Others (particularly those associated with evidential issues) are subsumed in the discussion in the next section of the judgment. None of the other arguments are as cogent as the arguments which we have just addressed associated with retrospective punishment. In those circumstances, there is no point in us discussing them in detail.

The contention that the evidence did not warrant the making of an order

Overview

[61] Predictions of future offending form a necessary part of the sentencing process where serious offending is involved. Prevention by incapacitation is a legitimate sentencing purpose. Yet attempts at prediction have tended to over-estimate recidivism when compared to later offender behaviour.

[62] Over the last twenty years or so numerous attempts have been made to develop actuarial models for the purpose of predicting future offending.

[63] In 1997 the Ministry of Justice produced "Sentencing Policy and Guidance: A Discussion Paper" (November 1997). This paper was, in a sense, a precursor to the ESO legislation. The paper noted:

> Studies show that actuarial (statistical) methods of prediction based on selected objective characteristics of the offender have had a higher success rate than clinical predictions based on a diagnostic approach to the individual characteristics of the offender. Actuarial prediction is gaining ground, particularly in the United States, as its techniques become more sophisticated. It is part of the conceptual shift from subjective approach involving a diagnostic assessment of an individual's psychology for indications of dangerousness to a more "objective" one of matching individuals to the high risk factors statistically linked to the highest probability of future violent offending. This application of "rationality"

> rather than human discretion is considered by its advocates to be more exact, consistent and transparent, and therefore fairer. (It is also cheaper.)

The actuarial instruments used or referred to by Dr Wilson

[64] The instruments used by Dr Wilson in his assessment of the appellant were Static AS, RoC*RoI and SONAR.

[65] Static AS (automated scoring) is a shortened version of the Static 99 measure which was developed in Canada. It is based on seven items (as opposed to ten in the case of Static 99) all of which are readily retrievable from the New Zealand offender criminal history database. This measure assesses the probability of sexual recidivism among adult males who have been convicted of at least one sexual offence against a child or non-consenting adult.

[66] RoC*RoI (risk of conviction times risk of imprisonment) was developed in New Zealand and addresses a general risk of conviction and likelihood of re-offending. It is based on static risk factors (ie those which cannot be changed by the offender) and provides a probability assessment associated with rates of re-conviction and imprisonment within five years. This assessment tool is addressed to future general offending and not specifically to sexual offending.

[67] SONAR (sexual offender needs assessment rating) assesses dynamic factors (ie those capable of being addressed by offenders) which serve as predictors of sexual recidivism. It has a moderate ability to distinguish between sexual recidivists and non-recidivists and also identifies factors which could be used to manage risk of re-offending over the long term.

[68] The Static AS and RoC*RoI assessments placed the appellant in groups with a high risk of re-offending. On the SONAR measure, the appellant's score was eight (on a range of zero to nine). This placed him at high risk of sexual recidivism. At the time the test was applied to the appellant, only three other offenders in New Zealand had a similarly high score.

[69] In his evidence before Keane J Dr Wilson referred to a fourth measure, the PCL:SV. Dr Wilson did not use this test on the appellant but such a test was administered in 1998 with a score of 19 being attributed to the appellant. A score of 18 or greater suggested strongly the likelihood of the psychopathy which is a significant risk predictor for sex offenders.

The appellant's primary arguments

[70] Before Keane J there was no challenge to the admissibility or validity of the actuarial assessments carried out or referred to by Dr Wilson. Before us, however, the appellant mounted a sustained attack on both fronts.

[71] This was primarily based on the evidence (in the form of affidavits filed for the purposes of this appeal) from Dr Paul Barrett. Dr Barrett is a psychologist. He holds, inter alia, a Doctor of Philosophy degree (in psychometrics) and his general areas of expertise include psychological measurement and assessment of personality and intelligence.

[72] Dr Barrett did not seek to advance a health assessment which differed from that proposed by Dr Wilson in the High Court and accepted by Keane J. In other words, he did not seek to assert that the appellant did not pose an appreciable risk of sexual recidivism. Rather, he sought to challenge the methodology of Dr Wilson, and in particular, his reliance on actuarial risk assessment measures.

[73] Dr Barrett referred, inter alia, to a paper by Berlin and others, "The use of actuarials at civil commitment hearings to predict the likelihood of future sexual violence" (2003) Sexual Abuse: A Journal of Research and Treatment 377 at 380-381:

> The higher the Static-99 score, the higher the percentage of individuals who eventually recidivated. Thus, it appears that the Static-99 may be quite capable of functioning as a good screening tool that can identify a group of individuals (e.g., those with a score of 6 and above), who when considered as a group, are at heightened risk. *Note that approximately 50% of individuals with a Static-99 score of 6 and above did, indeed, recidivate within a 15-year follow-up period. However, the other 50% or so did not.*

> Given the fact that not all persons within that so-called "high risk" group are at equal risk, the Static-99 can take us no further, by identifying specifically which individuals with a score of 6 or greater are actually more or less likely to recidivate. *In point of fact, when it comes to determining specifically which persons with a score of 6 or higher are more or less likely (whether likely means 50 or 40%) to commit a further act of "sexual violence", the Static-99 cannot do much better than a coin flip.* What the Static-99 has demonstrated is that many persons, including those with multiple prior offences, who might have been expected to recidivate, did not do so.
>
> (Emphasis in Dr Barrett's report).

[74] He also referred to the commentary on that paper in the same journal by S D Hart at 385:

> Consider a group of 100 offenders, 50 of whom recidivate within 5 years. Does this mean that every member of the group had a 50% chance of recidivism? Or that half had a 100% chance and half a 0% chance? Or perhaps 25 had a 100% chance, 25 had a 75% chance, 25 had a 25% chance, and 25 had a 0% chance … There is simply no way to determine the answer at this time.

Dr Barrett himself added:

> Thus, for recidivism prediction to be considered *prima facie* relevant to an individual, the case has to be made that the data which are identified as supporting an estimate of risk "for an individual", must at least be drawn from a normative group who possess important characteristics which are highly concordant with those of the individual. In a sense, each individual for whom a prediction of risk is to be calculated has to be examined for *"plausibility of homogeneity"* with the group of offenders whose risk probabilities will be used to provide an "indicative" risk for that individual. However, the quote by Berlin et al above underlines the fact that making an accurate prediction of an individual's outcome is not possible unless that individual possesses exactly the same characteristics of the members of a group whose probability of recidivism is 1.0.
>
> This is not an argument for avoiding the use of actuarial instruments, but one for showing extreme caution when applying them to single offenders in order to generate a prediction or risk for a particular offender. The first step in displaying that caution is ensuring as far as possible that Mr Belcher is a "typical" member of the homogenous group of high scoring individuals on the STATIC-AS. *The court* will then have to decide whether the justification is reasonable, or deficient, and not have the matter prejudged for them by Corrections Department psychologists or Dr Nick Wilson. Such a justification consists of the full set of characteristics which define this group, compared with those characteristics which "define" Mr Belcher. This is a standard procedure in case-control methodology, and should be standard procedure in the "matching" of an individual to a normative actuarial group. It can be a routine, computer-based, decision-support tool that aids the

> clinician in determining the normative-group fit, and which can be presented to the court as might any other score-sheet.
>
> (Emphasis in original)

[75] In Dr Barrett's opinion there were two factors personal to the appellant which meant that he could not necessarily be regarded as a homogenous member of the high risk groups to which he was assigned by Dr Wilson: first his age and secondly the fact that by the time of the hearing before Keane J he had been out of prison for three and half years and during that time had not offended sexually.

[76] As to his age, it might be thought plausible to assume that the older an offender at the time of assessment, the less likely the prospect of that offender re-offending sexually. This theme was developed in detail in the evidence of Dr Barrett. But offender age is not one of the factors which is taken into account for the purposes of the actuarial measures relied on by Dr Wilson.

[77] On the second point, Dr Barrett noted that the actuarial measures relied by Dr Wilson focus on the risk of re-offending as at the date of release from prison whereas the issue in the High Court required a focus on the appellant's risk of re-offending at the time the application for the ESO order was heard. Dr Barrett's position was that an accurate actuarial assessment in relation to the appellant should group him with other people with similar relevant characteristics, in this respect, those who had remained what he called "offence free" for three and a half years after release.

[78] There were other issues raised by Dr Barrett, in particular, a suggestion that the RoC*RoI measure was of limited relevance as it related to general offending, not sexual offending against children. In addition there was a complaint that there was a lack of validated correlation between actual rates of re-offending and actuarially assessed risks of such re-offending, especially in relation to Static-AS and another complaint that the appellant's assessed recidivism risk was expressed verbally (ie as "high") rather than mathematically (for example as, say, 65%). Dr Barrett maintained that it would have been open to the Department of Corrections, with the

database available, to have established far more accurate and sensitive predictive instruments which would have enabled actuarial allowance to be made for factors particular to the appellant, and in particular his age and the three and a half years which he had spent in the community sexual offence-free.

The Crown's response to Dr Barrett's arguments

[79] The Crown produced a number of affidavits by way of response to Dr Barrett. As well, much of the evidence it relied on in the High Court was relevant.

[80] The Crown evidence showed that there is a wealth of material which validates its use of the Static-AS measure. Empirical evidence of observed rates of sexual recidivism for those who score in the same range as the appellant were 46% at five years, 50% at ten years and 62% at 15 years. A separate analysis indicated that sexual recidivism rates for child sexual offenders who scored in this range were 28% at five years and 43% at ten years.

[81] The RoC*RoI measure was relevant to the likelihood of the appellant offending against children because such recidivism is associated, inter alia, with anti-social orientation (including rule violation), factors which are allowed for in the RoC*RoI assessment.

[82] The appellant's sexual offence-free time in the community post-release had to be assessed in light of:

(a) Figures which indicated that recidivism rates for treated sexual offenders increase rapidly after 730 days post-release.

(b) The reality that the appellant had been supervised during this period (and indeed during the period which followed his first lengthy term of imprisonment) and that such supervision did tend to assist him in dealing with psycho-social stressors.

(c) The fact that while the appellant had been sexual-offence free in the relevant period he had accumulated a number of convictions for other offences, a consideration which (along with others) suggested that he had not developed a pro-social orientation. There is apparently no material which supports the view that sexual offence-free time in the community is associated with a lower risk of sexual recidivism if the offender is, during that time, committing other, non-sexual, offences.

[83] As to the appellant's age, there is a significant fall off in recidivism risk posed by offenders from the age of 29 but no similar sharp fall until the age of 60. Age-related reduction in recidivism risk is also less marked for those who, like the appellant, offend against extra-familial victims. Further, the reasons for age associated reduction in sexual recidivism are not well-understood and it may be that there is no material reduction in the case of a fit and vigorous 50 year old offender. Indeed it is possible that some of the fall off is associated with deaths in the relevant cohort of offenders (in which case the figures for sexual offending by older men who remain alive are understated). The Crown position was that the age-related risk factors associated with the appellant's recidivism risk were not much different for him at the age of 50 than they were when he was 40 and re-offended.

[84] The Crown witnesses maintained that the analysis of the database contended for by Dr Barrett (ie by reference to factors which were personal to the appellant, particularly his age and his period in the community sexual offence-free) would not be helpful. Such an exercise would result in small sample sizes and thus less reliable probability estimates. Of course, if the two factors just mentioned are not necessarily relevant to actual risk of recidivism, the exercise would be pointless anyway.

[85] Assessing the appellant's recidivism risk mathematically would go beyond what could be legitimately derived from the actuarial measures (very much for the reasons given by Dr Barrett) and there is no developed methodology for adjusting the actuarial results to allow for factors which are idiosyncratic to the offender.

[86] The Crown through its witnesses also maintained that the approach adopted by Dr Wilson was not simply based on the actuarial measures but also a structured professional judgment and this approach is in accordance with current best practice.

Our conclusions

[87] In the end, we are not persuaded that the substance of the evidence adduced from Dr Barrett goes significantly beyond what was before the High Court.

[88] It is true that the actuarial instruments relied on by Dr Wilson focus on risk of recidivism assessed at or near the date of release from prison. They were not designed to predict risks of recidivism in relation to those who had been in the community for some years. For this reason, the measures did not take into account the period of time which the appellant had spent in the community since his release from prison. In turn, this has the consequence that the actuarial assessments of the appellant's risk of recidivism could only fairly be applied to the appellant if appropriate allowance was made for the time which he had spent in the community without further sexual offending. In substance, this was one of the two primary points made by Dr Moskowitz and there is a real sense in which Dr Barrett's evidence on this aspect of the case is primarily by way of elaboration of the argument of Dr Moskowitz.

[89] The same is true of the appellant's age. This too was very much relied on by Dr Moskowitz. Dr Barrett's contention that the appellant's age means that he is not a homogenous member of the high risk groups identified by actuarial assessment is, in a sense, just a development of the contentions of Dr Moskowitz on this point in the High Court.

[90] Obviously factors which have arisen post-release must be allowed for in an ESO assessment. For instance if the appellant had been rendered a tetraplegic as a result of a post-release accident, this would have presumably eliminated the likelihood of him re-offending and would undoubtedly have negated any adverse inferences which might otherwise have been drawn for actuarial assessments. The

difficulty for the appellant is that the primary factors relied on by Drs Moskowitz and Barrett are not conclusive and their significance requires an exercise of judgment based in part on a review of the statistical material available and in part on a professional assessment of their relevance to the appellant.

[91] There are many problems with the predictions of recidivism but one which is particularly material in the present context is that serious sexual offending against children is comparatively rare and its occurrence is likely to be dependent upon coincidences associated with the state of mind of the offender and the circumstances which provide an opportunity for offending. For this reason, the fact that the appellant had been in the community for some years without sexual offending is far from being a decisive consideration. It is of interest that he was in the community for some three years between his release in 1993 from imprisonment in respect of his 1988 offending and the serious 1995 offending. An associated consideration is that during the most recent period since release, he has been subject to release conditions which might be thought to reduce the likelihood of serious re-offending.

[92] Given that the appellant's relevant historical offending was against children and did not depend upon high levels of physical fitness or strength, his age is not an obvious barrier to further offending in the foreseeable future. Further, there is no concrete evidence to suggest that his sexual drive has significantly diminished.

[93] On the evidence as a whole the appellant is a member of a high risk group of sexual offenders of whom 40%-50% will re-offend sexually within ten years and of whom around 43% will do so in respect of children. The two factors primarily relied on by the appellant might suggest some diminution in risk but there are other factors, also not allowed for in the assessments, which go the other way. His continued offending in other respects, his RoC*RoI score and the results of the SONAR assessment (as to dynamic factors) provide examples. There is also Dr Wilson's professional judgment which Keane J accepted and which we see no reason to challenge. In totality, there is no basis for significantly downgrading the risk assessment indicated by the Static-AS measure

[94] We are satisfied that the test which we have set out in [11] has been well and truly met.

Process and associated evidential arguments

[95] The present case is apparently typical of most applications for ESOs in that the primary evidence in support of the application came from Dr Wilson, a psychologist who is employed by the Department of Corrections, the Chief Executive of which is the applicant. Dr Wilson had full access to previous reports on the appellant which the Department held. The appellant declined to be personally interviewed by Dr Wilson and he was not offered the opportunity for an assessment by someone else. The previous reports to which Dr Wilson had access had been prepared for a number of purposes but all had been obtained in circumstances in which the appellant was subject to the criminal justice system and not, in a real sense, a free agent.

[96] Arising out of this are a number of points which we will address sequentially.

[97] It is not unknown for expert evidence to be given by witnesses who have an association with one of the parties. It is, for instance, commonplace for police officers or forensic specialists (eg accountants or computer experts) to give expert evidence for the Crown in criminal cases. We therefore do not accept that Dr Wilson's association with the Department disqualified him from giving evidence (or providing a report) on the ESO application.

[98] Likewise we do not accept that the appellant had a right of veto over choice of the psychologist who was to prepare the report. The statutory scheme assumes that reports will be provided and it would make a mockery of that scheme if an offender could derail the process by refusing to see the (or any) psychologist chosen by the Chief Executive to provide the necessary report. We likewise do not accept that the absence of consent on the part of the offender and associated unwillingness to engage in the process means that it is unethical for a psychologist to provide a statutorily required report. In all of this, it is important to recognise that the decision

to impose an ESO rests with the Court and that it is open to the offender to place other evidence before the Court, as the appellant did in this case.

[99] Mr Ellis complained about the use made by Dr Wilson of pre-sentence reports, which he claimed was in breach of s 29 of the Sentencing Act 2002. This section provides:

> **29 Access to reports**
>
> (1) The following persons may have access to any report submitted to a court under section 26 or section 33, and held by the court:
>
> (a) the manager or other person in charge of a prison to which the offender is sent, whether during any proceedings or in accordance with any sentence imposed:
>
> (b) a Director of Area Mental Health Services, or a staff member of a hospital, who requires access to the report for the purposes of his or her official duties:
>
> (ba) a compulsory care co-ordinator, or a staff member of a facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, who requires access to the report for the purposes of his or her official duties:
>
> (c) an officer or employee of the Department of Corrections or the Ministry of Justice, or a staff member of a prison, who requires access to the report for the purposes of his or her official duties:
>
> (d) a member of the New Zealand Parole Board:
>
> (e) the prosecutor appearing on sentence or on appeal against sentence.
>
> (2) Despite anything in the Official Information Act 1982 or the Privacy Act 1993, no person may have access under either of those Acts to a report or any part of a report that a court has ordered under section 28 or section 34 not to be disclosed to that person.

In our view, s 29(1)(c) authorised Dr Wilson to have access to the pre-sentence reports.

[100] Section 33 of the Evidence Amendment Act (No 2) 1980 provides:

> **33 Disclosure in criminal proceeding of communication to medical practitioner or clinical psychologist**

(1) Subject to subsection (2) of this section, no medical practitioner and no clinical psychologist shall disclose in any criminal proceeding any protected communication made to him by a patient, being the defendant in the proceeding, except with the consent of the patient.

(2) This section shall not apply to any communication made for any criminal purpose.

(3) In subsection (1) of this section, **protected communication** means a communication made to a medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or act for the patient for—

(a) drug dependency; or

(b) any other condition or behaviour that manifests itself in criminal conduct;—

but does not include any communication made to a registered medical practitioner or a clinical psychologist by any person who has been required by any order of a Court, or by any person having lawful authority to make such requirement, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or other purpose.

(4) In subsection (3)—

clinical psychologist—

(a) means a psychologist who is, by his or her scope of practice, permitted to diagnose and treat persons suffering from mental and emotional problems; and

(b) includes any person acting in a professional character on behalf of the clinical psychologist in the course of the treatment of any patient by that psychologist

drug dependency means the state of periodic or chronic intoxication, produced by the repeated consumption, smoking, or other use of a controlled drug (within the meaning of section 2(1) of the Misuse of Drugs Act 1975) detrimental to the user, and involving a compulsive desire to continue consuming, smoking, or otherwise using the drug or a tendency to increase the dose of the drug

medical practitioner includes any person acting in his or her professional character on behalf of a medical practitioner in the course of the treatment of any patient by that medical practitioner.

[101] Mr Ellis claimed that protected communications were necessarily disclosed by Dr Wilson in breach of this provision.

[102] Similar arguments have been raised in respect of related criminal justice procedures, particularly as to reports prepared when preventive detention is under consideration, see *R v D* [2003] 1 NZLR 41 (CA).

[103] Dr Wilson would appear to have had access to material which was derived from therapeutic processes. For instance he has referred to "21 sessions" of individual treatment and to the lack of success of "anti-androgenic medication". The conclusion that such medication was not successful in the case of the appellant may, conceivably, have been derived from what the appellant conveyed to his clinical psychologist in "a protected communication". Further when he responded to Dr Moskowitz's report, Dr Wilson referred in rather more detail to what had occurred during the appellant's participation in the Kia Marama programme, treatment by Dr Alex Skelton and his removal from the Te Piriti specialist sexual offender programme and it is at least possible, and perhaps likely, that some of his comments may have been indirectly based on protected communications.

[104] While it is possible that Dr Wilson had access to protected communications and likewise possible that these communications had some effect on his report and evidence, we do not know whether this is so. There is no evidence from the appellant as to what he told the psychologists who treated him. At the hearing before Keane J there was no admissibility challenge to the evidence of Dr Wilson and thus no opportunity for him to explain what material had or had not been taken into account. Even in this Court Dr Wilson has not been challenged in cross-examination on his assertion that he did not take into account protected communications. Had there been such cross-examination and had it shown that contrary to Dr Wilson's assertion, he had based his assessment in part on protected communications, this would no doubt have permitted the parties to explore the materiality of such reliance to his overall conclusions. Further, given that the appellant has placed no restraint on the ability of Dr Moskowitz to have access to all post-1995 reports, it would seem unreal to decline Dr Wilson the opportunity to do likewise. In this context it is worth noting that the most explicit discussion by Dr Wilson of apparently therapeutic material came in response to Dr Moskowitz's report which in part had relied on that

material. Such reliance by Dr Moskowitz, who was the appellant's witness, seems to us to have authorised a response based on the same material.

[105] In those circumstances, we reject the admissibility challenge to the evidence of Dr Wilson.

The length of the ESO

[106] The final point is whether a ten year ESO was justified. Keane J did not expressly consider the question of how long the order in this case should endure except to say that he considered the ten year period sought in terms of s 107I(5) to be "the only sensible measure" with "no obvious earlier minimum end point".

[107] The order he imposed will apply until the appellant is around 60.

[108] In *Chief Executive of the Department of Corrections v McIntosh* HC CHCH CRI 2004-409-162 8 December 2004, Panckhurst and John Hansen JJ held that the criteria on which an order is based:

> underline the protective focus of the present jurisdiction. Put bluntly, orders are not to be made for the minimum period required to facilitate treatment, rather, for the minimum period required to achieve protection of vulnerable members of the community.

[109] Nothing that counsel for Mr Belcher has put before us has persuaded us that Keane J's assessment of the term most appropriate to achieve that aim was wrong. There was ample support for the imposition of the maximum term. In the circumstances, we see no reason to depart from the approach taken by the Judge.

Disposition

[110] The issue whether there should be a declaration of inconsistency is reserved for further consideration but the appeal is otherwise dismissed.

Solicitors:
Crown Law Office, Wellington